

mtg
12/6/62

Memorandum No. 81(1962)

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

Attached is a recommendation relating to discovery in eminent domain proceedings. This recommendation must be approved at the December meeting so that it can be printed for the 1963 legislative session.

Note that we have titled this recommendation in the same manner used for the sovereign immunity recommendations. Since previous eminent domain recommendations were not titled using this form, we indicate in the letter of transmittal the subjects covered by the three previous eminent domain recommendations.

Respectfully submitted,

Joseph B. Harvey
Assistant Executive Secretary

[Cover and Title page]

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION AND STUDY

relating to

CONDEMNATION LAW AND PROCEDURE

Number 4—Discovery in Eminent Domain Proceedings

January 1963

California Law Revision Commission
School of Law
Stanford University
Stanford, California



STATE OF CALIFORNIA
CALIFORNIA LAW REVISION COMMISSION

COMMISSION MEMBERS

HERMAN F. SELVIN
Chairman
523 West 6th Street
Los Angeles 14

JOHN R. McDONOUGH, Jr.
Vice-Chairman
School of Law
Stanford University

JAMES A. COBEY
Member of the Senate
P. O. Box 1229
Merced

CLARK L. BRADLEY
Member of the Assembly
802 First National Bank Bldg.
San Jose 13

JOSEPH A. BALL
120 Linden Avenue
Long Beach 2

JAMES R. EDWARDS
599 Arrowhead Avenue
San Bernardino

RICHARD H. KEATINGE
3325 Wilshire Boulevard
Los Angeles 5

SHO SATO
School of Law
University of California
Berkeley

THOMAS E. STANTON, Jr.
221 Sansome Street
San Francisco

ANGUS C. MORRISON
Ex Officio
Legislative Counsel
3021 State Capitol
Sacramento 14

January 2, 1963

COMMISSION STAFF
JOHN H. DeMOULLY
Executive Secretary

JOSEPH B. HARVEY
Assistant Executive Secretary

JON D. SMOCK
Assistant Counsel

GEORGE S. GROSSMAN
Administrative Assistant

Office of Commission and Staff
School of Law
Stanford University
Stanford, California

To HIS EXCELLENCY, EDMUND G. BROWN
Governor of California
and to the Legislature of California

The California Law Revision Commission was authorized by Resolution Chapter 42 of the Statutes of 1956 to make a study to determine whether the law and procedure relating to condemnation should be revised in order to safeguard the property rights of private citizens.

The Commission herewith submits its recommendation and a research study on a portion of this subject--discovery in eminent domain proceedings. This is the fourth in a series of reports on this subject. The previous reports--prepared for the 1961 Legislative Session--deal with evidence in eminent domain proceedings, taking possession and passage of title in eminent domain proceedings, and reimbursement for moving expenses when property is acquired for public use.

The research study that accompanies this recommendation was prepared by the Commission's research consultant, the law firm of Hill, Farrer and Burrill of Los Angeles. Only the recommendation (as distinguished from the research study) is expressive of Commission intent.

Respectfully submitted,

Herman F. Selvin, Chairman

12/6/62

RECOMMENDATION OF THE CALIFORNIA

LAW REVISION COMMISSION

relating to

Discovery in Eminent Domain Proceedings

One of the major improvements in the procedural law of this State in recent years has been the enactment of adequate discovery legislation. Effective discovery techniques serve two desirable purposes. First, they enable a party to learn and to determine the reliability of the evidence that will be presented against him at the trial. Second they make the pretrial conference more effective because each party has greater knowledge of what he can expect to prove and what the adverse party can be expected to prove against him.

Until the decision of the Supreme Court in County of Los Angeles v. Faus,¹ the need for adequate discovery procedures in eminent domain litigation was not acute; for until that decision, valuation data was inadmissible on direct examination. Hence, the only valuation data that would be introduced against a party was that which the party himself asked to be introduced through cross-examination. Since the Faus case, however, the development of workable discovery rules in these cases has become imperative. Unless the valuation data to be related on direct examination of an expert witness can be discovered and its reliability tested through investigation prior to trial, the only means available to test the reliability of such data is lengthy--and often fruitless--cross-examination during trial.

1. 48 Cal. 2d 672, 312 Pac.2d 680 (1957).

Nonetheless, the use of discovery in eminent domain proceedings has not kept pace with its use generally in other civil proceedings. Until recently, this was in part attributable to decisions² which severely limited the extent to which the opinion of an expert, and the data upon which the opinion was based, could be discovered in an eminent domain case. These decisions made discovery ineffective in eminent domain litigation because the principal issue involved in such cases--the value of the property taken or damaged--is a matter of expert opinion. It is now clear, however, that the opinion of the expert and the pertinent valuation data in an eminent domain case are discoverable.³

Despite the fact that no legal impediment remains to the use of broad discovery in eminent domain litigation, two major obstacles to the use of discovery in these cases still exist. The first involves compensating the expert for his time in preparing for and giving his deposition. It seems unfair for one party to impose this expense upon the adverse party against his will. Even if the problem of allocation of this expense were readily soluble, the amount of the expense involved in taking the deposition of an expert often would make this form of discovery impractical.

The other major obstacle is that the pertinent valuation data frequently is not accumulated until after the normal time for completion of discovery--the time of the pretrial conference. There are three reasons why this data is not available until a few days before the

2. E.g., *Rust v. Roberts*, 171 Cal. App.2d 772, 341 P.2d 36 (1959)

3. *People v. Donovan*, 57 A.C. 374 (1962); *Oceanside Union Sch. Dist. v. Superior Court*, 58 A.C. 182 (1962); *San Diego Professional Ass'n v. Superior Court*, 58 A.C. 197 (1962); *Mowry v. Superior Court*, 202 A.C.A. 263 (1962).

time of the actual trial. First, the parties usually are unwilling to incur the expense of having the expert complete his appraisal until shortly before the actual trial, for they seek to avoid this expense until it is clear that the case cannot be settled. Second, an appraisal report completed a considerable time before the trial must be brought up to date just before the trial and this involves additional expense. Third, an appraiser who completes his appraisal a considerable time before the trial may find that he has forgotten many of the details by the time of the trial and may need to devote a substantial amount of time to reviewing his appraisal just before trial in order to refresh his memory.

The Commission believes that the obstacles to effective discovery in eminent domain cases may be overcome by legislation providing for a pretrial exchange of written statements containing pertinent valuation data. This technique is not novel; a variation of this procedure is now used in some federal district courts in eminent domain proceedings and similar procedures are provided by the statutes of some other states. Analogous procedures are provided by California statutes relating to other fields where the problems are comparable. For example, Code of Civil Procedure Section 454 provides that, upon demand, a copy of an account sued upon must be delivered to the adverse party; and, if such delivery is not made, the party suing upon the account may not give any evidence thereof at the trial. Similarly, Code of Civil Procedure Section 2032 provides for a compulsory exchange of physicians' reports under certain circumstances; and, if the report of an examining physician has not been exchanged, the court may exclude his testimony at the trial.

The Commission recognizes that pretrial exchange of valuation data will require a party to prepare a substantial portion of his case

somewhat earlier than is now the practice -- i.e., by the time the information is required to be exchanged rather than by the time of the trial. But the recommended procedure has several offsetting advantages. First, it will tend to assure the reliability of the data upon which the appraisal testimony given at the trial is based, for the parties will have had an opportunity to test such data through investigation prior to trial. Such pretrial investigation should curtail the time required for the trial and in some cases may facilitate settlement. Second, if the exchange of information takes place prior to the pretrial conference, the conference will serve a more useful function in eminent domain proceedings. For example, the parties, having checked the supporting data in advance, may be able to stipulate at the pretrial conference to highest and best use, to what sales are comparable, to the admissibility of certain other evidence and, perhaps, even to the amounts of certain items of damage. Of course, this desirable objective can be fully achieved only if the Judicial Council amends the pretrial rules to provide for the holding of pretrial conferences in eminent domain cases subsequent to the time for exchange of the valuation data.⁴

The procedure recommended above for the pretrial exchange of valuation data is supplemental to other discovery procedures.

-
4. The proposed statute provides for the exchange of valuation data not less than 20 days prior to trial. Under existing pretrial procedures, this time limit does not provide assurance that the data will be exchanged prior to the pretrial conference. As valuation opinions are subject to change as more data are acquired, it is desirable to have the completion of discovery, and hence the pretrial conference, as near to the actual trial as possible.

The Commission has made no recommendation in regard to pretrial conferences in eminent domain proceedings because such conferences are governed by court rules promulgated by Judicial Council.

Nevertheless, the Commission anticipates that the procedure herein recommended will provide all the information that is necessary in the ordinary case and that other methods of discovery will be used only in unusual cases.

For the foregoing reasons, the Commission makes the following recommendations:

1. At least 45 days prior to the trial, any party to an eminent domain proceeding should be permitted to serve on any adverse party a demand to exchange valuation data. Thereafter, at least 20 days prior to the trial, both the party serving the demand and the party on whom the demand is served should be required to serve on each other statements setting forth specified valuation data, such as the names of expert witnesses, the names of the witnesses who will testify as to the value of the property, the opinions of the valuation witnesses and certain of the data upon which the opinions are based.

A person served with a demand, within five days from such service, should be able to serve another demand--a cross-demand--on any other party interested in the same parcel of property. This right will protect a party from being required to reveal his valuation data to a person with but a nominal interest in the proceeding while receiving no important information in return.

Compliance with these requirements will be relatively inexpensive. Appraisal reports ordinarily contain all the valuation data required to be listed in the statement and copies of the reports can be made a part of the statement. Of course, the required listing of data is not intended to enlarge the extent to which such data may be admissible as evidence in the actual trial of an eminent domain case.

C

2. If a demand and a statement of valuation data are served, a party should not be permitted to call a witness to testify on direct examination during his case in chief to any information required to be listed upon a statement of valuation data unless he has listed the witness and the information in the statement he served on the adverse parties.

C

This sanction is needed to enforce the required exchange of the statements of valuation data. The same procedural technique is used to enforce the required exchange of physicians' statements under Code of Civil Procedure Section 2032 and to enforce the required service of a copy of the account under Code of Civil Procedure Section 454. The sanction, however, should be limited to a party's case in chief so that cross-examination and rebuttal are unaffected by the required exchange of valuation data, for it is often difficult to anticipate the evidence required for proper rebuttal or cross-examination.

C

3. The court should be authorized to permit a party to call a witness or to introduce evidence not listed in his statement of valuation data upon a showing that such party made a good faith effort to comply with the statute, that he diligently gave notice to the adverse parties of his intention to call such witness or to introduce such evidence, and that prior to serving the statement he (1) could not in the exercise of reasonable diligence have determined to call the witness or have discovered or listed the evidence or (2) failed to determine to call the witness or to discover or list the evidence through mistake, inadvertence, surprise or excusable neglect. These are similar to the standards now applied by the courts under Code of Civil Procedure Section 657 (for

granting a new trial upon newly discovered evidence) and under Code of Civil Procedure Section 473 (for relieving a party from default) and it is appropriate for the court to apply the standards here.

4. Section 1247b of the Code of Civil Procedure, which now requires the condemner in partial taking cases to serve a map of the affected parcel upon the condemnee if requested to do so, should be amended so that the condemnee may obtain the map prior to the time for the service of his statement of valuation data. The map will be helpful to the condemnee in the preparation of his statement of valuation data.

The Commission's recommendation would be effectuated by the enactment of the following measure:

An act to amend and renumber Section 1246.1 of, to amend Section 1247b of, and to add Sections 1246.1, 1246.2, 1246.3, 1246.4, 1246.5, 1246.6 and 1246.7 to, the Code of Civil Procedure, relating to eminent domain proceedings.

The people of the State of California do enact as follows:

SECTION 1. Section 1246.1 of the Code of Civil Procedure is amended and renumbered to read:

[~~1246.1~~] 1246.9. Where there are two or more estates or divided interests in property sought to be condemned, the plaintiff is entitled to have the amount of the award for said property first determined as between plaintiff and all defendants claiming any interest therein; thereafter in the same proceeding the respective rights of such defendants in and to the award shall be determined by the court, jury, or referee and the award apportioned accordingly. The costs of determining the apportionment of the award shall be allowed to the defendants and taxed against the plaintiff except that the costs of determining any issue as to title between two or more defendants shall be borne by the defendants in such proportion as the court may direct.

SEC. 2. Section 1246.1 is added to the Code of Civil Procedure, to read:

1246.1 (a) Any party to an eminent domain proceeding may, not later than ~~45~~ days prior to the day set for trial,

serve upon any adverse party to the eminent domain proceeding and file a demand to exchange valuation data.

(b) A party on whom a demand is served may, not later than five days after the service of the demand, serve upon any adverse party to the eminent domain proceeding and file a cross-demand to exchange valuation data relating to the parcel of property described in the demand.

(c) The demand or cross-demand shall:

(1) Describe the parcel of property upon which valuation data is sought to be exchanged, which description may be made by reference to the complaint.

(2) Include a statement in substantially the following form: "You are required to serve and file a statement of valuation data in compliance with Sections 1246.1 and 1246.2 of the Code of Civil Procedure not later than 20 days prior to the day set for trial and, subject to Section 1246.5 of the Code of Civil Procedure, your failure to do so will constitute a waiver of the right to introduce on direct examination in your case in chief any of the evidence required to be set forth in your statement of valuation data."

(d) Not later than 20 days prior to the day set for trial, each party who served a demand or cross-demand and each party upon whom a demand or cross-demand was served shall serve and file a statement of valuation data. A party who served a demand or cross-demand shall serve his statement of valuation data upon each party on whom he served

his demand or cross-demand. Each party on whom a demand or cross-demand was served shall serve his statement of valuation data upon the party who served the demand or cross-demand.

SEC. 3. Section 1246.2 is added to the Code of Civil Procedure, to read:

1246.2. The statement of valuation data shall contain:

(a) The name and business or residence address of each person intended to be called as an expert witness by the party.

(b) The name and business address of each person intended to be called as a witness by the party to testify to his opinion of the value of the property described in the demand or cross-demand or as to the amount of the damage or benefit, if any, to the larger parcel from which such property is taken and the name and business or residence address of each person upon whose statements or opinion the opinion is based in whole or in substantial part.

(c) The opinion of each witness listed as required in subdivision (b) of this section as to the value of the property described in the demand or cross-demand and as to the amount of the damage or benefit, if any, which will accrue to the larger parcel from which such property is taken and the following data to the extent that the opinion is based thereon:

(1) The highest and best use of the property.

(2) The applicable zoning and the opinion of the witness

C concerning probable change thereof.

(3) A list of the offers, contracts, sales of property, leases and other transactions supporting the opinion.

(4) The cost of reproduction or replacement of the property less depreciation and obsolescence and the rate of depreciation used.

(5) The gross and net income from the property, its reasonable net rental value, its capitalized value and the rate of capitalization used.

(6) Where the property is a portion of a larger parcel, a description of the larger parcel from which the property is taken.

C (d) With respect to each offer, contract, sale, lease or other transaction listed under paragraph (3) of subdivision (c) of this section:

(1) The names and business or residence addresses, if known, of the parties to the transaction.

(2) The location of the property subject to the transaction.

(3) The date of the transaction.

(4) If recorded, the date of recording and the volume and page where recorded.

(5) The consideration and other terms of the transaction. The statement in lieu of stating the terms contained in any contract, lease or other document may, if such document is available for inspection by the adverse party, state the place where and the times when it is available for inspection.

C SEC. 4. Section 1246.3 is added to the Code of Civil Procedure, to read:

1246.3. (a) A party who has served and filed a statement of valuation data shall diligently give notice to the parties upon whom the statement was served if, after service of his statement of valuation data, he:

(1) Determines to call an expert witness not listed on his statement of valuation data;

(2) Determines to call a witness not listed on his statement of valuation data for the purpose of having such witness testify to his opinion of the value of the property described in the demand or the amount of the damage or benefit, if any, to the larger parcel from which such property is taken;

C (3) Determines to have a witness called by him testify on direct examination during his case in chief to any data required to be listed on the statement of valuation but which was not so listed; or

(4) Discovers any valuation data required to be listed on his statement of valuation data but which was not so listed.

(b) The notice required by subdivision (a) of this Section shall include the information specified in Section 1246.2 and shall be in writing; but such notice is not required to be in writing if it is given after the commencement of the trial.

C SEC. 5. Section 1246.4 is added to the Code of Civil Procedure, to read:

1246.4. Except as provided in Section 1246.5, if a demand to exchange valuation data and one or more statements of valuation data are served and filed pursuant to Section 1246.1:

(a) No party required to serve and file a statement of valuation data may call an expert witness to testify on direct examination during the case in chief of the party calling him unless the name and address of such witness are listed on the statement of the party who calls the witness.

(b) No party required to serve and file a statement of valuation data may call a witness to testify on direct examination during the case in chief of the party calling him to his opinion of the value of the property described in the demand or cross-demand or the amount of the damage or benefit, if any, to the larger parcel from which such property is taken unless the name and address of such witness are listed on the statement of the party who calls the witness.

(c) No witness called by any party required to serve and file a statement of valuation data may testify on direct examination during the case in chief of the party who called him to any data required to be listed on a statement of valuation data unless such data is listed on the statement of valuation data of the party who calls the witness, except that testimony that is merely an explanation or elaboration of data so listed is not inadmissible under this section.

C SEC. 6. Section 1246.5 is added to the Code of Civil Procedure, to read:

1246.5. The court may, upon such terms as may be just, permit a party to call a witness or introduce on direct examination in his case in chief evidence required to be but not listed in such party's statement of valuation data if the court finds that such party has made a good faith effort to comply with Sections 1246.1 and 1246.2, that he has complied with Section 1246.3, and that, by the date of the service of his statement of valuation data, he:

(a) Would not in the exercise of reasonable diligence have determined to call such witness or discovered or listed such evidence; or

C (b) Failed to determine to call such witness or to discover or list such evidence through mistake, inadvertence, surprise or excusable neglect.

SEC. 7. Section 1246.6 is added to the Code of Civil Procedure, to read:

1246.6. The procedure provided in Sections 1246.1 to 1246.5, inclusive, does not prevent the use of other discovery procedures in eminent domain proceedings.

SEC. 8. Section 1246.7 is added to the Code of Civil Procedure, to read:

C 1246.7. Nothing in Sections 1246.1 to 1246.6, inclusive,

C makes admissible any matter that is not otherwise admissible as evidence in eminent domain proceedings.

SEC. 9. Section 1247b of the Code of Civil Procedure is amended to read:

1247b. Whenever in [~~a-condemnation~~] an eminent domain proceeding only a portion of a parcel of property is sought to be taken [~~and upon~~], the plaintiff, within 15 days after a request of a defendant to the plaintiff, [~~made at least 30 days prior to the time of trial, the plaintiff~~] shall prepare a map showing the boundaries of the entire parcel, indicating thereon the part to be taken, the part remaining, and shall serve an exact copy of such map on the defendant or his attorney [~~at least fifteen (15) days prior to the time of trial~~].