

First Supplement to Memorandum 65-52

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

Since preparing the basic memorandum, the staff has had an opportunity to examine the provisions in other states relating to discovery and exchange of appraisal reports. It is interesting to note that most of the states that have made a recent comprehensive study of their eminent domain laws have provided for the discovery of, or the exchange of, appraisal reports or the equivalent.

Before considering provisions in other states, refer to pages 720-722 of the Commission's 1963 recommendation (attached to basic memorandum) where the pertinent provisions of the Rules of the United States District Court for the Southern District of California are set out. As of March 1965, these provisions were still in effect.

Rule 25a of the New York Court of Claims (attached as Exhibit I - pink), which took effect on March 1, 1965, provides for the exchange of appraisal reports and generally precludes the offering of any proof on matters not contained in the appraisal reports that were exchanged.

In Pennsylvania and New Jersey, the commission system is used. As a result, to some extent, appraisal information is made known at the commission hearing, but either party may appeal from the commission's determination and obtain a new trial before the court. Section 703(2) of the Pennsylvania statute provides that at the trial in court:

(2) If any valuation expert who has not previously testified before the viewers is to testify, the party calling him must disclose his name and serve a statement of his valuation of the property before and after the condemnation and his opinion of the highest and best use of the property before the condemnation and

of any part thereof remaining after the condemnation, on the opposing party at least 10 days before the date when the case is listed for pretrial or trial, whichever is earlier.

The proposed New Jersey statute in Section 13(b)(second paragraph) contains substantially the same provision as the Pennsylvania statute.

Section 32.09(8) and (9) of the Wisconsin statute provides a procedure for the exchange of detailed statements concerning the experts to be called, exhibits to be used, and appraisal reports. The Wisconsin statute is discussed in the Commission's pamphlet containing its 1963 recommendation at page 729 and was considered when the 1963 recommendation was prepared.

In 1962, a joint committee of the Legislative Council of Maryland and of the Bar Association of Baltimore recommended the enactment of a new eminent domain statute for Maryland. The recommended legislation was enacted in 1962. The joint committee also recommended to the courts for adoption as a court rule a provision dealing with discovery of appraisal reports and similar information. In 1962, the proposed rule was adopted as Rule U12. The text of this rule is set out as Exhibit II (yellow pages). The rule is subject to the objection that it can be one-sided and will penalize the party who prepares for his case prior to trial.

We suggest that we distribute the text of recently enacted statutory provisions in other states and the Maryland rule with the legislation previously proposed by the Commission to interested persons for comment. We will revise the proposed letter of transmittal attached to the basic memorandum to so indicate.

The fact that other states that have recently studied the problems of condemnation procedure have seen fit to include specific provisions in

their statutes or court rules to deal with the problem of discovery indicates to the staff that it is important that our previous recommendation on this subject be distributed for comments so that we can consider (after such comments are received) what, if any, provisions should be included in our comprehensive statute to deal with discovery problems.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

EXHIBIT I

First Supp. Memo 65-52

NEW YORK - COURT OF CLAIMS
New Rule 25a

1. Within six (6) months from the date of the filing of a claim in an appropriation case the parties shall file with the Clerk of the Court four (4) copies of their appraisals which shall set forth separately as to vacant land and improvements the valuation and data upon which such evaluations are based, including but not limited to the before value of the property, the after value, direct, consequential and total damages and details of appropriations, comparable sales and other factors utilized. If all of the details required by Section 16 (3) of the Court of Claims Act relating to alleged comparable sales are included in the appraisal report prescribed herein, the same shall be deemed compliance with Section 16 (3) of the Court of Claims Act.
2. When the Clerk shall have received the appraisal reports of all parties he shall send to each attorney of record a copy of the appraisal report of all other parties to the claim.
3. Within thirty (30) days after the service upon a party of an appraisal report of any other party, any party to the proceeding may file and serve on all other parties an amended or supplemental appraisal report or reports.
4. Within sixty (60) days after the final filing and service of appraisal reports or amended or supplemental appraisal reports a party, may because of unusual developments or circumstances, make a motion for permission to file and serve an additional appraisal report or amended or supplemental reports, the granting of which application shall rest in the sound discretion of the Court as the interests of justice may require.
5. A party confronted with unusual and special circumstances requiring more time than prescribed above for the filing of appraisal reports may make an application upon notice for an extension of time which extension, in the sound discretion of the Court, may be granted ~~on such terms and under such conditions as the Court deems~~

Upon the trial of a claim for the appropriation of property the parties shall be precluded from offering any proof on matters not contained in the appraisal reports or amended or supplemental appraisal reports as required by this Rule; however, a party may, notwithstanding his failure to comply with this Rule, offer proof on matters contained in Bills of Particulars and Examinations before Trial in accordance with the usual procedures and Rules of this Court.

(b) This Rule shall not apply to a party who files a statement within six (6) months of the filing of a claim to the effect that he will not introduce expert evidence of value and damages upon the trial.

7. Six (6) months after the filing of a claim for damages for the appropriation of property a Judge, designated by the Presiding Judge, may conduct a pre-trial conference to be attended by every party's trial counsel or lawyer with dispositive authority. At least eight (8) days notice thereof shall be given by the Clerk to each party or lawyer of record; this provision amends and supplements present Rule 5 (a).

8. The purposes and intent of this Rule are (a) to aid and encourage the early disposition and settlement of appropriation claims and (b) to compel a full and complete disclosure so as to enable all parties to more adequately and intelligently prepare for a trial of the issues.

9. This Rule shall apply to all claims filed on and after March 1, 1965.

MARYLAND -- COURT RULE U12

Rule U12. Discovery.**a. Generally.**

In a proceeding for condemnation pre-trial discovery shall be permitted and shall be governed by Chapter 400 (Depositions and Discovery) of the Maryland Rules, except as herein otherwise provided.

b. Additional Subjects of Discovery.

In addition to the documents and matters which he may discover under Rules 410 (Scope of Examination) and 417 (Discovery by Interrogatory to Party), but subject to the provisions of Rule 406 (Order to Protect Party and Deponent), a party to a proceeding for condemnation may:

- (1) By written interrogatory or by deposition require any other party to produce and submit for inspection, or to furnish a copy of, all written reports of experts pertaining to the value of the property sought to be condemned or any part thereof, whether or not such expert is to be called as a witness, and whether or not such report was obtained in anticipation of litigation or in preparation for trial.
- (2) By written interrogatory or by deposition require any other party to disclose the identity and location of every expert whom such other party has caused to examine the property sought to be condemned or any part thereof for the purpose of determining its value, whether or not such expert is to be called as a witness, and whether or not such examination was procured in anticipation of litigation or in preparation for trial.
- (3) By written interrogatory or by deposition require any other party to disclose the identity and location of every expert whom such other party proposes to call as a witness.
- (4) By deposition on written questions or oral examination, examine any expert whose identity and location are obtainable under the provisions of this section, as to such expert's findings and opinions. An expert so examined shall be entitled to reasonable compensation therefor, to be paid him by the party examining him.