

36.85

5/28/69

First Supplement to Memorandum 69-66

Subject: Study 36.85 - Condemnation Law and Procedure (Litigation Expenses)

Attached as Exhibit I is a listing of the persons who have sent in responses to our questionnaire since Memorandum 69-57 was prepared. Where the person's comments were short, they are set out in Exhibit I. Exhibits II-V are longer comments. Exhibit VI is an up-to-date tabulation of the results of the questionnaire as of the date this supplement was prepared.

We do not plan to discuss this supplement at the meeting. We will assume that each of you has read the supplement so that you will be familiar with the material contained in it. You should, however, take special note of the proposed revision to Section 997 of the Code of Civil Procedure suggested by Mr. Gale. See Exhibit V (blue)(last page of Exhibit V).

Respectfully submitted,

John H. DeMouilly
Executive Secretary

EXHIBIT I

ADDITIONAL COMMENTS FROM QUESTIONNAIRES
LITIGATION EXPENSES IN CONDEMNATION PROCEEDINGS

69. Kenneth W. Downey - Condemnees and Condemnors

Any scheme of compensation for condemnee's attorneys and appraiser's fees to be paid for by the condemnor will increase litigation. The scheme that would have the least tendency in this direction would be the litigation expense allocation scheme.

One thing that should be borne in mind is that a significant percentage of any condemnor's work involves small takes involving \$2,000 or less. In any take involving a "small amount of money" a scheme that would provide for expenses of litigation for the condemnee would increase the general cost of condemnation and prolong effective settlement. On these smaller takes litigation would be promoted because the condemnee would feel that he has a free ride and because any expense for appraisal may not be recoverable in a settlement proceeding and, therefore, the case must be litigated in order that the appraisal fee be a recoverable cost.

70. T. C. Carlstrom - Condemnees

In almost every case the condemnor will increase its offer over the amount offered at the commencement of the action. The "best offer" approach is best only if the condemnor is required to make it in writing at the time of service of summons and complaint upon defendant.

Example: In a recent case an increased offer was made two weeks before trial at a time when most trial preparation was completed by attorney, appraiser and client. Had the case settled then, the cost of trial preparation would have been lost without a rule requiring an earlier "best offer."

I therefore suggest for these and other reasons as follows:

The condemnor be required to make its best offer in writing at the time of service of summons and complaint upon condemnee or condemnor's authorized agent for such service.

Should the action be settled for a higher sum thereafter at any time before judgment or verdict [or after judgment or verdict while there is on file a valid notice of motion or of intention to move for new trial or notice of appeal], attorney's [and appraiser's] fees and costs shall be fixed in the same manner as in cases of abandonment of actions by condemnors. A waiver of such fees and costs should be prohibited as void and against public policy.

Should the action go to judgment or verdict for a sum higher than condemnor's highest and best offer made at the commencement of action condemnee's attorneys fees [appraiser's fees] shall be awarded as taxable costs.

(T. C. Carlstrom - cont.)

The most essential factor is that the "best offer" be required to be given simultaneously with the commencement of the action. The expense of a change of mind by the condemnor after the condemnee has employed attorneys [and appraisers] should not be borne by the condemnee.

71. D. Bianco - Condemnees and Condemnors

I have always felt that condemnors do not as a rule submit a realistic figure for settlement before suit is filed. I feel that if condemnors were required to submit a full scale appraiser's report with their offers to settle before trial that a considerable amount of litigation would be avoided.

I don't believe that condemnors should be permitted to submit figures for negotiation purposes as the condemnee has no choice to sell or not to sell. If they submit unrealistic figures and are not willing to stand by them, then they should bear the expense of the trial.

72. William E. Woodard - Condemnors

D. 5--Should not permit recovery of expenses if the award exceeds the offer. May be wholly unrealistic if an award approaches 100% or more in addition to condemnor's so-called "jurisdictional offer"--[or "offer to treat"].

73. P. Dennis Keenan - Condemnors (No Comment)

74. William E. Thomas - Condemnees

I oppose judicial discretion because experience has taught me that most judges who have an understanding of condemnation are former city attorneys, county counsels, deputy attorney generals, etc.

They appear to, subconsciously, be "pro-condemnor."

75. Richard F. Desmond - Condemnees (No Comment)

76. David Livingston - Condemnees (No Comment)

77. Earl A. Radford - Condemnees (No Comment)

78. Tom P. Gilfoy - Condemnees and Condemnors

G. "Independent Appraisal" So much depends on how the independent appraiser would be selected and who he might be that it's impossible to answer this in its present form. With proper control the idea might have merit.

79. Edwin M. Osborne - Condemnors

The cover letter states that: "The logical support for the 'jurisdictional offer' lies in the uncomplicated view that if the award exceeds the offer, the condemnor's conduct demonstrably has 'caused' the proceeding." That is not logical. If the award is less than the condemnee's best offer, his conduct has just as demonstrably "caused" the proceeding and he should pay the condemnor's litigation expenses.

80. Donald L. Clark - Condemnors

We favor the present law whereby the property owner has the burden of proof of the fair market value of his land. The property owner is entitled to just compensation, and it should not be presumed that the public agency attempts to acquire property for less than fair market value. The public agency (and the taxpayers) will be put to additional expense and disadvantage if the agency is required to pay litigation expenses (attorney's fees and appraiser costs). Instead of proposing that the public agency pay litigation expenses in condemnation proceedings, more consideration might be given to recommendations in areas of arbitration proceedings and commission hearings instead of court trials, where expenses might be reduced.

81. Richard G. Rypinski - Condemnors (No Comment)

82. M. N. Singer - Condemnors

Of the three general alternatives set forth, it appears to me that a reasonable allocation of the "Litigation Expense Allocation Scheme" might be the best. This does not appear to be as "capricious" as the jurisdictional offer requirement, and yet is more predictable than the situation where the trial court is given complete discretion.

83. Sherman E. Hollingsworth - Condemnors (No Comment)

84. Richard L. Franck - Condemnors (No Comment)

- 85. John D. Rogers - Condemnees and Condemnors (No Comment)
- 86. Richard D. De Luce - Condemnees and Condemnors (No Comment)
- 87. J. Dennis Sullivan - Condemnors (No Comment)
- 88. John J. Lynch - Condemnors (No Comment)
- 89. Charles E. Spencer, Jr. - Condemnors (No Comment)



Attorney General
Arizona Highway Department
LEGAL DIVISION
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Phoenix, Arizona 85007

GARY K. NELSON
THE ATTORNEY GENERAL
JOHN T. AHEY
CHIEF COUNSEL
STANLEY Z. GOODFARB
ASSISTANT CHIEF COUNSEL

March 26, 1969

Mr. Robert Carlson
Assistant Chief Counsel
Department of Public Works
Sacramento, California

Dear Bob:

We received a copy of a questionnaire being submitted by the California Law Revision Commission relating to litigation expenses in condemnation. My feelings are very strong about this, and I have filled out the questionnaire based upon my personal experiences representing State agencies and property owners.

Not knowing whether or not the California Law Revision Commission would be interested in hearing from other than California attorneys, I am forwarding my answers to you with this letter. If you think that they will be interested, please send the answers on to them for their consideration.

Best regards.

Very truly yours,

GARY K. NELSON
The Attorney General


STANLEY Z. GOODFARB
Assistant Attorney General

SZG:lw
enc.

QUESTIONNAIRE

LITIGATION EXPENSES IN CONDEMNATION PROCEEDINGS

Person completing questionnaire: Stanley Z. Goodfarb
Assistant Chief Counsel
Arizona Highway Department
206 South 17th Avenue
Phoenix, Arizona 85007

I usually represent both condemnees and condemnors with the majority of my work being done for condemnors.

A. Basic Preference

In a revision of California law in which jury trial remains basic, I would prefer the following approach:

1. Nonrecovery of litigation expenses (except to the extent provided by existing law).

B. Effect on Litigation and Negotiations

With respect to the existing rule of nonrecovery, I think:

1. Property owners typically do make a litigation "avoidance" concession.
2. Condemnors typically do not make a "litigation avoidance" concession. The condemnor must offer just compensation under the constitution. Since he cannot bargain, it is impossible to start low and work up.
3. It would be illogical to distinguish condemnation proceedings from other litigation. I do not think that the condemnee is any more an involuntary defendant than any other defendant who is forced by reason of circumstances, i. e. auto accident, to go to court to get their rights resolved.

C. Expense Allocation Scheme

With respect to the allocation scheme outlined in the letter accompanying this questionnaire (recovery based on relationship of "best offers" to ultimate award, I think:

1. The scheme would significantly increase litigation. Any system which would pay expenses and attorneys' fees is going to increase the amount of litigation since it reduces the chance of truly losing. Part of the incentive for negotiation is therefore removed.

2. Would significantly affect negotiated figures.

3. Should be made reciprocal.

4. Should not allow expenses to the condemnee to the extent that the award exceeds the condemnor's "best offer" rather than exceeds the half-way point between the best offers.

5. Is impractical because it would require the court to determine expenses in many cases. There are few judges in this world who will not assist the attorneys consciously or subconsciously by awarding attorney's fees to those men who they know must make their bread and butter in court.

D. Jurisdictional Offer

With respect to the so-called "jurisdictional offer" requirement (mentioned in the accompanying letter,) I think:

1. It would significantly increase litigation.

2. Would significantly affect negotiated figures. However, we must consider how this will affect other settlements which never get to court. If everyone who is in a project learns that the State can, in fact, negotiate, they will all want the negotiated figure.

3. Has no merit because it is the simplest way of handling. The simplest method of handling litigation expenses is to pay court costs only.

4. Would operate capriciously at best.

5. If used, should permit recovery of expenses if the award exceeds the offer by an amount of 50%.

E. Trial Court's Discretion

With respect to recovery or partial recovery of expenses in the court's discretion, I think:

E. Trial Court's Discretion

With respect to recovery or partial recovery of expenses in the court's discretion, I think:

1. The idea is not practicable. Courts always award attorneys' fees to those lawyers who practice in front of them.
2. If used, it should be reciprocal between condemnor and condemnee. Courts will never award expenses to a condemning agency. It just is not in the human makeup.
3. It should apply to taxable costs as well as litigation expenses.
4. It should not be implemented by requiring the parties to make a specific "best offer" to aid the court in exercising its discretion. How can a condemning agency make a best offer when under the laws of the constitution, it is required that just compensation be offered in the initial negotiation. All this would do would be to increase the bargaining.

F. Binding Court Determination of Attorney Fees

In condemnation cases in which the court might determine the amount of a reasonable attorney's fee to be paid by the condemnor to the condemnee, the amount determined should be binding upon attorney and client, their contractual arrangement notwithstanding. Attorneys who handle condemnation cases for property owners will never agree to this procedure.

G. "Independent Appraisal"

With respect to entitling the condemnee to an "independent appraisal" I think:

1. This is not a fair imposition upon condemnors. There is no such thing as an "independent appraisal."
2. Such appraisals would frequently be demanded. They will always be demanded by the property owners and disregarded if they do not conform to their opinion.
3. Entitlement to such an appraisal would not significantly affect negotiation practice and negotiated figures. It would create another fruitless and useless step.

4. The expense of the appraisal should be borne equally rather than imposed upon the condemnor. The appraisal, if used, should be paid for by the party whose figure it is closest to.
5. Either party should not be entitled to have the independent appraiser called as an impartial expert witness. There is no such thing as an "impartial expert witness."
6. The judge should not be empowered to call the independent appraiser sua sponte. This should only be allowed if a case is tried in court without a jury.

H. General Comments

It is my personal opinion that condemnation cases are best tried to juries. Judges tend to always split the difference. It is my opinion that property owners in the eyes of the law are no different than anyone else who goes to court either by automobile accident, fraud, contractual claim or creditor claim. When our courts are ready to adopt the English system where the prevailing party will, as a part of the judgment, be paid all of its expenses including attorney's fees, this should apply to condemnation.

There is no significant reason for treating condemnation cases different than other cases. There is a legitimate reason for treating them different from the standpoint of the condemnor because the condemnor is required by law and the constitution to make an offer of fair market value or just compensation to begin with. Under our law, it is not right to bargain. It should make its initial offer and never vary. This is not the case with the average insurance adjustor, creditor, land deal, etc. Since the property owner has a number of the public benefits from the public construction as well as other parties, his position is far better and deserves less consideration than all of the other people involved in litigation. Until we are ready to change our entire system, it is wrong to punish public agencies who are trying to construct public works, by singling them out on the basis of their being a big bad wolf.

EXHIBIT III



State of New Jersey

DEPARTMENT OF LAW AND PUBLIC SAFETY

DIVISION OF LAW
DEPARTMENT OF TRANSPORTATION
1035 PARKWAY AVENUE
TRENTON

ARTHUR J. SILLS
Attorney General
WILLIAM J. MCCORMACK
JOSEPH LIPKIN
PHILIP A. DONNELLY
JOHN F. CANNON
Deputy Attorneys General

March 17, 1969

Robert Carlson
Assistant Chief Counsel
California Department of Public Works
Sacramento, California

Dear Bob:

Dave Levin has, as you probably know, sent copies of the California Law Revision Commission's memorandum of February 17 to all members of AASHO's Legal Committee.

For a long time, we have had efforts annually to change the Eminent Domain Law to provide for various "give aways" here as I assume there have been in many other States as to the effort to get counsel fees and cost.

For several years, I was a member of Governor Meyner's three-man Eminent Domain Committee and since I have been quite active on behalf of the Department in connection with Eminent Domain Legislation. In New Jersey if a person sues in contract, brings a negligence action, or seeks an injunction or various other forms of equitable relief, he pays his own counsel fees. If a truck runs into his house and damages it, he pays his own lawyer out of what proceeds he gets from the insurance company.

In condemnation cases, the commissioners and juries generally are inclined to be liberal because they know the owner has expenses. Even when they take the State's figure as being

Mr. Robert Carlson

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March 17, 1969

absolutely right, the awards are usually 10 or 15 percent above that figure. It has seemed to me that to provide for payment of attorneys' fees and cost of appraisers and other experts is to invite litigation.

I have, on various occasions over the years, offered the "two-way street" proposition but the owners' attorneys do not want it. It seems to me that the proposed allocation in proportion to each parties responsibility or trial is complicated and difficult to make work. I have also suggested authorizing the courts to obtain an independent appraisal at the joint expense of both parties but have received no favorable response from the owners' attorneys.


Of course, every State is pending on the Federal Bureau's "fair market" rule for recompense. It could lose money on the independent appraisal. In New Jersey we are required to make an offer and under Federal regulations the fair market value offer.

I feel, as you can gather, that it is not logical to distinguish condemnation proceedings from other litigation. There are various noncompensable items in condemnation even though United States v. Miller talks about payment in full. If there is to be any allowance for lawyers' fees and appraisers' charges, (and I submit that there should be none), then the "two-way street" plan can, I think, eliminate litigation. I believe what I have said has eliminated any idea of the court making allowances.

I am sending this to you so that you may submit it to your Law Revision Commission, if you wish to do so.

Warmest regards.

Sincerely,


William J. McCormack
Deputy Attorney General

WJM:RMB

H. Comments:

When the condemnation involves a large parcel of property or a substantial amount of money, the owners of the property usually are in a position to engage appraisers and attorneys; when the condemnation matter involves a small parcel of property or minor amount, as far as the total value is concerned, or is for a right of way, the property owners may not be in a position to financially engage an appraiser or attorney. In such situations, the property owners often find themselves in the position of being damned if they do and damned if they don't. In other words, the cost of engaging an attorney and an appraiser might exceed the amount of the award or make it impractical for the property owner to seek such services.

The condemnor in every instance being a public agency or a public utility would have their own staff or sufficient funds to engage appraisers and attorneys and such costs are usually irrelevant to the condemnor's budget. In other words, you have professionals on one side and an amateur on the other side, creating an unjust situation. Even when the amount of money involved is substantial, it is not fair to the property owner to have to engage an appraiser and an attorney merely to protect his rights and to make a determination as to whether the offer by the condemnor is fair. It is my opinion that the condemnee should be entitled to the cost of an independent appraiser to make an initial appraisal of the property, plus the cost of seeking the advice of an attorney, which amount could be limited on the basis of the County's minimum fee schedule. As for example, the condemnee may be entitled to \$100 for attorney's fees so that he would be in a position to at least consult an attorney to determine his rights. The condemnor should not object to this if the condemnor has made a fair offer to the condemnee for the property.

The attorney's fees are usually based on a percentage of the total recovery or 50% of the excess received over and above the original offer, whichever is greater. This is so whether the settlement is made before trial or after trial. In order to encourage the condemnor to make a fair offer at the outset, it is recommended that the following basis could also be used:

The condemnor would pay to the condemnee the cost of an appraisal. The condemnee will pay the attorney's fees to the extent of an amount equal to real estate commissions established for the County, as attorney's fees. Any attorney's fees in excess of said percentage based upon the real estate commission which is paid to the attorney by virtue of the excess settlement or award should be paid by the condemnor.

Comments (continued)

Example: condemnor offers \$100,000. Real Estate commissions in the county are 6%. After settlement either before trial, or the award amounts to \$125,000, the attorney's fees would general be \$12,500 (50% of the excess over the original award). \$7,500 (6% of \$125,000) would be paid for the account of the condemnee and \$5,000 would be paid by the condemnor. This method is justified on the grounds that a seller would usually engage the services of a realtor and the commissions would be normal expenses. The cost of one appraiser in any event would be paid by the condemnor.

I believe the above method would discourage litigation because the condemnor would be encouraged to make his best offer to the condemnee. This is only fair since the condemnor is in an advantageous position of having attorneys and appraisers or funds for these purposes and the condemnee does not. Since the offer would be a fair offer, the attorney, in most instances, will find that the offer is just and that litigation would only be a waste of time.

I feel very strongly about providing some relief to the condemnee in condemnation actions for the cost of appraisers and for attorney's fees and other expenses.

SSN/ph

EXHIBIT V

STANLEY J. GALE
LAWRENCE M. GOLDSTEIN

LAW OFFICES
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RANCHO CORDOVA
EMPIRE 3-1566

ADDRESS ALL REPLIES TO MAIN OFFICE

OUR FILE NO. _____

May 26, 1969

CALIFORNIA LAW REVISION COMMISSION
School of Law
Stanford University
Stanford, California 94305

Attention: JOHN H. DeMOULLY
Executive Secretary

Re : Law Revision Relating
to Condemnation Law

Gentlemen:

Enclosed find questionnaire concerning litigation expenses in condemnation proceedings and proposed draft of proposed revision to Section 997, C.C.P.

I would like to voice an additional comment about the suggestion that the Court should appoint so-called "independent appraisal". The proposal as outlined in your letter does not clearly state whether the independent appraiser would be selected by the condemnee or by the Court. I would be opposed to any proposal or revision that would permit the Court to appoint an independent appraiser, for several reasons:

1) Such "independent appraiser" might reflect the philosophy or viewpoint of the appointing power and in such case would not truly be independent.

2) If a panel of independent experts were submitted, it would probably reflect the nominations of the local M.A.I. Chapter and be composed primarily of their members.

As an attorney primarily representing condemnees, I seldom use M.A.I. appraisal witnesses. I find that ~~these~~ witnesses are condemnor oriented because their principal source of employment comes from condemning agencies. Also, I find that M.A.I. appraisers do not truthfully reflect the

CALIFORNIA LAW REVISION COMMISSION

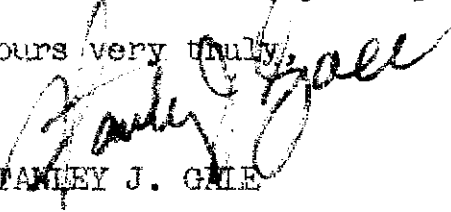
May 26, 1969

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appraisal philosophy expressed in the classical Heilbron definition of fair market value. As you know, Heilbron requires that the property owner receive the highest value, etc. In contrast to this, the M.A.I. appraisers generally use average values based upon comparable sales and their appraisals reflect the lowest range of comparable sales rather than the highest range. Where the expert witness is employed by the condemnor, we find no particular difficulty in explaining their philosophy to the jury by means of effective cross-examination. We can usually show that they are partisan advocates. On the other hand, the jury would be inclined to place undue and over-weighted value upon the testimony of the so-called independent appraiser who, in my opinion, would be part of the condemnor oriented group.

As long as we have an adversary trial system relating to determination of values, we should continue with the adversary system of expert witnesses, all of which means that each side would produce experts to support their own particular viewpoint. The allowance of costs and expenses to the successful condemnee would be a much more satisfactory solution than the appointment of independent witnesses who would not be truly independent.

Yours very truly,


STANLEY J. GALE

SJG:mbp

Enclosures

The "jurisdictional offer" is the best of the proposed plans submitted. Another approach would be to amend Section 997, CCP. A proposed form of revision is enclosed.

The appointment of an "independent appraiser" by the Court is not practical. It has the same objections that are inherent in the Court appointed medical expert approach. Each litigant generally has a different approach to the problem of highest and best use of the subject property. The use of an independent expert would unduly weight his opinion of highest and best use before the jury. The present procedure of allowing each side to present witnesses who generally support the viewpoint of each side is entirely feasible and workable as long as the condemnee is given equal budget resources for the employment of experts.

PROPOSED REVISION TO SECTION 997, C.C.P.

(a) In eminent domain and inverse condemnation proceedings, either party may, not less than thirty days prior to trial, serve upon the other party, an offer to allow judgment to be entered for or against the offeror, for the amount or to the effect therein specified. If the other party accepts the offer, and gives notice thereof within five days, he may file the offer with proof of notice of acceptance, and the clerk or the Judge must thereupon enter judgment accordingly. If the offer of acceptance be not given, the offer is to be deemed withdrawn and cannot be used in evidence upon the trial, but may be reviewed thereafter by the trial Judge to aid or assist any award of costs, fees and expenses. If the party failing to accept the offer fails to obtain a more favorable judgment, he cannot recover his costs, and must, in addition, pay the other party's costs from the time of the offer.

Thereafter, if the property owner secures a judgment or award at least ten per cent (10%) in excess of his settlement offer, the property owner shall further be entitled to recover all expenses incurred during the pendency of the action that are reasonably related to the trial and preparation thereof, including expert witness fees actually paid or incurred, costs of preparing exhibits and visual aids, and reasonable attorney's fees, in an amount to be determined by the trial Court, in addition to taxable costs as otherwise provided.

STANLEY J. GAIE

EXHIBIT VI

TABULATION OF QUESTIONNAIRE

LITIGATION EXPENSES IN CONDEMNATION PROCEEDINGS

	Con- demnees	Con- demnors	Both	Other	Total
<u>A. Basic Preference</u>					
In a revision of California law in which jury trial remains basic, I would prefer the following approach:					
1. Nonrecovery of litigation expenses (except to the extent provided by existing law).	4	26	6	0	36
2. Award to condemnee in all cases.	12	1	2	1	16
3. An allocation scheme based on the ultimate award	6	4	4	0	14
4. A "jurisdictional offer" requirement	12	5	3	2	22
5. Discretion in the court to allow or partially allow	6	3	2	2	13
6. A "two-way street" scheme	0	2	2	0	4
<u>B. Effect on Litigation and Negotiations</u>					
With respect to the existing rule of nonrecovery, I think:					
1. Property owners typically make a "litigation avoidance" concession					
YES	27	18	13	4	62
NO	1	9	1	0	11
IMPOSSIBLE TO GENERALIZE	1	4	1	0	6
2. Condemnors typically make a "litigation avoidance" concession					
YES	5	14	5	1	25
NO	18	6	6	2	32
IMPOSSIBLE TO GENERALIZE	5	13	5	1	24

(B. Effect on Litigation and Negotiations--con't)

3. It would be illogical to distinguish condemnation proceedings from other litigation

YES

NO

Con- demnees	Con- demnors	Both	Other	Total
4	19	4	0	27
20	13	10	4	47

C. Expense Allocation Scheme

With respect to the allocation scheme outlined in the letter accompanying this questionnaire (recovery based on relationship of "best offers" to ultimate award), I think:

1. The scheme would significantly increase litigation.

YES

NO

2. Would significantly affect negotiated figures.

YES

NO

3. Should be made reciprocal (i.e., a "two-way street").

YES

NO

4. Should allow expenses to the condemnee to the extent that the award exceeds the condemnor's "best offer," rather than exceeds the half-way point between the best offers.

YES

NO

5. Is impractical because it would require the court to determine expenses in many cases.

YES

NO

Con- demnees	Con- demnors	Both	Other	Total
4	19	4	0	27
20	13	10	4	47
5	30	7	1	43
18	5	9	2	34
17	14	8	3	42
6	17	7	0	30
0	19	4	1	24
21	11	12	3	47
16	7	7	4	34
5	25	9	0	39
7	18	6	2	33
14	13	8	2	37

D. "Jurisdictional Offer"

With respect to the so-called "jurisdictional offer" requirement (mentioned in the accompanying letter), I think:

1. It would significantly increase litigation.

YES	4	30	7	1	42
NO	20	3	9	2	34

2. Would significantly affect negotiated figures.

YES	18	17	10	3	48
NO	4	16	6	0	26

3. Has merit because it is the simplest way of handling litigation expenses.

YES	15	8	11	1	35
NO	6	21	5	2	34

4. Would operate capriciously at best.

YES	4	23	5	1	33
NO	19	7	10	2	38

5. If used, should permit recovery of expenses if the award exceeds the offer by

ANY AMOUNT	10	0	2	3	15
10%	11	1	7	1	20
25%	1	16	3	0	20
OTHER PERCENTAGE	2	9	3	0	14

E. Trial Court's Discretion

With respect to recovery or partial recovery of expenses in the court's discretion, I think:

1. The idea is practicable.

YES	14	7	6	2	29
NO	15	28	10	2	55

<u>E. Trial Court's Discretion--cont)</u>		Con- demno	Con- demno s	Both	Other	Total
2. If used, should be reciprocal between condemnor and condemnee.						
	YES	1	22	4	2	29
	NO	24	7	12	2	45
3. Should apply to taxable costs, as well as litigation expenses.						
	YES	9	21	7	3	40
	NO	17	9	8	1	35
4. Should be implemented by requiring the parties to make a specific "best offer" to aid the court in exercising its discretion.						
	YES	20	23	10	4	57
	NO	7	9	5	0	21

F. Binding Court Determination of Attorney Fees

In condemnation cases in which the court might determine the amount of a reasonable attorney's fee to be paid by the condemnor to the condemnee, the amount determined should be binding upon attorney and client, their contractual arrangement notwithstanding.

YES	8	25	5	2	40
NO	21	11	11	2	45

G. "Independent Appraisal"

With respect to entitling the condemnee to an "independent appraisal" (as outlined in the accompanying letter), I think:

1. This is a "fair" imposition upon condemnors.

YES	21	7	13	3	44
NO	7	29	3	0	39

2. Such appraisals would frequently be demanded.

YES	22	30	16	4	72
NO	6	4	0	0	10

(G. "Independent Appraisal"--con't)

		Con- demnee	Con- demnor	Both	Other	Total
3. Entitlement to such an appraisal would significantly affect negotiation practice and negotiated figures.						
	YES	18	22	15	3	58
	NO	9	10	1	1	21
4. The expense of the appraisal should be borne equally, rather than imposed upon the condemnor.						
	YES	1	30	4	1	36
	NO	27	7	12	2	48
5. Either party should be entitled to have the independent appraiser called as an impartial expert witness.						
	YES	16	24	15	4	59
	NO	11	10	1	0	22
6. The judge should be empowered to call the independent appraiser <u>sua sponte</u> .						
	YES	14	21	8	4	47
	NO	14	14	7	0	35

H. General Comments on Problem

See exhibits attached to Memorandum 69-66
and the First Supplement to Memorandum 69-66.

VIZZARD, BAKER, SULLIVAN, MCFARLAND & LONG

ATTORNEYS AT LAW

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IN REPLY REFER TO:

May 22, 1969

California Trial Lawyers Association
California Law Revision Commission
School of Law, Stanford University
Palo Alto, California

Gentlemen:

At the request of the Chairman of the Eminent Domain Committee of the California Trial Lawyers Association, I have read and studied certain tentative recommendations to the law of eminent domain relating to arbitration of just compensation for the use of eminent domain to acquire by-roads, and a provision for alternative means for arbitration of eminent domain matters.

All of these suggestions appear to me to be a step forward in the field of eminent domain, and I would not have any further suggestion for modification or improvement of the statutory changes already suggested.

While it may not be germane to this particular letter, I still wish to stress the point that the very heart of improvement and correction of eminent domain legislation from the point of view of making it more fair and equitable to the property owner is to achieve legislation under which the condemnor will be required in its pleadings to set out a value of the property similar to the provision for a "jurisdictional offer" provided in a majority of states, and the further provision that in the event the condemnee goes to trial and obtains a better and higher result by some set percentage, whether it be 5% or 10%, the condemnor will then become additionally liable for reasonable attorneys' fees, reasonable costs of appraisal and other reasonable costs of the condemnee that cannot now be recovered by a cost bill.

Under the present system, many condemning agencies lose sight of the fact that the condemnee is not a wrongdoer in any

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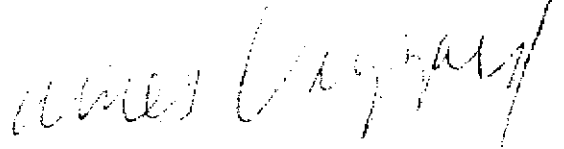
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sense and is a taxpayer and uses successive appraisals as a means of obtaining a lower bargaining appraisal for use before a jury, and also utilizes public funds to prosecute actions under which the condemnee must face substantial and sometimes hazardous out-of-pocket expense if he has reason to believe that he is being coerced into accepting an unfair offer. This is particularly true where the value of the property is not very great so that the condemnee must sacrifice his property rather than meet legal expenses and heavy appraisal expenses which would not justify a trial, even though he had strong reason to believe he could corroborate his position that he is being offered an unduly low price for his property.

Yours very truly,

VIZZARD, BAKER, SULLIVAN, McFARLAND & LON

By



JV:BB

cc: California Trial Lawyers Association
1020 12th Street
Sacramento, California 95814
Attention: Louis N. Desmond, Chairman
C.T.L.A. Eminent Domain Committee