Memorandum 67-37

Subject: Senate Bill No. 253 (Exchange of Information in Eminent Domain Proceedings)

Attached to this memorandum are the following exhibits:

Exhibit I (pink) - California Pretrial Rules, effective September 1

Exhibit II (yellow) - Proposed revisions of Senate Bill No. 253

Exhibit III (green) - Comments to revised bill

Exhibit IV (gold) - Los Angeles Policy Memorandum

Letter - Charles T. Van Deusen (blue)

Letter - City Attorney, Los Angeles (buff)

Revisions of the bill have been made in light of the revised rules governing pretrial. For example, the demand for an exchange of valuation data is required by the revised bill to be made 50 days prior to the day of the trial. (Pretrial is optional under the revised rules.)

In the interest of clarity, we have made a distinction between the list of expert witnesses (Section 1272.03 of the revised draft) and statements of valuation data (Section 1272.02 of the revised draft). Conforming changes have been made throughout the bill. No substantive change is involved, but the revised bill should eliminate confusion.

Section 1272.07 is designed to save the Los Angeles procedure. Note that the Los Angeles procedure will be applicable to any case where there is a pretrial and one of the parties requests that valuation data be exchanged under the Los Angeles procedure. In other words, if there is no pretrial in a particular case, the statute will apply. Moreover, even if there is a pretrial, the parties can stipulate (by not making a request that the Los Angeles exchange procedure apply) that the exchange be made pursuant to the statute rather than the Los Angeles rules. This would be possible where the attorneys on both sides have confidence in each other and are willing

to make an exchange without the court having to review the material to be exchanged to determine that it is a fair exchange of comparable information.

A difficult problem under the proposed statute is the determination of what portion of the evidence offered by the condemnor constitutes rebuttal of the condemnee's case and what portion constitutes the condemnor's case in chief. Mr. Van Deusen's letter suggests that the statute make clear that rebuttal evidence can be offered by the condemnor at the same time as he is presenting his case in chief. We have not included such a provision in the statute. We have attempted to indicate what "case in chief" means in the comment to Section 1272.04.

The other revisions of the statute appear to need no comment. If you have any questions concerning them, we will answer them at the meeting.

Respectfully submitted,

Clarence B. Taylor
Special Condemnation Counsel

Memo 67-37

EXHIBIT I

California Pretrial Rules Altered, Effective Sept. 1

SAN FRANCISCO — The State Judicial Council has approved amendments to the California Rules of Court dealing with pretrial procedures, it was announced Monday by Chief Justice of California Roger J. Traynor.

The Chief Justice, who is Chairman of the Council, reported that the Council approved the amendments at its meeting in Santa Rosa Friday. They constitute the final step in a year of negotiations between the Council and the State Bar to reach agreement on the rules and will take effect Sept. 1, 1967. The State Bar Board of Governors earlier had given its approval to the amendments.

It is the belief of the Council that the amendments meet the needs of the Bar, while safeguarding the ability of courts to manage their trial calendars, the Chief Justice said.

Chief Justice Traynor also said that the Council plans to call a meeting of the judges handling calendar management in the superior courts some time in June to discuss changes in calendaring procedures required under the revised rules.

A summary of the principal changes from existing procedures that will result from the amendments is as follows:

1. The memorandum to set would be replaced by an an at-issue memorandum. (Rule 206.)

2. Pretrial conferences would be held only when requested by a party or ordered by the court in the particular case. (Rule 208.)

3. Cases would be set for trial at a trial setting conference in courts with more than 10 judges. (Rules 220-220.3.) In the smaller courts, cases could be set without a trial setting conference if the court so provided by local rule. (Rule 220.4.)

4. A certificate of readiness may be required by local rule. If such a certificate is required, the procedure prescribed by Council rule must be followed. The certificate would be filed simultaneously with or at any time after the filing of the at-issue memorandum, ex-

cept that if the condition of the court's calendar is such that a case cannot be brought to trial within six months, the certificate may be filed only upon notification by the court of eligibility to file a certificate. (Rule 221.)

5. All parties would have a right to conduct discovery proceedings until 30 days before the date set for trial. Within the period of 30 days before trial discovery could be had by order of the court for good cause and there could be voluntary exchanges of information and discovery by stipulation of the parties. (Rule 222.)

AMENDMENTS TO CALIFORNIA RULES OF COURT

(relating to pretrial procedures)

ADOPTED BY THE JUDICIAL COUNCIL OF THE STATE OF CALIFORNIA

Effective September 1, 1967

Rule 206 is amended to read:

I.

RULE 206. MEMORANDUM THAT CIVIL CASE IS AT ISSUE

(a) No civil case shall be placed on the civil active list or be set for a pretrial conference, for a trial setting conference or for trial until it is at issue and unless a party thereto has served and filed therein an at-issue memorandum, stating:

1. The title and number of the case;
2. The nature of the case;
3. That all essential parties have been served with process or appeared therein and that the case is at issue as to all such parties;
4. Whether the case is entitled to legal preference and, if so, the citation of the section number of the code or statute granting such preference;
5. Whether or not a pretrial conference is requested;
6. Whether or not a jury trial is demanded;
7. The time estimated for the trial;
8. The names, addresses and telephone numbers of the attorneys for the parties or of parties appearing in person.

(b) Any party not in agreement with the information or estimates given in an at-issue memorandum shall within five days after the service thereof serve and file a memorandum on his behalf.

(c) If a pretrial conference is not requested, it may thereafter be

(Continued on Page 5)

requested by either party and such request shall be granted unless to do so will in the opinion of the court unreasonably interfere with bringing the case to trial or will otherwise result in unfair advantage to any party.

II.

Rule 207 is amended to read:

RULE 207. CIVIL ACTIVE LIST

(a) [Preparation] At least once in each calendar month, on a day to be designated by the presiding judge or the judges, the clerk shall prepare a list of all civil cases at issue but not yet set for trial wherein **an at-issue** memorandum has theretofore been filed. Such list shall be known as the civil active list and shall be available for public examination.

(b) [Contents] The cases enumerated on the civil active list shall be designated by their number and by the surname of the first-named party on each side and shall be arranged in the order in which the **at-issue** memoranda were filed.

III.

Rule 207.1 is added to read:

RULE 207.1. SETTING SHORT CAUSES FOR TRIAL

As soon as feasible after the filing of an at-issue memorandum or a certificate of readiness, if such certificate is required, the clerk under the supervision of the presiding judge, or, if none, the judge or judges shall assign a time and place for trial for short causes in which the time estimated for trial by all parties is one day or less. All such cases shall be exempt from any requirement of a pretrial, settlement or trial setting conference. If any such case is not completely tried within five hours of trial time, including time necessary for reading transcripts, depositions and other documentary evidence, the judge may complete the trial or in the interest of justice may declare a mistrial. In the latter event a new at-issue memorandum under rule 206 shall be served and filed estimating the time for trial at more than one day, and thereafter the case shall be placed on the civil active list in the sequence in which this new memorandum is filed in the case.

IV.

Rule 207.5 is amended to read:

RULE 207.5. SETTLEMENT CALENDAR

As a part of its pretrial facilities the superior court in each county shall establish and maintain a settlement calendar. When a civil case has been on the civil active list for 30 days, or at such other time as may be provided by local rule, the clerk shall send all parties to the case an invitation to attend a settlement conference. The case shall then be placed on the settlement calendar if one or more of the parties not later than 20 days prior to the date set for pretrial **or trial setting** conference, or, if no pretrial **or trial setting** conference is required, not later than 20 days prior to the date set for trial advises the clerk in writing that he accepts the invitation. The clerk shall notify all other parties of the acceptance. The court may, and upon the joint request of all parties shall, order a particular case to be placed on such settlement calendar at any time.

Settlement conference shall be held informally before a judge at a time and place provided by the presiding judge or, if none, by the judge or judges. The conference may be continued from time to time by the judge. Each case on the settlement calendar shall retain its place on the civil active list. If the case is not settled at such conference, no reference shall thereafter be made to any settlement discussion had under this rule, except in subsequent settlement proceedings. The settlement procedure provided in this rule is not intended to be exclusive, and local settlement procedures

after the completion of pretrial proceedings are expressly authorized or consistent with these rules.

This rule shall not operate to delay the setting of cases for pretrial or trial setting conference, or for trial.

V.

Rule 203 is amended to read:

RULE 203. CASES IN WHICH A PRETRIAL CONFERENCE SHALL BE HELD

A pretrial conference shall be held in every case on the civil active list in which it is requested by a party or ordered by the court other than short causes set for trial under rule 207.1. The court on its own motion may order a pretrial conference in an individual case only after consideration of the necessities of that particular case. Pretrial conferences shall not be required in all cases or in classes of cases by general court order or by local rule.

VI.

Subdivision (b) of Rule 209 is amended to read:

RULE 209. SETTING FOR PRETRIAL CONFERENCE

* * *

(b) The clerk shall give not less than **60** days' notice by mail of the time and place of the pretrial conference to all parties appearing therein **unless the parties agree to a shorter time or the court orders a shorter time for good cause shown upon noticed motion,** and no further notice thereof need be given by any party to the case.

VII.

Rule 210 is amended by repealing subdivision (d) thereof and adding to new subdivision (d) to read:

RULE 210. DUTIES OF ATTORNEYS IN RESPECT TO PRETRIAL CONFERENCES

* * *

(d) Each party shall make reasonable efforts to complete discovery proceedings before the pretrial conference and shall be prepared to inform the court what discovery has been completed, what discovery may be required and when such discovery can be completed.

VIII.

Subdivision (f) of Rule 211 is amended to read:

RULE 211. CONDUCT OF, AND LIMITATIONS ON, PRETRIAL CONFERENCES

* * *

(f) At the pretrial conference, the judge shall determine whether any party remains in the case who has not been served with process within the time allowed by law or appeared pursuant to prior service of process or stipulation in respect to his appearance, and whether any law and motion matter is pending or likely; and, if so, the judge shall have power to: (i) continue the pretrial conference where expedient, with provision for the giving of notice thereof to any party not previously notified of the conference; and (ii) where necessary, order the case off the civil active list and to be replaced thereon only after a new memorandum under rule 206 is served and filed.

IX.

Subdivision (a) of Rule 212 is amended to read:

RULE 212. THE PRETRIAL CONFERENCE

(a) At the pretrial conference, whether in the courtroom or in chambers, the judge, without adjudicating controverted facts, may consider and act upon the following matters:

1. The written statements submitted under rule 210, and the statements of the factual and legal contentions made as to the issues remaining in dispute;
2. Any amendments to the pleadings to be made by consent or by order of the judge upon application of a party at such conference in respect to any amendment to the pleadings not previously passed upon by any judge, and fixing the time within which amended pleadings shall be filed;
3. Simplification of the factual and legal issues involved;
4. Admissions of fact, and of documents, as will avoid unnecessary proof;
5. References to a referee, commissioner, or other person, as now or hereafter provided by law;
6. Whether the court has jurisdiction to act in the case as now or hereafter provided by law and, if not, by consent to transfer or to dismiss the **case** accordingly;
7. Whether the depositions, inspections of writings and other

discovery proceedings, and the physical examinations, if any, have been completed under rule 210; and, if not, subject to rule 222, the fixing of time limits therefor;

8. Whether a trial brief or memorandum of points and authorities shall be required; and, if so, the fixing of the time of the service and filing thereof;
9. Re-estimating the time for trial after inquiry whether a jury trial is to be had; and
10. Assigning the date and place of the trial in accordance with rule 219.

X.

Subdivision (b) of Rule 215 is amended to read:

RULE 215. SERVICE AND FILING OF PRETRIAL CONFERENCE ORDER

* * *

(b) Within five days after such service of the copy of the pretrial conference order any attorney may serve upon all other attorneys in the case, and file with the clerk, a request for correction or modification of this order. The pretrial judge may deny, grant or provide for a hearing on such request and cause notice of his action to be given to each attorney in the case. After the five-day period, or after disposition of a request for correction or modification if such request is made, the pretrial order shall be filed in the case **and the clerk shall forthwith give notice thereof by mail to all parties appearing in the case.**

XI.

Rule 220 is renumbered as Rule 219 and amended to read:

RULE 219. SETTING FOR TRIAL AFTER PRETRIAL CONFERENCE

(a) Every case required to be pretried shall be set for trial for a place and time not earlier than **30 days after** the time of filing the pretrial order **(provided the time may, within the court's discretion, be shortened if necessary to prevent a dismissal under section 583 of the Code of Civil Procedure or for other good cause shown upon noticed motion)** and within 12 weeks after the pretrial conference, giving priority to those cases entitled thereto under the law.

(b) If the time and place of trial is fixed in the pretrial order no further thereof need be given. If the time and place of trial is not fixed in the pretrial order the clerk shall give at least 30 days' notice thereof by mail **(unless such time is shortened to prevent a dismissal under section 583 of the Code of Civil Procedure or for other good cause shown upon noticed motion)** to all parties appearing in the case.

XII.

Rules 221 and 222 are repealed and new Rules 220, 220.1, 220.2, 220.3, 220.4, 221 and 222 are added to read:

RULE 220. SETTING FOR TRIAL WITHOUT PRETRIAL CONFERENCE IN COURTS HAVING MORE THAN TEN JUDGES

(a) At least once a month in courts having more than ten judges, from the cases on the civil active list in which no pretrial conference is required, other than short causes set under rule 207.1, times and places shall be assigned for a trial setting conference during such a period as will permit their being set for trial not later than 12 weeks after the conference. This setting for a trial setting conference shall: (i) be by or under the supervision of the presiding judge; (ii) be in the sequence as nearly as possible in which the cases appear on the civil active list; (iii) give priority to those cases entitled thereto under the law; and (iv) insofar as feasible assign the same date for trial setting conferences to those cases in which the same attorney appears. The presiding judge shall provide for a trial setting conference calendar. Motions to continue any such conference shall be made to the trial setting conference judge or, if not available, before the presiding judge; and motions to advance, reset, or specially set for trial setting conference shall be made in like manner as such motions are made in respect to the trial of a case.

(b) The clerk shall give not less than 60 days' notice by mail of the time and place of the trial setting conference in each case to all parties appearing therein unless the parties agree to a shorter time or the court orders the time shortened for good cause shown upon noticed motion, and no further notice thereof need be given by any party to the case.

RULE 220.1. SETTING FOR TRIAL AFTER A TRIAL SETTING CONFERENCE

Every case in which a trial setting conference is had shall be set for trial for a place and time not earlier than 30 days after the setting conference (provided the time may, within the court's dis-

cretion, be shortened if necessary to prevent a dismissal under section 583 of the Code of Civil Procedure or for good cause shown upon noticed motion) and within 12 weeks after the conference, giving priority to those cases entitled thereto under the law. This setting for trial shall be by the trial setting judge subject to the supervision or order of the presiding judge.

RULE 220.2. DUTIES OF ATTORNEYS IN RESPECT TO TRIAL SETTING CONFERENCES

(a) Each party appearing in any case shall attend the trial setting conference in person or by counsel. The persons so attending shall have sufficient knowledge of the case to represent to the court that the case is or is not ready for setting and to furnish sufficient information to the court concerning the case to permit the court to determine if the case is in fact ready to be assigned a definite trial date.

(b) Each party shall be prepared to inform the court as to what discovery has been completed, what further discovery may be required and when such discovery can be completed.

RULE 220.3. DUTIES OF THE COURTS IN RESPECT TO TRIAL SETTING CONFERENCES

At the trial setting conference the court shall determine whether the case is or will be ready for trial, and, if so, shall set a time and place for trial.

The court shall not: (i) require any written pre-conference statement, (ii) redetermine or restate the issues made by the pleadings, (iii) dismiss fictitious defendants or condition the setting of a trial date upon the dismissal of such fictitious defendants without the consent of all parties, or (iv) require the parties to disclose evidence or exhibits.

RULE 220.4. SETTING FOR TRIAL WITHOUT PRETRIAL CONFERENCE IN COURTS HAVING TEN OR LESS JUDGES

Any court with ten or less judges shall use the setting procedures provided in rules 220 through 220.3, unless it provides by local rule that cases shall be set for trial without a trial setting conference. In such event, the court shall at least once a month set for trial as many cases on the civil active list in which no pretrial conference is required, other than short causes set under rule 207.1, as may reasonably be tried during the period involved. This setting for trial shall be by or under the supervision of the presiding judge or, if none, the judge or judges of that court and shall be in the sequence as nearly as possible in which the cases appear on the civil active list, giving priority to those cases entitled thereto under the law. The clerk shall give at least 90 days' notice by mail of the time and place of trial to all parties appearing in any case so set unless the parties stipulate to an earlier trial date or the court orders the time shortened to prevent a dismissal under section 583 of the Code of Civil Procedure or for other good cause shown upon noticed motion.

RULE 221. CERTIFICATE OF READINESS

(a) [When required] In any county in which the court by local rule requires a certificate of readiness, no case on the civil active list shall be set for a pretrial conference, for a trial setting conference or for trial unless a certificate of readiness is filed that complies substantially with this rule.

(b) [Contents] A certificate of readiness may be prepared and filed by any party and may be joined in by any other party to the action and shall state:

1. That the party or parties signing such certificate are ready to and desire to have the case set for pretrial conference or trial setting conference, if required, or for trial;
2. What discovery proceedings have been commenced or completed at the time of signing such certificate;
3. To the extent then known, what discovery proceedings remain to be done;
4. That all discovery will be completed at least 30 days prior to trial except as may be allowed by order of court for good cause shown or as may be by stipulation of the parties or through voluntary exchanges of information in preparation for trial.

A party will have complied with paragraphs (2) and (3) above if he generally describes the number and kinds of discovery pro-

ceedings initiated, completed or remaining to be done, without identifying names of persons or other details of such discovery.

(c) [Service on nonsigning parties and assignment for pretrial or setting conference, or for trial] A copy of such certificate shall be served on all parties not signing the certificate. The case shall be assigned a time and place for a pretrial conference, for a trial setting conference or for trial in regular order unless otherwise ordered by the court upon motion made upon notice supported by affidavit showing good cause, served and filed within 10 days after service of the certificate of readiness. Such motion shall be noticed for hearing within 10 days after service of notice of motion.

(d) [Time for filing certificate] A certificate of readiness may be filed simultaneously with an at-issue memorandum or at any time thereafter, except that in any court in which a case cannot be brought to trial within six months from the filing of a certificate of readiness because of the condition of the court's calendar, such certificate may be filed only upon notification from the court as provided in subdivision (e) hereof.

(e) [Notification of eligibility to file certificate] In any county in which a certificate of readiness is required and in which a case cannot be brought to trial within six months from the time a certificate of readiness is filed because of the condition of the court's calendar, at least once a month as many cases on the civil active list as can be brought to trial during the succeeding six months shall be selected for notification that the cases are eligible for filing a certificate of readiness. This selection shall: (i) be by or under the supervision of the presiding judge, or, if none, the judge or judges; (ii) be in the sequence as nearly as possible in which the cases appear on the civil active list; and (iii) give priority to those cases entitled thereto under the law. The clerk shall notify the parties to each of the selected cases that if the case is ready for trial they may file a certificate of readiness.

Within 20 days from the mailing of the clerk's notice any party may file a certificate of readiness. A case shall retain its place on the civil active list even though a certificate of readiness is not filed pursuant to the clerk's notice; provided, however, that when such notice is given in each of two months and no certificate is filed the case shall be removed from the civil active list and not restored to that list unless a new at-issue memorandum be served and filed.

RULE 222. LIMITATIONS ON DISCOVERY

All parties in all cases shall be entitled as a matter of right to conduct discovery proceedings until 30 days before any date set for the trial of the cases. The right to conduct discovery proceedings within 30 days before trial shall be within the discretion of the court. In exercising its discretion the court shall take into consideration the necessity and reasons for such discovery, the diligence or lack of diligence of the party seeking such discovery and his reasons for not having completed his discovery prior to 30 days before trial, whether the permitting of such discovery will prevent the case from going to trial on the day set or otherwise interfere with the trial calendar or result in prejudice to any party, and any other matter relevant to the request. Nothing herein shall preclude or limit voluntary exchanges of information or discovery by stipulation of the parties within 30 days before trial, but in no event shall such exchanges or stipulations require a court to grant a continuance of trial.

XIII.

Rule 231 is amended to read:

RULE 231. REQUEST FOR JURY TRIAL IN EQUITY, ETC., CASES

A party desiring a jury trial where the right thereto is not guaranteed by law shall, after issue is joined and before or at the time of filing the at-issue memorandum, or within five days after service of such memorandum by any other party, give notice of motion that the whole issue or any specific issues of fact involved therein be tried by a jury. A copy of the issues of fact proposed for submission to the jury, in proper form therefor, shall be served with the notice of motion. A party desiring to vacate the setting for a jury trial when the right thereto is not guaranteed by law and when the setting was made by the court without opportunity for the party to oppose it, shall, within five days after receiving notice from the clerk that the case has been set for jury trial, give notice of motion to vacate such setting and to reset the case for trial by the court without a jury. Such motions shall be noticed for hearing on the eighth court day after the giving of notice, but if the Law and Motion Calendar is not regularly heard on that day, the hearing shall be noticed for the next succeeding Law and Motion Calendar following such eighth day; provided, however, on order of the court for good cause shown, the hearing may be had on an earlier or later day on notice prescribed by the court.

AMENDED IN SENATE MARCH 9, 1967

SENATE BILL No. 253

Introduced by ~~Senator Bradley~~ Senators Bradley and Song

February 6, 1967

REFERRED TO COMMITTEE ON JUDICIARY

An act to add a chapter heading immediately preceding Section 1237 of, and to add Chapter 2 (commencing with Section 1272.01) to Title 7 of Part 3 of, the Code of Civil Procedure, relating to eminent domain.

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

SECTION 1. A chapter heading is added immediately preceding Section 1237 of the Code of Civil Procedure, to read:

CHAPTER 1. EMINENT DOMAIN GENERALLY

SEC. 2. Chapter 2 (commencing with Section 1272.01) is added to Title 7 of Part 3 of the Code of Civil Procedure, to read:

LEGISLATIVE COUNSEL'S DIGEST

SB 253, as amended, Bradley (Jud.). Eminent domain.

Adds Ch. heading, and adds Ch. 2 (commencing with Sec. 1272.01), Title 7, Pt. 3, C.C.P.

Specifies procedures for ~~discovery~~ in eminent domain proceedings. Sets time for which demands and cross-demands ~~of valuation data~~ must be made, prescribing the form and contents of such demands. ~~Allows Judicial Council to prescribe, by rule, times for serving and filing demands in eminent domain proceedings different from those prescribed in the Code of Civil Procedure.~~

Specifies what information shall be contained in ~~the statement~~ of valuation data.

Requires party who has served and filed a ~~statement~~ of valuation data to give notice if he plans to call ~~prescribed~~ witnesses not listed ~~in his statement of valuation data, or witnesses to~~ testify to *opinion or* data required to be listed in his statement but which was not. Requires that notice be given where information is discovered which was not listed.

~~Limits~~ admission ~~to of~~ evidence which was required to be, but which was not, listed in ~~the valuation~~ statement.

Provides that statutory procedure does not supersede statewide or local court rules and prescribes the extent to which such rules may vary the procedure specified in statute.

Vote—Majority; Appropriation—No; State Expense—No.

exchange of lists of expert witnesses and statements of valuation data

for exchanges

statements

list of expert witnesses and statements

expert

or to have a witness

a

Forbids calling of witnesses who were required to be, but were not, listed and limit-

EXCHANGE OF INFORMATION

CHAPTER 2. ~~DISCOVERY~~ IN EMINENT DOMAIN PROCEEDINGS

50

1272.01. (a) Not later than ~~10~~ days ~~after the memorandum to set has been served and filed~~ *prior to the date set for the ~~pretrial conference~~*, any party to an eminent domain proceeding may serve upon any adverse party and file a demand to exchange valuation data.

trial

lists of expert witnesses and statements of

(b) A party on whom a demand is served may, not later than 10 days after the service of the demand, serve upon any adverse party and file a cross-demand to exchange valuation data relating to the parcel of property described in the demand.

lists of expert witnesses and statements of

(c) The demand or cross-demand shall:

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

Chapter 2 (commencing with Section 1272.01) of Title 7 of Part 3

list of expert witnesses and statements

(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 1272.01 and 1272.02~~ of the Code of Civil Procedure not later than ~~10~~ *20* days prior to the day set for trial ~~and, subject to Section 1272.05 of the Code of Civil Procedure,~~ your failure to do so will constitute a waiver of ~~the~~ right to introduce on direct examination during your case in chief any matter required to be set forth in your ~~statement~~ of valuation data."

Except as otherwise provided in that chapter,

your right to call expert witnesses during your case in chief and of your

statements

(d) Not later than ~~10~~ *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~~ 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~~ upon the party who served the demand or cross-demand.

list of expert witnesses and statements

list of expert witnesses and statements of valuation data

list and statements

~~(e) The Judicial Council may, by rule, prescribe times for serving and filing demands and cross-demands, and a time for serving and filing statements of valuation data, that are different from the time specified in this section, but such rule shall provide that the trial will be held within 35 days from the day on which the statements of valuation data are required by such rules to be served and filed. Such rule may provide for a different form of statement than that specified by paragraph (2) of subdivision (c).~~

(a)

1272.02. ~~The statement of valuation data shall contain:~~

~~(a) (1) 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 or residence 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~~

A statement of valuation data shall be exchanged for

~~damage or benefit, if any, to the larger parcel from which such property is taken.~~ *as to any of the following matters:*

(1) The value of the property described in the demand or cross-demand.

(2) The amount of the damage, if any, to the remainder of the larger parcel from which such property is taken.

(3) The amount of the benefit, if any, to the remainder of the larger parcel from which such property is taken.

~~(c) The name and business or residence address of each person upon whose opinion the opinion referred to in subdivision (b) is based in whole or in substantial part.~~

~~(d) The opinion of With respect to 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 and benefit, if any, to the larger parcel from which such property is taken, a statement~~

(b) The statement of valuation data shall give the name and business or residence address of the witness and shall include a statement *whether the witness has an opinion as to each of the matters listed in subdivision (b), and, as to each such matter upon which he has an opinion, what that opinion* is and the following data to the extent that the opinion *on such matter* is based thereon:

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

(2) The applicable zoning and the opinion of the witness as to the probability of any change in such zoning.

(3) A list of the sales, contracts to sell and purchase, and leases supporting the opinion.

(4) The cost of reproduction or replacement of the existing improvements on the property less whatever depreciation or obsolescence the improvements have suffered and the method of calculation used to determine depreciation.

(5) The gross income from the property, the deductions ~~from gross income, the resulting net income, the reasonable~~ *from gross income, and the resulting net income; the reasonable* net rental value attributable to the land and existing improvements thereon, *and the estimated gross rental income and deductions therefrom upon which such reasonable net rental value is computed;* the rate of capitalization used; and the value indicated by such capitalization.

(6) If the property is a portion of a larger parcel, a description of the larger parcel ~~from which the property is taken~~ *and its value*.

~~(e)~~ With respect to each sale, contract, or lease listed under paragraph (3) of subdivision ~~(d)~~:

(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 price and other terms and circumstances of the transaction. In lieu of stating the terms contained in any con-

tract, lease, or other document, the statement may, if the document is available for inspection by the adverse party, state the place where and the times when it is available for inspection.

(d) The statement of valuation data shall include the name, business or residence address, and business, occupation, or profession of each person upon whose opinion the opinion referred to in subdivision (a) is based in whole or in substantial part.

(e) The statement of valuation data shall include a statement, signed by the witness, that the witness has read the statement of valuation data and that it fairly and correctly states his opinions and knowledge of the matters therein stated.

(f) An appraisal report that has been prepared by the witness which includes the information required to be included in a statement of valuation data may be served and filed as a statement of valuation data.

1272.03. The list of expert witnesses shall include the name, business or residence address, and business, occupation, or profession of each person intended to be called as an expert witness by the party and a statement as to the subject matter to which his opinion relates.

1272.04. ~~1272.03.~~ (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 in his statement of valuation data~~;

(2) Determines to call a witness ~~not listed in 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 *remainder of the* larger parcel from which such property is taken;

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

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

1272.05. (b) The notice required by subdivision (a) shall include the information specified in Section 1272.02 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.

~~1272.05.~~ Except as provided in Section ~~1272.05, if a demand to exchange valuation data and one or more statements of valuation data are served and filed pursuant to~~ Section 1272.01:

(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 in 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 *remainder of the* larger parcel from which such property is taken unless ~~the name and address of such witness are listed in 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 *opinion or* data required to be listed in ~~a~~ statement of valuation data unless such *opinion or* data is listed in ~~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 inadmissable under this section.

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is required to exchange lists of expert witnesses and statements included in his list of expert witnesses

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1272.05. upon objection of any party who serves and files his list of expert witnesses and statements of valuation data in compliance with

and 1272.03

1272.06,

list of expert witnesses

the witness is included in the list served and filed by

statements

a statement of valuation data for the witness was served and filed by

statements served and filed by the party for such witness

the such

~~1272.05.~~ (a) The court may, upon such terms as may be just, permit a party to call a witness, or permit a witness called by a party to testify to *an opinion or* data on direct examination, during the party's case in chief where such witness, *opinion*, or data is required to be, but is not, ~~listed~~ included 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 1272.01 ~~and 1272.02~~ to 1272.03, inclusive, that he has complied with Section ~~1272.03~~ and that, by the date of the service of his ~~statement of valuation data~~ list and statements, he:

(1) Would not in the exercise of reasonable diligence have determined to call such witness or discovered or listed such *opinion or* data; or

(2) Failed to determine to call such witness or to discover or list such *opinion or* data through mistake, inadvertence, surprise, or excusable neglect.

(b) In making a determination under this section, the court shall take into account the fact that the opposing party may have relied upon the ~~statement~~ list of expert witnesses and statements of valuation data and will be prejudiced if the witness is called or the testimony concerning such *opinion or* data is given.

1272.07. (a) Except as provided in this section, this chapter does not supersede or prevent the adoption of statewide or local court rules relating to pretrial, calendaring, or discovery in eminent domain proceedings. Notwithstanding such rules, any party to an eminent domain proceeding may serve and file a demand or cross-demand to exchange lists of expert witnesses and statements of valuation data in accordance with this chapter and, when such a demand or cross-demand is served and filed, the provisions of this chapter shall apply unless the rules otherwise provide and are applicable in the particular case.

(b) Statewide or local court rules may require that lists of expert witnesses and statements of valuation data be exchanged in accordance with this chapter, whether or not a demand for such exchange has been served and filed pursuant to Section 1272.01.

(c) Statewide or local court rules may provide a procedure for the exchange of lists of expert witnesses and valuation data and such procedure shall be followed instead of the procedure provided in this chapter in a particular eminent domain proceeding if a pretrial conference is held and one of the parties requests that the procedure provided by such rules be followed. The rules establishing such procedure may prescribe the valuation data to be exchanged, the conditions under which it will be exchanged, and the consequences of the failure of a party to satisfy such conditions.

1272.08.

~~1272.06.~~ The procedure provided in this chapter does not prevent the use of ~~other~~ discovery procedures or limit the matters that are ~~otherwise~~ discoverable in eminent domain proceedings. Neither the existence of the procedures provided by this chapter, nor the fact that they have or have not been invoked by a party to the proceeding, is intended to extend the time for completion of discovery in the proceeding.

1272.09.

~~1272.07.~~ Nothing in this chapter makes admissible any evidence that is not otherwise admissible or permits a witness to base an opinion on any matter that is not a proper basis for such an opinion.

Memorandum 67-37

EXHIBIT III
COMMENTS TO REVISED BILL

Section 1272.01

Comment. Section 1272.01 and the other sections of this chapter provide a simplified procedure for exchanges of valuation information in eminent domain cases. The procedure provided by this chapter is not mandatory; it applies only if it is invoked by a party to the proceeding. However, statewide or local court rules may require an exchange of information in all cases and may establish alternative procedures for cases in which pretrial conferences are held. This chapter does not supersede or prevent adoption of such rules. See Section 1272.07 and the Comment to that section.

Existence of the procedure provided by this chapter does not prevent the use of depositions, interrogatories, or other discovery procedures in eminent domain proceedings. See Section 1272.08 and the Comment to that section.

In requiring that demands be served and filed not later than 50 days before the date set for trial, subdivision (a) does not presuppose that in all cases a trial date will be set more than 50 days in advance. To assure timely filing and service, a party must anticipate the trial date that may be set by the court (at a pretrial or trial setting conference or otherwise) and file and serve his demand at least 50 days before the date that is fixed for the trial. The 50-day period is necessary to allow time for the filing and service of cross-demands, the preparation of lists and statements, and the filing and service of such lists and statements 20 days before trial.

Subdivision (b) permits a party upon whom a demand for an exchange has been served to serve a cross-demand on any other party to the proceeding. Such a cross-demand may be used, for example, by a party who

wishes to protect himself from being required to reveal his expert witnesses and valuation data to a party who has only a nominal interest in the proceeding while receiving no significant information in return. Under these circumstances, the party upon whom the demand was served may wish to serve a cross-demand on the opposing party who has a substantial interest in the proceeding. Absent such cross-demand, he would obtain no valuation data from this party since the exchange takes place only between the party who served the demand and the party upon whom the demand was served.

If a party serves a demand to exchange valuation data on another party to the proceeding, both the party serving the demand and the party upon whom the demand has been served are required to exchange statements of valuation data not later than 20 days prior to the day set for trial. Under subdivision (d) the party who serves a demand must, as a matter of course, serve his statement of data upon each party upon whom he served the demand. The parties required to make an exchange may stipulate or agree to the precise time when the exchange will take place in order to insure that it is complete and simultaneous. Absent such agreement, the exchange nevertheless will be substantially simultaneous because both parties normally will file and serve the required lists and statements approximately 20 days prior to the date set for trial.

Section 1272.02

Comment. Subdivision (a). Section 1272.02 requires that a statement of valuation data be provided for each person who is to testify to his opinion as to value, damages, or benefits, whether that person qualifies as an expert or not. For example, a statement must be provided for the owner of the property if he is to testify concerning value, damages, or benefits. See EVIDENCE CODE § 813(a)(2) (owner may testify concerning value).

Subdivisions (b) and (c). These subdivisions require that each statement of valuation data recite whether the witness has an opinion as to value, damages, or benefits and, if he does, what that opinion is. These subdivisions also require the setting forth of specified basic data to the extent that any opinion is based thereon. Cf. EVIDENCE CODE §§ 814-821. The subdivisions do not require that the specified data be set forth if the witness' opinion is not based thereon even though such data may have been compiled or ascertained by the witness. For example, if an appraiser does not support his opinion as to value by reference to reproduction costs or a capitalization of income, the information specified by paragraphs (3) and (4) of subdivision (b) need not be given in his statement or appraisal report.

Subdivision (d). Subdivision (d) requires that each valuation statement list the name and address, and indicate the business, occupation or profession, of any person who will not be called as a witness by the party but upon whose opinion the testimony of any valuation witness he plans to call will be based in whole or in part. This information is needed by the adverse party not only for the general purpose of properly preparing for trial but also to enable him to utilize his right under Section 804 of the

Evidence Code to call the expert and examine him as if under cross-examination concerning his opinion.

Subdivision (e). Subdivision (e) requires that each valuation statement include a recitation, signed by the witness, that he has read the statement and that it accurately reflects his opinions and information. The purpose of the requirement is to guard against misinterpretation or misstatement of the witness' opinions or supporting data in preparation of the statement.

Subdivision (f). Ordinarily an appraisal report prepared by an expert witness will contain all of the information required by subdivisions (c), (d), and (e) to be set forth for such witness. To the extent that the report does so, this subdivision permits service and filing of the report in lieu of a statement of valuation data for such witness.

Section 1272.03

Comment. Section 1272.03 requires the list of expert witnesses to include all persons to be called as experts. The list therefore must include not only the valuation experts for whom statements of valuation data or appraisal reports are required by Section 1272.02, but also any experts who will testify concerning other matters that may be presented to the trier of fact to facilitate understanding and weighing of the valuation testimony. See EVIDENCE CODE §§ 813(b), 814. For example, in a case involving a partial taking, if a party intends to present expert testimony concerning the character of the improvement to be constructed by the plaintiff (see EVIDENCE CODE § 813 (b)), the proposed witness' name must be listed. Similarly, a party is required to list a structural engineer who is to testify concerning the structural soundness of an existing building or a geologist who is to testify concerning the existence of valuable minerals on the property.

In addition to naming each proposed expert witness, the list must indicate his profession or calling and identify the subject matter of his testimony. For example, the subject matter may be identified as "valuation testimony," "character of proposed improvement," "structural soundness of building," "existence of oil on subject property," and the like. This further information is necessary to apprise the adverse party of the range and general nature of the expert testimony to be presented at the trial. Unlike Section 1272.02, this section does not require that the particulars of the expert opinion be stated or that the supporting factual data be set forth.

Section 1272.04

Comment. Section 1272.04 requires that a party promptly advise the adverse party if he intends to call an expert witness not included in his list of expert witnesses, to call a valuation witness for whom no statement was provided, or to use valuation data that was not listed in a statement of valuation data. Compliance with the section does not, however, insure that the party will be permitted to call the witness or use the valuation data. See Section 1272.06.

Section 1272.05

Comment. Section 1272.05 provides a sanction calculated to insure that the parties make a good faith exchange of lists of expert witnesses and essential valuation data. For applications of the same sanction to other required pretrial disclosures, see Code of Civil Procedure Sections 454 (copies of accounts) and 2032 (physicians' statements). Although the furnishing of a list of expert witnesses and statements of valuation data is analogous to responding to interrogatories or a request for admissions, the consequences specified by Code of Civil Procedure Section 2034 for failure or refusal to make discovery are not made applicable to a failure to comply with the requirements of this chapter. Existence of the sanction provided by Section 1272.05 does not, of course, prevent those consequences from attaching to a failure to make discovery when regular discovery techniques are invoked in the proceeding.

Under exceptional circumstances, the court is authorized to permit the use of a witness or of valuation data not included in the list or statements. See Section 1272.06 and the Comment to that section.

Section 1272.05 limits only the calling of a witness, or the presentation of testimony, during the case in chief of the party calling the witness or presenting the testimony. The section does not preclude a party from calling a witness in rebuttal or having a witness give rebuttal testimony that is otherwise proper. See San Francisco v. Tillman Estate Co., 205 Cal. 651, 272 Pac. 585 (1928); State v. Loop, 127 Cal. App.2d 786, 274 P.2d 885 (1954). The section also does not preclude a party from bringing out additional data on redirect examination where it is necessary to meet matters brought out on the cross-examination of his witness. However, the court should

exercise diligence to confine rebuttal and redirect examination to their proper purpose of meeting matters brought out by the adverse party. Obviously, a party should not be permitted to defeat the purpose of and evade the sanction of this chapter by reserving witnesses and valuation opinions and data for use in rebuttal where such witnesses should have been used during the case in chief and such opinions and data should have been presented during direct examination. Although rebuttal properly may include testimony "offered for the purpose of destroying the effect" of evidence previously introduced by an adverse party (see State v. Loop, supra), rarely if ever should opinions and data that could and should have been set forth in statements of valuation data be considered to be proper rebuttal of contradictory opinions or inconsistent data offered by the adverse party.

Application of the concept of "case in chief" to the presentation of evidence by the plaintiff requires particular attention. As the burden of proof on the issues of value and damages is upon the defendants (see San Francisco v. Tillman Estate Co., supra), those parties ordinarily are permitted to present their case in chief first in the order of the trial. Therefore, the following presentation by the plaintiff may include evidence of two kinds; i.e., evidence comprising the case in chief of the plaintiff and evidence in rebuttal of evidence previously presented by the defendants. If the evidence offered in rebuttal is proper as such, this section does not prevent its presentation at that time.

Section 1272.06

Comment. Section 1272.06 allows the court to permit a party who has made a good faith effort to comply with Sections 1272.01-1272.04 to call a witness or use valuation data that was not included in his list of expert witnesses or statements of valuation data. The standards set out in the section are similar to those applied 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). The court should apply the same standards in making determinations under this section. The consideration listed in subdivision (b) is important but is not necessarily the only consideration to be taken into account in making determinations under this section.

The court, in permitting a party to call a witness or use valuation data under this section, may impose such limitations and conditions as the court determines to be just under the circumstances of the particular case.

Section 1272.07

Comment. Section 1272.07 takes into account the facts that (1) calendaring and pretrial procedures in eminent domain cases are governed by rules adopted by the Judicial Council, rather than by statute, and (2) in some counties local courts have established mandatory procedures for the exchange of appraisal reports and other information as a means of making pretrial conferences more effective, of assuring readiness for trial, and of attaining reciprocity of disclosure under the various discovery procedures. In Los Angeles County, for example, procedure prior to trial in eminent domain cases is governed by a policy memorandum. See Policy Memorandum, Pretrial, Discovery and Calendaring in Eminent Domain Cases, Superior Court, County of Los Angeles; McCoy, Pretrial in Eminent Domain Actions, 38 L.A. Bar Bull. 439 (1963), reprinted in 1 Modern Practice Commentator 514 (1964). Under that memorandum, an initial pretrial order requires that appraisal reports be furnished to the court at the time of the final pretrial conference. The reports are exchanged among the parties if the court determines the reports to be "comparable" and an exchange to be appropriate in the particular case. The power of a trial court to require such an exchange in eminent domain proceedings was recognized in Swartzman v. Superior Court, 231 Cal. App.2d 195, 200-204, 41 Cal. Rptr. 721, 726-728 (1964).

This section permits the adoption or continuation of such rules and procedures as those existing in Los Angeles County. However, subdivision (a) assures that the procedure of this chapter is available in all counties and in all cases unless such rules provide an alternative procedure and specify that this chapter's provisions shall not be applicable.

In keeping with the views expressed in the Swartzman decision, subdivision (b) permits court rules to require an exchange of the information specified by this chapter, whether or not a party serves and files a demand for such an exchange.

Subdivision (c) authorizes the adoption of court rules to establish a procedure for exchange of valuation information as a part of the pretrial procedure. Because of the substantial differences between an exchange under the auspices of the court and one accomplished by service and filing under this chapter, subdivision (c) permits the court rules that establish the former procedure to specify the information to be exchanged, the conditions under which the proffered information will or will not be exchanged, and the consequences of any failure to comply with the rules.

The procedure provided by such rules would be applicable to any case where there is a pretrial and one of the parties requests that valuation information be exchanged according to the procedure provided by the rules. However, if there is no pretrial conference in a particular case, the procedure provided by the statute would govern. And, even where there is a pretrial conference, the parties can in effect stipulate (by not making a request that the procedure provided by the rules for the exchange of valuation data be used) that the exchange be governed by the statute rather than the rules. This might occur, for example, where the parties on both sides have confidence that a fair exchange would take place without the necessity of the court reviewing the material to be exchanged to determine that it is a fair exchange of comparable information.

Section 1272.08

Comment. This chapter has no effect on the use of discovery procedures, on the matters that may be discovered, or on the time for completion of discovery. It should be noted, however, that a party may be entitled to a protective order if no good cause is shown for the taking of a deposition of his expert prior to the exchange of valuation data. See Swartzman v. Superior Court, 231 Cal. App.2d 195, 41 Cal. Rptr. 721 (1964).

Section 1272.09

Comment. The admission of evidence in eminent domain proceedings is governed by Evidence Code Sections 810-822 and other provisions of the Evidence Code. The exchange of information pursuant to this chapter has no effect on the rules set out in the Evidence Code.

EXHIBIT IV

VII. EMINENT DOMAIN (INCLUDING INVERSE CONDEMNATION)

A. Policy Memorandum

1. Contested eminent domain cases are governed by California Rules of Court, Rules 206 to 222, inclusive, with respect to setting for pretrial and trial and with respect to pretrial and settlement conferences.

2. Experience has shown that in order to make discovery and pretrial procedures effective and to properly control the calendaring of eminent domain cases for pretrial conferences and for trial, the court must insist on compliance with the California Rules of Court and with the provisions of this Policy Memorandum, provided that in the exercise of the court's discretion and for good cause, compliance with the provisions of this policy Memorandum may be waived in any particular case.

3. It is the policy of the court in setting such cases for pretrial and trial to give them the priority to which they are entitled by law. (C.C.P., sec. 1264.) All such cases should be brought to trial if possible within twelve months after the filing of the complaint.

Counsel are expected to assist the court in carrying out this policy by compliance with the Rules and with the following procedures with respect to calendaring, pretrial, and discovery.

4. This Policy Memorandum shall apply to eminent domain cases in the Central District, and to all such cases in any other Districts when so ordered by the judge presiding in the Master Calendar Department in any such District.

5. In order to assure uniformity in eminent domain cases (including inverse condemnation cases) all pretrial conferences, together with all law and motion matters, (except motions to transfer to another district, which are heard in the master calendar department), all discovery procedures, all exparte orders and judgments, all stipulated and other uncontested matters, all contested matters for trial and determination of issues when such issues are for determination of the court rather than a jury and such issues are submitted for trial and determination by the court, will be handled in Department 64 of the Court. Department 64 has been designated by the Presiding Judge as a special department for all of the stated purposes.

6. All eminent domain cases are set for a first pretrial conference within sixty days after the filing of the memorandum to set. At that conference the Court, with the help of counsel, will settle the issues to be tried and set a date for the trial of the case, as well as the date for a final pretrial conference about thirty days before the date set for trial. Since the date then set for the trial will usually be six months after the first pretrial conference, counsel will be expected to keep that date available, thus eliminating the necessity for continuance because of conflicting engagements. Counsel will also be expected to complete all their discovery between the first and final pretrial conferences. Continuances of the final pretrial conference for that purpose will only be granted on an affirmative showing of good cause.

B. Pretrial, Discovery, Other Proceedings Before Trial and Calendaring

1. "No eminent domain case shall be set for a pretrial conference or for trial until it is at issue and unless a party thereto has served and filed a memorandum to set." (Rule 206.) (Exhibit B)

2. In order to expedite the setting of a contested eminent domain case for pretrial and trial, the summons should be served promptly on all defendants, and answers should be filed promptly after the service of summons. While reasonable extensions of time to answer may properly be agreed to by counsel, the court considers that in the ordinary case an extension of time for more than sixty days is not reasonable where the sole reason for such delay is to give to a defendant's counsel time to secure professional appraisals of the property taken or damaged.

In most cases an answer can and should be filed within sixty days based on the information as to the value of the property taken or damaged then available, having in mind the owner's right to file an amended answer on stipulation or by order of the court on motion after he has obtained an adequate appraisal. The early filing of an answer will enable the court, upon the filing of a memorandum to set, to set the case for pretrial and for trial within twelve months after the commencement of the action, on dates which are agreeable to all counsel.

3. In preparing answers to complaints in eminent domain cases, counsel are expected to comply with the requirement of section 1246, Code of Civil Procedure, that "[e]ach defendant must, by answer, set forth his estate or interest in each parcel of property described in the complaint and the amount, if any, which he claims for each of the several items of damage specified in section 1248.

C. First Pretrial Conference

1. When the memorandum to set a contested eminent domain case (Exhibit B) has been filed, the clerk in Department 64 will set a date for a first pretrial conference not later than sixty days after the filing of the memorandum.

2. Where all parties appearing in the action agree in writing, by letter or stipulation filed with the pretrial Setting Clerk in Department 64 concurrently with the memorandum to set, the first pretrial conference will be set on any one of three dates within said period of sixty days as requested by the parties. If the parties do not agree, counsel for the party filing the memorandum to set, by letter to the Pretrial Setting Clerk in Department 64 with copy to each other party appearing in the action in propria persona or by counsel, filed with the memorandum to set, may request that the case be set for the first pretrial conference on any one of three dates, in which event the case will be set for such conference on one of those dates unless within five days from the date of such request, any party appearing in the action, by letter to the Pretrial Setting Clerk in Department 64 with copy to all other parties appearing in the action, objects to all such dates and requests that such conference be set on any one of three other dates. If within five days thereafter the parties do not advise the said Pretrial Setting Clerk in writing that they have agreed on a mutually convenient date, the case will be set for a first pretrial conference by direction of the judge assigned for that purpose by the Presiding Judge on a date within said period of sixty days convenient to the court, which date will be changed only on motion on an affirmative showing of good cause. Notice of the date set for the pretrial conference (Exhibit C) will be sent by the said Pretrial Setting Clerk to all parties appearing in the action as required by Rule 209.

3. The first pretrial conference will be held for the purpose of discussing and securing agreement on all matters set forth in the joint statement to be filed as provided in paragraph 15 of this Policy Memorandum, and such other matters as may be suggested by the judge presiding at such conference or by the parties then present. When necessary, a reasonable continuance may be granted in order that the parties can agree on all such matters before securing their appraisals and engaging in discovery proceedings. At such conference the court will also discuss the possibility of settlement.

4. At the first pretrial conference the court will also fix the date for the trial and a date for the final pretrial conference not more than thirty days before the date so fixed for the trial, having in mind the calendars of counsel and the calendar of the court. When such dates are fixed, counsel will be expected to avoid conflicting engagements.

The dates set for the final pretrial conference or for the trial may be changed by the court in Department 64 on motion on notice to all interested parties, on an affirmative showing of good cause. The court expects counsel to give notice of any such motion promptly on discovering good cause therefor. Reserved dates for motions may be obtained from the clerk in Department 64.

5. Unless the first pretrial conference is waived as hereinafter provided, each party appearing in the case shall attend the first pretrial conference by counsel, or if none, in person, and shall have a thorough knowledge of the case and be prepared to discuss it and make stipulations or admissions where appropriate, and be prepared to agree on a date for the final pretrial conference and for the trial.

6. It is the policy of the court to require the filing of a joint statement at or before the time set for the first pretrial conference evidencing the extent to which counsel are agreed on matters which should be agreed on at the first pretrial conference, including a date for the final pretrial conference and for the trial. The court has prepared a check list of all such matters, which should be used by counsel as a guide in preparing the required joint statement. Copies of the check list are available at the main or any branch office of the County Clerk. (See Section VII E)

7. It is the policy of the court to waive the first pretrial conference when the joint statement evidences the agreement of counsel on all matters set forth in the check list which are applicable to the particular case, on condition that the joint statement, together with a request for such waiver, is filed not less than ten days before the time set for the first pretrial conference. In that event, counsel may call the pretrial clerk in Department 64 on the second court-day before the day set for such conference, to determine whether appearance at the conference is necessary.

8. At the conclusion of the first pretrial conference, or upon the waiver of such conference if the joint statement is approved, the court will prepare a first pretrial conference order setting forth all matters agreed on except the several parties' estimates of value [see Rule 214, subd. (d)], including the date set for the final pretrial conference and for the trial, and serve and file such order as provided in Rule 215.

D. Interim Proceedings

1. During the period between the conclusion of the first pretrial conference and the time then set for the final pretrial conference, the parties are expected to complete any law and motion matters and any deposition and discovery proceedings as may be provided in the first pretrial order, including the exchange of all valuation data as may be agreed on by the parties. During such period the parties are also expected to confer in person or by correspondence to reach agreement upon as many additional matters as possible.

2. Counsel are reminded that at the first pretrial conference or at any time before or at the final pretrial conference, the parties may by stipulation also submit to the judge assigned for that purpose, and such judge may determine, any other matter which will aid in the disposition of the case. [See Rule 212, subdivision (b)].

E. Final Pretrial Conference

1. At or before the final pretrial conference, when ordered by the court, the parties will submit to the pretrial conference judge a joint written statement of all matters agreed on subsequent to the first pretrial conference and a joint written statement or separate written statements of the factual and legal contentions to be made as to the issues remaining in dispute, to the extent that such matters have not previously been incorporated in any partial pretrial conference order or amendment thereto. [See Rule 210.]

2. At such conference, when so ordered by the court, the parties will submit to the court a descriptive list of all maps, photographs and other documentary exhibits which either party then intends to offer in evidence, except documents either party may intend to use for impeachment, with a statement indicating which ones may be marked in evidence at the beginning of the trial and which ones are to be marked for identification. In the discretion of the court said list may be included, in whole or in part, as a part of the joint written statement required to be filed at or before such conference. To the extent that such exhibits are then available, they should be produced at the time of the final pretrial conference and marked by the clerk as exhibits in evidence or for identification. The provisions of this paragraph do not preclude the production of other exhibits at the time of trial.

no longer followed. oral statements are relied on. Issues, except compensation, will generally have not only been ascertained but will have been resolved.

3. Prior to the final pretrial conference each party will submit in camera to the court in writing a memorandum setting forth in summary form a statement of the opinions of each of their respective appraisers and other valuation witnesses as to (1) the value of each parcel to be taken, (2) severance damages, if any, and (3) the value of the benefits resulting from the construction of the proposed public work, and other information and data as may be requested by the court. Such memoranda shall not be filed and at time of final pretrial conference may be returned to the respective parties or ordered exchanged if deemed comparable and in compliance with the first pretrial order. The requirements with reference to appraisal reports or other valuation data as generally required are set forth in Exhibit E.

Also no longer followed (because our orders contain requirements re Exhibit E)

4. At the conclusion of the final pretrial conference the judge as required by Rule 214 will prepare a final pretrial conference order, shall incorporate by reference any partial pretrial conference order and a statement of any amendments thereto and of the matters then agreed on, the list of proposed exhibits if submitted by the parties with their stipulation with respect thereto, a statement of any factual and legal contentions made by each party as to the issues remaining in dispute, which have not been set forth in any partial pretrial order or amendment thereto, and a concise and descriptive statement of every ruling and order of the judge at the final pretrial conference on any matter which has theretofore been determined or will aid the court in the disposition of the case.

5. The final pretrial conference order will be served and filed as provided in Rule 215.

F. Check List for Completion of Joint Statements for First Pretrial Conference in Eminent Domain Proceedings

1. A joint written statement setting forth the position of the parties as to all matters listed in paragraph 2 of this check list must be filed at or before the time set for the first pretrial conference in contested eminent domain cases.

Each such statement should indicate in the caption the number of the parcel or parcels to which it refers. Paragraph numbers and headings herein should be used by counsel in preparing such statements.

2. As to each of the items referred to in this paragraph, state one of the following: (1) the facts agreed to, (2) that the item is "disputed", or (3) that the particular item is not applicable. When the parties cannot agree on any matter, each party shall state his contentions with respect thereto.

All of the following items are to be included as to each parcel in preparing the joint statement:

(a) **Date of Filing Complaint and of Issuance of Summons.** (See C.C.P. sec. 1249.)

(b) Names and capacities of all parties served and of parties not served.

(c) **Immediate Possession:** Effective date of order for immediate possession.

(d) **Description of Property:** Address, legal description of land or property to be taken and of remaining property, if any; area of property; existing structures and improvements, if any; existing encumbrances; existing leases; and existing zoning.

(e) **Nature, Extent or Character and Ownership** of the several estates or interests to be taken.

(f) **Purpose of Acquisition** and a brief general description of the proposed public work.

(g) **Condemner's Estimated Valuation.** Plaintiff may include here a statement as to its source, such as a staff or other preliminary appraisal.

(h) **Condemnee's Estimated Valuation.** The party may include here a statement as to its source, such as the owner's opinion of value or a preliminary appraisal.

(i) Whether severance damages are claimed, and if so, by whom?

(j) Whether benefits are claimed by the construction of the proposed public work, and if so, what benefits?

(k) Dates for Valuation Data Exchange.

(l) **Issues.** Whether there are any other issues to be determined in addition to the issue of value.

(m) **Available Trial Dates**—fill in not less than two dates at least 30 days prior to expiration of one year from the date the action was commenced.

(n) **Available Final Pretrial Conference Dates**—fill in at least two dates not less than 60 days prior to expiration of one year after the date the summons was issued.

(o) Other matters agreed on or admitted.

(p) Whether any party contemplates making a motion to transfer the trial to another Superior Court District for trial and, if so, which party.

Note: The information required by the foregoing check list should be based on all information available as of the date of the required joint statement. If the parties so desire, the information required by items (g) and (h) may be furnished in a separate supplemental statement. When the parties cannot agree on the dates required under items (l) and (m), the statement should include two dates in each instance which are available to counsel for each of the parties.

3. If the parties so desire, the statement may conclude with a joint request for a waiver of the first pretrial conference. In that event, the statement must be filed not less than ten days before the date set for such conference.

This Policy Memorandum shall be effective on and after July 1, 1966.

DATED: June 15, 1966.

LLOYD S. NIX,
Presiding Judge

Exhibit E

REQUIREMENTS FOR VALUATION DATA

The parties are ordered to file appraisal reports upon which they intend to rely at the time of trial, if any, with the clerk in Department 64, on or before five days before the final pretrial. If any party intends to have an owner or any witness, other than the appraisers whose appraisal reports are to be submitted, testify in this case with respect to valuation, such party shall also file with the court on the same date the name of such person, his opinion as to valuation, and all factual data, not otherwise submitted, upon which such opinion is based, including market data, reproduction studies, and capitalization studies, in as much detail as practicable. If the court determines said reports to be comparable, and if it appears just and proper to do so, an exchange will be ordered. If the court does not order an exchange, the court will initial the documents for identification at the time of trial. Except as set forth herein, and except for the purpose of rebuttal, the parties will not be permitted to call any witness to testify on direct examination to an opinion of value, a sale, a reproduction study or capitalization study, unless submitted to the court as set forth above.

In the event a party subsequently discovers any information which should have been submitted as set forth in the preceding paragraph, and desires in good faith to use the information at time of trial, he must immediately notify the other party to this effect, and provide the other party with the said information, and show good cause to the court, either in Department 64 or the trial department, that he should be permitted to use such information at the trial.

In the event a party intends to use an expert other than those who will testify with respect to valuation as set forth above, said party shall disclose, prior to the final pretrial in this case, if possible, or as soon thereafter as such information is available, the name and address of the said person, if known, and the nature of the testimony of said witness to be used at the trial of this case.

The appraisal report shall bear the title and number of the case, the parcel numbers involved, the names of the defendant owners of the parcels involved, and the date of final pretrial, on the outside cover of the appraisal report, and shall include, as minimum, clear and concise statements of the following:

1. A description of the property including, as a minimum, a plot plan (not necessarily to scale) showing the size, shape, dimensions of the property being acquired and its location to street accesses. Additional information relating to terrain, utilities, principal street accesses, location of improvements upon the property, and the relationship of the property to and description of a larger parcel of which it is a part, when appropriate, if necessary for understanding of the appraisal problem.

2. Present zoning of property, and if the existing use is inconsistent with the present zoning, the authority for which such use is permitted.

3. A statement of the appraiser's opinion of the highest and best use of the property. If such use is inconsistent with the present zoning, a concise statement of factual matter upon which the opinion of probable zone change was predicated. The appraiser's opinion of the market value of the property being acquired and if the property is part of a larger parcel, his opinion of severance damage, if any, and special benefits, if any. If the appraiser is of the opinion that there is no severance damage or special benefit, a statement to this effect should be included.

4. The valuation approaches or methods utilized in the formation of the appraiser's opinion should be set forth in a brief statement. If any approach or method is not specified, it shall be presumed that the appraiser did not consider it in arriving at his opinion.

5. Where market data or sales are utilized the following information as to each sale: legal description and address, if available, or other sufficient designation for identification; size and shape of property; zoning; date of sale or transaction; names of buyer and seller; nature and brief description of improvements, if any; price paid and terms of sale; with whom and when the sale was verified. Which sales are considered indicative of the value of the property. Gross multiplier used, if any.

6. If reproduction cost studies are made, the following information must be submitted: description of improvements; size and area of building; type of construction; age of building; condition of buildings indicating obsolstion and depreciation; remaining economic life of improvements; cost factor or other computation used to establish cost to replace improvements; depreciation allowance used and the basis therefor.

7. If a capitalization or other income study is made, the following minimum information should be included, where relevant: gross income utilized in computations and whether actual income being produced or assumed income is used and the basis therefor; enumeration of expense items expected, the respective amounts thereof and whether said amounts are based upon actual or assumed expenses; method of processing or treating income; capitalization rate or rates or multiplier used; if the recapture of improvements is provided for, (land residual method), a statement of the remaining economic life of improvements used and rate of capitalization applied to residual land; if annuity methods used, a statement of the anticipated economic period in which payments are expected and the discount rate used, and the residual value of the land adopted in the study. The valuation indicated by said method or methods.

8. Lease information, if applicable, including terms of existing leases and names and addresses of lessors, lessees, and other perons who verified the information.

Dated: _____

PACIFIC GAS AND ELECTRIC COMPANY

PG&E — 245 MARKET STREET · SAN FRANCISCO, CALIFORNIA 94106 · TELEPHONE 781-4211

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ATTORNEYS

April 17, 1967

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
Stanford University
Stanford, California

Re: Recommendation of California Law Revision Commission Relating to Discovery in Eminent Domain Proceedings (SB 253)

Dear Mr. DeMoully:

The Law Revision Commission's proposed statute relating to discovery in eminent domain proceedings has been embodied without substantial change, I believe, in Senate Bill No. 253 now pending in the legislature. I believe SB 253 has passed the Senate and is now awaiting action by the Assembly. Accordingly, it may well be pretty late to propose amendments.

I am informed, however, that the Law Revision Commission continues to be interested in suggestions from members of the Bar and others concerning its proposal and will consider incorporating such suggestions in its comments on the proposed statute. I have a suggestion I would like to make.

The proposed statute requires, if a party asks for it in time, an exchange of information concerning witnesses to be called and evidence to be presented. The sanctions for failure to comply with the requirements of the statute consist of the exclusion of evidence at the trial. It is expressly provided in all three subsections of proposed section 1272.04 of the Code of Civil Procedure that the exclusionary sanctions apply only during the "case in chief" of the party against whom they operate. They do not apply to prevent the reception of evidence offered in rebuttal. The Commission's comment on proposed section 1272.04 appearing on page 28 of the Commission's Annual Report issued in December 1966 makes this clear. The reason for the distinction between a party's case in chief and his rebuttal is logical.

I am concerned, however, that many trial judges will be inclined to oversimplify this distinction so as to reject any evidence offered by the condemnor during its main presentation of

evidence if the offered evidence or the offered witness was not listed in the pre-trial exchange of valuation data. It will be contended many times, I am convinced, that all the evidence offered by the condemnor during that portion of the trial which immediately follows the landowner's case in chief on valuation is part of the condemnor's "case in chief." Many people assume this to be true without reflecting on the true nature of this portion of the condemnor's case.

Actually, after the landowner has rested his case in chief, the condemnor almost always immediately presents evidence of two kinds. It seeks to rebut the case of the landowner and also to offer affirmative evidence in its own behalf. Both kinds of evidence are proper at this stage of the proceedings. However, if the dual nature of the initial presentation of evidence by the condemnor is not appreciated, the exclusionary rules of proposed section 1272.04 may well operate to prevent the plaintiff from rebutting the landowner's case. There is no corresponding problem for the landowner, since he cannot present rebuttal evidence during his initial presentation, and the evidence he produces after the condemnor's presentation will normally consist only of rebuttal evidence.

I am satisfied that many trial judges will not perceive these distinctions readily, and I know from personal experience it is sometimes difficult to explain such concepts in court during the course of a closely contested trial. Ideally, the statute should clear the matter up by containing, possibly, a subsection (d) something like this:

> "(d) The term 'case in chief' as used in this section does not include that portion of a party's presentation of evidence which is calculated to rebut evidence previously given by another party, regardless of when during the trial such rebuttal evidence is presented."

This draftsmanship could be improved on, I am sure, but it gives a pretty clear idea of the point I am trying to make.

The bill may be too far along in the legislature to make an amendment to this effect feasible. Short of such an amendment, I would respectfully suggest that the Law Revision Commission mention this matter in its comment on proposed section 1272.04. It could do this by inserting a sentence such as the following between the second and third sentences of the second full paragraph of the Commission's comment as printed on page 28 of the Annual Report:

> "The condemnor would be allowed to call such witnesses or use such valuation data during what is normally its main presentation of evidence to the extent it is seeking to rebut evidence introduced by the landowner during his initial presentation, and the landowner would be allowed to call such witnesses or use such valuation data after the condemnor has rested its main case."

Again, of course, the precise language of the comment would be what the Commission prefers; I only offer the above sentence as a suggestion.

I would appreciate it if this suggestion were called to the attention of the Commission at an early date. I am sorry I have not made it earlier; I simply wasn't able to reflect fully on the proposed legislation until recently. I do think the problem is one of considerable practical significance, however, and that is why I commend it most seriously to the attention of the Commission.

Very truly yours,

CHARLES T. VAN DEUSEN

CTVD:sb

OFFICE OF
CITY ATTORNEY
CITY HALL
LOS ANGELES 12, CALIFORNIA

ROGER ARNEBERGH
CITY ATTORNEY

April 20, 1967

The Honorable Richard Barry
Department 70A
Los Angeles County Courthouse
111 North Hill Street
Los Angeles, California 90012

Re: Senate Bill No. 253 "Discovery In Eminent Domain Matters"

Dear Commissioner Barry:

This letter is a follow up to our telephone conversation of Wednesday, April 19, relating to the comments we have regarding this bill. As was explained, we feel it is a bad bill. In general, we feel that the objective of establishing a procedure for eminent domain discovery on a statewide basis could be better accomplished through additions and/or changes in the court rules. By such means the individual court could better adapt discovery on a case by case basis so as to avoid unfairness and the harassment which might very well be inherent in the procedure set up by Senate Bill No.253. Certainly any rules which should prove ill-advised could be more easily amended than could an ill-advised statute.

Though we have not studied this bill in the detail in which you did, we would like to set forth, for your information, some of the objections we have to the bill:

(1) The bill does not provide for an exchange of valuation data or an exchange of valuation or appraisal reports; rather, it provides for an exchange of a "Statement of Valuation Data." It would appear that such "statement" would be prepared on numbered, legal paper by counsel for the parties and in the order as set forth in Section 1272.02 of the bill. There is no provision for merely serving a copy of an appraisal report

upon the opposing party--and it appears to us that service of such appraisal report would not be compliance with Section 1272.02. Therefore, a great amount of additional paper work would have to be "manufactured" by all counsel, with the end result that the cost of condemnation litigation will be increased both for the condemnor and the condemnee. The condemnor could live with this. We wonder whether an individual condemnee involved in an acquisition of a limited value could afford to pay the additional legal fees which private counsel would have to charge. We are in a situation already where settlements may be forced, and often are forced, because the condemnee cannot afford the expense of litigation in comparison to the potential award.

Certainly this procedure would be a means of harassment. As the attorneys for the condemnor, we feel we would be harassed. However, should we be, we could, and probably would, respond in kind.

In short, the new bill provides for a duplication of paper work. The papers will originally be prepared by the appraiser and will thereafter be copied or paraphrased by counsel. We feel this is unnecessary and undesirable.

(2) Section 1272.01(2)(d) provides that the statement of "valuation data" shall be both served and filed. When a pleading or paper is filed it becomes a part of the public records of the court. It is open to anyone who wishes to examine it. We feel this is unfair to the appraiser who prepares these reports. A litigant could use material contained in the "statements" filed in the action in connection with other parcels as a basis for alleged impeachment. These collateral issues could unduly prolong condemnation trials.

An appraiser employed by either party is doing work and writing a report for the particular litigation for which he is employed. He is not publishing the results of his investigation for all the world to see, to copy, and to make use of, without any additional compensation paid to him. Many appraisal reports set forth that they are prepared for "limited publication." The procedure spelled out in Senate Bill No. 253 defeats this lawful and fair objective of the appraiser. It allows litigants who have not employed an appraiser to "pirate" an appraiser's research, his thinking, and his ultimate opinions. Thereafter, based on the appraiser's work, the owner could testify at the trial.

As attorneys, we tend to think that we are the ones most interested and affected by court procedures. We tend to

set aside considerations of fairness to our witnesses and to witnesses for our opponents. However, expert appraisal witnesses are important and necessary parts of the machinery by which property is acquired for public use and just compensation paid. We feel that the court has an obligation to preserve their rights and to see that they are not unfairly treated by the parties to litigation or by the general public. Therefore, we urge that you point this out to the Law Revision Commission, and, in the same manner as you attempt to protect the constitutional rights of litigants, we feel you and the Superior Court judges should protect the rights of appraisal witnesses.

(3) As you point out in your comments, there is no "in camera" exchange provided for in Senate Bill 253. We in this office feel that we present for exchange complete appraisal reports. We also feel that all too often the reports presented to us are sketchy and incomplete in comparison to the data we furnish the condemnee. This is not intended as a criticism of your department or the court, but is a recognition that perfect equivalency can never be obtained. We imagine condemnees often feel the same way about us. However, at this time, in this county there is some control and some equivalency. There would be no control, and no assurance of equivalency, under the procedure set up in Senate Bill 253. We believe that "in camera" exchange is essential to prevent one-way discovery, as was attempted in Swartzman v. Superior Court, 231 Cal. App. 2d 195 (1964), and to allow the court to regulate "work product" discovery on terms of "equity and justice" as recommended by San Diego Professional Association v. Superior Court, 58 Cal. 2d 194 (1962).

(4) The sanctions provided by Section 1272.04 are largely illusory. We feel that Section 1272.05 allows the court to excuse failure to provide a complete statement of valuation data at its sole and uncontrolled discretion. As a matter of experience, we have found that objections to introduction of sales or to calling of witnesses because of failure to disclose at pretrial are mostly overruled. Perhaps this is necessary in order that the condemnee receives a fair trial and receives just compensation. Because of this "fact of life" and because of the lack of "in camera" exchange in this bill, good faith litigants and good faith counsel would be left at the mercy of litigants or counsel who do not act in good faith at all times.

(5) In your letter to the Law Revision Commission you point out the probability that counsel may misstate the opinion of an appraiser or the facts on which he bases this opinion. Such misstatement is not necessarily intentional.

It could be a result of hurried analysis or misinterpretation of an appraisal report; or as a result of paraphrasing or condensing the appraiser's data and opinions.

We agree with this objection. Appraisers to some degree, speak in language different from attorneys. It would certainly be difficult for counsel to verbalize the subjective thinking and opinions of an appraiser. An appraiser should be bound by his own statements, but he would not be bound by someone else's interpretation thereof.

Under the proposed legislation careful counsel would be well advised to ask his appraiser to review the statements of valuation data. This would no doubt increase the cost of eminent domain litigation by the fee of the appraiser for doing such review. Should the statement of valuation data not be reviewed or not be completely accurate, it could cause the appraiser to be unnecessarily and unjustifiably embarassed at the trial by attempts to impeach him by statements of his employer made through the mouth of counsel.

We are arranging for a representative of this office to be present at the Commission meeting on Saturday, April 22. It is also possible that a representative of an appraisal society may be there to present the views of his organization.

May we point out that these comments are not submitted to you with a purpose of seeking to influence you to adopt the condemnor's position. We rather desire that condemnation litigation and the process of acquiring property by eminent domain be one which is fair to both the taxpayers and to the individual condemnee. We sincerely feel that we are in the same business, to wit, serving the public. Our objective should be the same, fairness to all the public. We feel Senate Bill No. 253 will not accomplish this objective.

We hope our comments will be helpful.

Yours very truly,

ROGER ARNEBERGH, City Attorney

By 
NORMAN L. ROBERTS
Deputy City Attorney

NLR:ig