

12/8/60

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Second Supplement to Memorandum No. 97(1960)

Subject: Study No. 36(L) - Condemnation (Pretrial)

The procedure suggested by Public Works in the letter attached to the Supplement to Memorandum No. 97 (1960) is not unique. Analogous procedures have been used in other areas of the law to afford the parties an expeditious and economical method of discovering relevant evidence. Perhaps the most similar procedure is found in Code of Civil Procedure Section 2032.

Section 2032 of the Code of Civil Procedure provides that in an action where physical condition or blood relationship of a party is in controversy, the court on motion may order such party to submit to an examination by the physician of the opposing party. The party examined is then entitled to demand a copy of the report of the examining physician setting forth the findings and conclusions. The party examined is also entitled to demand a copy of all reports of earlier examinations of the same condition. If the party examined demands the examination reports, the opposing party is then entitled to demand from the party examined all like reports of any examinations made of the same condition. If the reports are not given, the court at the trial may exclude the testimony of the physician making the examination. Demand by the party examined for a copy of the report of the examining physician waives all privileges such party may have relating to the testimony of any person who may examine him concerning the same condition.

The Commission's present recommendation on notice of alibi is not

greatly different in operation. There, the Commission recommends the exchange of lists of witnesses after demand by the prosecution. The court is given the power to exclude evidence for failure to comply.

Another statute designed to accomplish the same end is Code of Civil Procedure Section 454. That statute provides that the items of an account sued upon need not be alleged in the pleading, but a copy must be delivered to the adverse party within 10 days after a demand therefor. If the account is not given, the party is precluded from giving evidence thereof at the trial.

Section 1247b of the Code of Civil Procedure now requires the plaintiff in a condemnation proceeding to serve a map of the proposed taking upon the defendant if the proceeding involves a partial taking and the defendant demands the map.

The proposed statute suggested by Public Works would adapt the principle underlying these statutes to eminent domain procedure. Of course, the list of matters required to be exchanged could be narrowed to that suggested by Public Works, or it could be broadened to include virtually all the matters listed in our presently recommended discovery statute.

Respectfully submitted,

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