#36.35 8/7/70

Second Supplement to Memorandum 70-59

Subject: Study 36.35 - Condemnation (Possession Prior to Final Judgment and Related Problems)

A significant issue is the one presented by the Cowan case (attached as Exhibit VII--white of Memorandum 70-59): Can the appraisal used to fix the amount of an immediate possession deposit be used as an admission of the condemnor or can the property owner call the state's staff appraiser as a witness and then impeach him by showing his prior immediate possession deposit appraisal?

The staff discusses this matter on pages 6-8 of Memorandum 70-59. No change is proposed by the staff in the provision previously approved by the Commission and included in the tentative recommendation to deal with this problem. In Memorandum 70-59, the staff suggests only that the Comment to Section 1268.10 be expanded to note that the section would change the rule of the Cowan case.

We have received a communication from Mr. Kanner objecting to proposed Section 1268.10. Also, although we had not previously received any substantial objection to this section from the 500 persons to whom the tentative recommendation was distributed, we have received objections within the last week or so from four other attorneys. See the attached exhibits.

It is understandable that attorneys who specialize in condemnation cases would like to have the condemnor's offer (or at least the appraisal in the immediate possession deposit) admissible because it is unlikely that the jury would ever go below this amount. These attorneys do not look with favor on cases where an offer is made and the appraisal testimony by the condemnor at the trial is below that offer.

Condemnation proceedings are unique in that the condemnor is expected to, and many condemnors actually do, make a generous offer for the property. The practice of attempting to buy property at the lowest possible price has been justly condemned. Hence, these cases are not like the usual case where each party is offering to compromise a disputed matter at a price most favorable to him. Condemnors should be encouraged to offer generous amounts to condemnees, not discouraged.

In normal litigation, it would be unthinkable to admit the offer of one side as evidence to be considered by the trier of fact. One of the significant changes made by the Evidence Code is found in Evidence Code Section 1152 which makes inadmissible the amount of the offer "as well as any conduct or statements made in negotiation thereof." The addition of the quoted clause is justified in the official Comment as follows:

> The words "as well as any conduct or statements made in negotiation thereof" make it clear that statements made by parties during negotiations for the settlement of a claim may not be used as admissions in later litigation. This language will change the existing law under which certain statements made during settlement negotiations may be used as admissions. People v. Forster, 58 Cal.2d 257, 23 Cal. Rptr. 582, 373 P.2d 630 (1962). The rule excluding offers is based upon the public policy in favor of the settlement of disputes without litigation. The same public policy requires that admissions made during settlement negotiations also be excluded. . . .

The Forster case was an eminent domain case where the condemnor had in effect stated that its offer was based on its opinion of the value of the property as appraised by it. Section 1152 was phrased to exclude the condemnor's statement from admission as evidence. The same objections were made when Evidence Code Section 1152 was proposed and enacted as are now made. Of course, then the objection went to the problem generally, rather than to appraisals made in connection with immediate possession deposits.

It should be noted that the objection to Section 1268.10 goes only to some of the cases where the "fighting figures" problem (or the so-called low ball problem) is presented. That problem is not restricted to immediate possession cases as is Section 1268.10.

Several writers state that the property owner is better off if the immediate possession deposit is fixed at the lowest possible amount the property owner is sure to recover. I suspect that the average property owner, who is forced to move and to finance the move with the money deposited, would disagree. He would appreciate the highest amount the condemning agency is willing to deposit. He knows he can always accept that amount and settle the case and also knows--like any litigant--that if he litigates the matter he may not prevail and he may have to repay some of the amount received. In addition, the property owner has interest-free use of the excess amount withdrawn from the time of withdrawal until final judgment. (He need pay no interest on the excess amount withdrawn. See Section 1270.06.)

It is a matter of policy whether a condemnor must go into a condemnation trial with the trier of fact advised as to the amount it has offered for the property. The likelihood that the jury will ever find a value below the offer is remote. In practically every case, the jury will find a value above the offer. The prospect of stimulating litigation seems great if the offer is admissible.

The staff finds nothing unconscionable if the condemnor whose offer is rejected then presents his case using appraisal testimony for the lowest amount a reasonable appraiser believes the property is worth. The property owner, of course, presents his appraisal testimony for the highest amount a reasonable appraiser believes the property is worth. If the appraiser or appraisers who present appraisal testimony for the condemnor have an unsound opinion as to value or if they are biased, the competent attorney representing the condemnee

can demonstrate the same to the jury. The situation just described is the situation that generally exists in litigation of a disputed matter--each party presents his case by presenting the case most favorable to his position. To change the situation by requiring one party--the condemnor--to make a generous offer and by then advising the trier of fact of the amout of that offer would not be fair to the taxpayers generally and would tend to stimulate litigation. Moreover, it would be contrary to the recent legislative decision made when Evidence Code Section 1152 was enacted over objections by condemnees.

There is much that needs to be done to improve the position of the condemnee. However, the Cowan case rule is not something that should be retained. In this connection, for example, the tentative recommendation would make a significant improvement in the condemnee's position. It would provide him with access to the appraisal information upon which the immediate possession deposit is based. See Section 1268.01(c) and 1268.02(b). This is a reform that has long been urged by lawyers who represent condemnees. In some cases, the condemnee cannot afford to have an appraisal made in order to evaluate his case, and the appraisal data made available to the condemnee under the tentative recommendation will be of assistance to him in evaluating his case. It should be noted that one of the writers who objected to the tentative recommendation suggests that such a requirement be established (see Exhibit IV, page 5, footnote **).

The staff believes that Section 1268.10 of the tentative recommendation sets out a highly desirable rule. However, the Commission may wish to revise this section to provide that a witness called by the condemnor may be impeached by reference to his appraisal report, statement of valuation data, or other statement made by him in connection with a deposit or withdrawal pursuant to the immediate possession provisions. This revision would be consistent with recent policy expressions by the Commission and would not appear to operate to defeat the basic purpose of Section 1268.10.

Respectfully submitted,

John H. DeMoully
Executive Secretary

Memo 70 - 59
2d Supp

EXHIBIT I

LAW OFFICES
FADEM AND KANNER
A PROFESSIONAL CORPORATION
8505 WILSHIRE BOULEVARD
LOS ANGELES, CALIFORNIA 90048

TELEPHONE
651-3372
AREA CODE 213

JERROLD A. FADEM
GIDEON KANNER
RONALD N. TELANOFF
WILLIAM STOCKER
SAMUEL BOBROWSKY
MICHAEL M. BERGER

OF COUNSEL
ROBERT S. FINCH

July 23, 1970

California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Re: Memorandum 70-59

Gentlemen:

The attached material is in response to John's request that I comment in writing from time to time on eminent domain matters before the Commission, and is directed to the portions of Memorandum 70-59 commenting on People v. Cowan, 1 CA 3d 1001, and its interaction with the Commission's Tentative Recommendation on that subject dated September 1967.

In the interest of candor I should add that I had a limited role in Cowan. As originally published, Cowan (1 CA 3d 242, 247) awarded costs to the condemnor. I then filed an Amicus Curiae brief on the subject of a condemnee's right to costs on appeal, and the opinion was modified to award costs to the owners (1 CA 3d 1001, 1007). My briefing was limited to costs on appeal.

Very truly yours,

GIDEON KANNER
for
FADEM AND KANNER

GK/ms

Encl.

LOWBALL IN THE SIDE POCKET

OR

WHERE'D THAT HOLE COME FROM?

(A Comment on Certain Aspects of Memorandum 70-59)

by

GIDEON KANNER
6505 Wilshire Boulevard
Los Angeles, California 90048

INTRODUCTION

Memorandum 70-59, at pp. 6-8, undertakes a discussion of People v. Cowan, 1 CA 3d 1001, and its effect on proposed immediate possession legislation. The staff recommends there that Commission comments be expanded to expressly indicate that it is the intention of the proposed legislation to repeal the rule of the Cowan case.

The purpose of this memorandum is to vigorously disagree with that recommendation, and indeed with any legislation which would temper with the Cowan rule.

Let me say preliminarily that the Commission conclusion that an adequate deposit is of great value to the owner (Memorandum 70-59, p.7) is eminently sound, but the judgment expressed there, that the adequacy of the deposit is more valuable than the right to ". . . use the appraisal made in connection with the deposit," is a non-sequitur, which bears no relationship to the factual premise, economic reality or to the dispossessed owner's plight.

The deposit is "adequate" only if the owner can draw it down and use it to acquire replacement property or perform needed curative work on the remainder. If the amount of the deposit isn't real - i.e., if it is subject to the threat of being reduced by later "lowball" */

---

*/ See discussion at pp.5-10, infra.

testimony - then it isn't "adequate" by definition because it fails to perform its primary function: i.e., to supply liquid funds to the owner to enable him to obtain replacement property upon dispossession. What good is a deposit, if the owner cannot spend it without running the risk that he may have to pay some of it back after he already spent it on replacement property?

I submit on the basis of experience that the owner is far better off with a lower but reliable OIP deposit, (i.e., a deposit he can spend) than he would be with a spuriously "generous" deposit which turns out to be a cruel delusion.

In Steinhart v. Superior Court (1902) 137 C 575, 579, the Supreme Court astutely observed that a deposit has not been made for the owner if he cannot withdraw it from court. It is equally true that a deposit has not been made for the owner if he cannot spend it after it is withdrawn.

If the deposit is indeed too low, the owner has the remedy of making a motion to increase the deposit. Then, if the court increases the deposit and the owner draws it down, the burden of any future reduction is undertaken by the owner as a conscious risk, and not sprung on him later as a surprise.

I suggest that the staff recommendation on this

point evinces some naivete, as to the realities of this type of litigation. Accordingly, instead of discussing the legal aspects of the problem, there follows a brief discussion of the practicalities of the matter.

THE "LOWBALL"

OR

HOW TO MAKE A "HOLE"

As the Commission may well surmise from the above heading, there is a whole body of knowledge and folkways having to do with condemnors' appraisal tactics.

The basic "lowball" scheme operates as follows: First, an offer is made. The condemnation action is then commenced, and an OIP is obtained (the OIP deposit is typically in the amount of the earlier offer). Both the offer and the OIP deposit are based on the staff appraisal.*/

Later, the condemnor hires an independent appraiser, to do a new appraisal of the subject property, and to testify as condemnor's expert at the trial.

Some of these independent appraisers are independent only in the sense that they are employed by contract rather than being on a condemnor's weekly payroll. They do virtually all their work for a handful of condemnors, with one condemnor often providing a lion's share of employment for some.

---

*/ Since in California staff appraisals are not disclosed or produced, there are no reliable data as to whether the offers are in the full amount of the staff appraisal. Cf. Berger and Rohan, "The Nassau County Study: An Empirical Look Into the Practices of Condemnation", 67 Columbia Law Rev. 430 (1967).

Inevitably, some of these appraisers choose to curry the favor of their condemnor-employers by bringing in low appraisals, thereby hoping to get repeat business. While some of these appraisers are guilty of little more than a natural to them extreme conservatism*/ in formulating their opinion of value, others are blatant "lowball" artists.

The term "lowball" designates an appraisal which is consciously made to come in at a figure below the OIP deposit or offer (usually the OIP deposit and the offer are the same). The purpose of a "lowball" is twofold. First, to discourage the property owner from litigating, i.e. to force him to acquiesce in the offer, rather than risk a verdict below the offer. This tactic sometimes works with inexperienced owners' counsel who don't know how to prepare and put on a good case, and therefore entertain doubts about their ability to climb out of the "hole" at the trial.

The "hole", incidentally, is the amount whereby the condemnor's trial testimony falls below the OIP deposit

---

*/ Please bear in mind that the owner is entitled to receive for his property the fair market value, i.e. the highest price (see Sacramento etc. R. Co. v. Heilbron (1909) 156 Cal 408, 409), not the average, or most conservatively estimated price.

or offer.*/ To digress a bit further on terminology, the difference between the condemnor's and the owner's testimony is known as the "spread". Thus, the use of a "lowball" appraiser increases the "spread" and if the jury should reach a compromise verdict splitting the "spread", increases the probability that the verdict will fall on a lower place in the "spread" than it would if the "spread" were honest (i.e. if it were unaugmented by the "hole"). The foregoing probability is the second objective of "lowball" appraisals.

Another, and rarer variation of the "lowball", is the "disappearing appraiser" ploy. In this scheme the condemnor hires two appraisers; one comes in with an opinion of value below the offer (or OIP deposit) and the other somewhat above it. These appraisers' reports are then exchanged with the owner under the Los Angeles Superior Court eminent domain policy memorandum or under CCP §1272.01 et seq. At the trial the owner puts on his case, and the condemnor then follows by calling its low appraiser first. Then when this appraiser is finished, the condemnor rests

---

*/ To give you an idea of how far this can be carried, there was a case tried recently in the Los Angeles Superior Court in which the "hole" was about a million dollars. (John McLaurin represented the owner in that one, and can undoubtedly supply details better than I).

and never calls its high appraiser. The utility of this kind of an abuse of the appraisal data exchange has probably been crimped by Regents of the Univ. of California v. Morris (1968) 266 CA 2d 616, 629-632 [6],*/ because of that opinion's condemnation of the use of a misleading appraisal exchange as a tactic of surprise. However, this scheme is still used on occasion by some condemnors.

Appraisers who can be relied on by condemnors to come in with "lowball" appraisals are in great demand, and earn enormous fees. For example, there is one fellow in the Los Angeles area, whom the Division of Highways used heavily in cases in which our office represented the owners. Time after time, this man would come in with "lowball" appraisals. Finally, after a few years of this, we decided to look into his bias (as a witness), and in one case last year we directed a Subpoena Duces Tecum to the Department of Public Works to produce copies of warrants paid to him

---

*/ Note that the device of tampering with the integrity of the exchanged appraisal report, condemned in the Regents case is no isolated incident. See Arnebergh, "Trial Tactics from the Standpoint of the Condemnor", 1968 Proceedings of the Eighth Institute on Eminent Domain, Southwestern Legal Foundation, p.6, where Mr. Arnebergh notes the prevalence of this technique among some condemnors. See also Kanner, "More Search for Truth", 44 Cal. State Bar Jour. 236, 239 (1969).

over the previous few years. We expected these warrants to add up to a substantial figure, but the result startled even us. In the course of the years 1964-1968, this one appraiser was paid a total of $137,475.00! And this was only by one condemnor: the Division of Highways. (I understand he is now in the second year of his round the world cruise on his own yacht).

What I have described above is no courtroom rarity, but a consistent pattern of conduct in which some appraisers engage, with the acquiescence ane encouragement of a few condemnors.*/ For example, some condemnors use what is known as a "status conference" which is a conference in which the independent appraiser is required to deliver a status report before his report is completed. The appraiser is then questioned by condemnor's personnel, and if it appears that his opinion of value will be too high to suit his employers, he is paid for work done up to then, and told not to complete his report. Needless to say, he does not testify in that case. Also needless to say, he gets the message.

To sum up, the practice of making an OIP deposit, and then trying to undercut it by the "lowball" technique

---

*/ I understand that this practice is common among northern California condemnors.

is sufficiently frequent to cause concern. In this context the Cowan opinion is most salutary as it puts a limit on this reprehensible practice and provides a device for keeping condemnors honest.

As things stood before Cowan the law was outrageously unfair. Under Evidence Code §822(b) a condemnor could bring in as an admission the owner's offer or listing, but the owner could not (because of CCP §1243.5[3]) bring in as an admission the fact that the condemnor through its appraiser had sworn under penalty of perjury that the amount of the OIP deposit constituted adequate security for the property being taken and damaged. What made this situation so outrageous was that freeways and other projects often are years in coming, and in the meantime blight and stultify property in their path. Thus, an owner who for one reason or another wanted to or had to move, and in desperation listed his property with a broker for a below-market price, could have it thrown back at him in a later condemnation. But a condemnor whose professional appraiser made a formal appraisal of value, and filed a sworn affidavit in Court presenting the results thereof could not be called upon to tell the truth.

CONCLUSION

I believe that the subject of this memorandum may best be summed up by reference to the remarks of Commissioner Gregory at the June 1970 meeting, when he observed that the Commission ought not to have a hand in the formulation of any rules that would encourage perjury.*/

If a condemnor's appraisal is good enough to form the basis of a staff appraiser's affidavit for an OIP, and thereby the basis for an ex parte Court determination whereby the owner is summarily dispossessed from his land, it ought to be good enough to be introduced into evidence, at least as an admission, the same as an owner's offer or listing.

Anything else encourages all sorts of hanky-panky which at times necessarily invites perjury. And that is not an acceptable ingredient of any lawsuit, much less a condemnation which brings into question the constitutional rights of perfectly innocent citizens who are in Court solely because they arbitrarily found themselves in the path of some public project, and wish to avail themselves of their

---

*/ This came up in context of the excess condemnation discussion. Some condemnors' representatives urged that in a two-phase valuation under People v. Superior Court (Rodoni) (1968) 68 C 2d 206, the condemnor who lost the first phase trial should be permitted to exclude its own testimony when the second phase valuation trial commenced, so that it could in the second phase claim lesser severance damages than it did in the first phase.

constitutionally guaranteed right to a trial by jury so that their just compensation is fairly and impartially determined.

> "A condemnation trial is a sober inquiry into values, designed to strike a just balance between the economic interests of the public and those of the landowner." Sacramento etc. Drainage Dist. v. Reed (1963) 215 CA 2d 60,69.

That type of proceeding would be free of chicanery. The Cowan opinion went a long way toward achieving that laudable objective.

The Commission staff concern expressed at p.7 of Memorandum 70-59, that condemnors' staff appraisals and appraisers need "clear protection" lest condemnors' staff appraisals become "extremely conservative" */ evinces a concern with the wrong problem. If condemnors' staff appraisers are going to consciously arrive at lower appraisals than their honest opinion, and if they are going to knowingly sign affidavits falsely indicating lower opinions of value than their honestly held belief, then

---

*/ I cannot fail to observe that this concern of the Commission staff necessarily makes a devastating comment on our governmental agencies' integrity.

obviously a different kind of legislation is called for, Cf. Penal Code §§118a, 119, (And as for the condemnors' "cute" tactic described at p.8 of Memorandum 70-59, of having an attorney rather than an appraiser sign the OIP affidavit to evade the Cowan rule, Cf. Penal Code §122).

Or to put it another way, when there is a rash of bank robberies, a right-thinking society goes after the bank robbers; it does not order the banks closed.

The Cowan rule ought to be codified, or better yet, CCP §1243.5(e) ought to be repealed. This would do away with much hanky-panky and promote an atmosphere of a search for truth in condemnation trials.

2d Supp Memo 70-59

EXHIBIT II

RICHARD V. BRESSANI
(1904-1959)

LAW OFFICES OF
BRESSANI, HANSEN & BLOS
1405 BANK OF AMERICA BUILDING
SAN JOSE, CALIFORNIA 95113
TELEPHONE (408) 294-0060

GERALD B. HANSEN
RICHARD B. BLOS

July 24, 1970

California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Re: Law Revision Memorandum 70-59
Proposal to Repeal Principal of People v. Cowan,
1 CA 3d 1001

Gentlemen:

I wish to oppose the above recommendation.

As a general practitioner I have tried approximately seventy five condemnation trials in the last fifteen years and, having occasionally been subjected to the "lowball" technique; I disagree with the proposal.

The rational of the memorandum proposal is that the admission of security deposit appraisals "would cause condemnors to seek to make unreasonably low security deposits." 1 CA 3d 1006. The proposal is based upon the general dishonesty of condemnors. That is really a great reason for any law.

Very truly yours,

Gerald B. Hansen

GBH:bl

2nd Supp. Memo 70-59 EXHIBIT III

THOMAS G. BAGGOT
ATTORNEY AT LAW
SUITE 3450 CROCKER-CITIZENS PLAZA
611 WEST SIXTH STREET
LOS ANGELES, CALIFORNIA 90017
TELEPHONE 626-6451

July 28,,1970

California Law Revision
School of Law
Stanford University
Stanford, California 94305

Gentlemen:

I have been informed that the Law Review Commission now has before it a recommendation that there be legislation to nullify the effect of the decision in People vs. Cowan 1 C.A. 3rd 1001. The proposal apparently states that (1) an adequate deposit is of more value to the condemnee than the right to use the appraisal made in connection with the deposit and (2) the Cowan decision will be of little, if any, benefit to, and will have an adverse effect on, condemnees.

I strongly disagree with both of the above opinions. In my opinion, the Cowan decision is clearly correct and is generally salutary in effect to both condemnors and condemnees because it is basically a decision that declares that an appraisal of the subject property made by a qualified appraiser should be heard by the trier of fact regardless of whom it hurts or helps. Furthermore, it is in accordance with the basic rule of evidence that an admission of a party can be used against him in litigation. Either party to an eminent domain proceeding should be allowed to call, as his own witness, any qualified person who has appraised the subject property. The practice of some condemnors of producing a lower appraisal when the owners refuse to settle should be discouraged and the Cowan decision is one important step in that direction. For all of the above reasons, it is my opinion that the proposal to nullify Cowan should be rejected.

Very truly yours,

Thomas G. Baggot

THOMAS G. BAGGOT

TGB/tb

DESMOND, MILLER & DESMOND
ATTORNEYS AT LAW
816 "I" STREET
SACRAMENTO, CALIFORNIA 95814
TELEPHONE (916) 442-2051

July 29, 1970

EARL D. DESMOND
(1895-1960)
E. WAYNE MILLER
(1904-1968)

RICHARD F. DESMOND
LOUIS N. DESMOND
CAROL HALL
JOHN R. LEWIS, JR.
FRANK REYNOSO

California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Gentlemen:

I have practised law almost exclusively in the condemnation field, on behalf of property owners, for the past ten years; and am therefore naturally interested in the deliberations and activities of your Commission.

I am advised that there is a proposal before your Commission that the rule of People v. Cowan, 1 Cal.App.3d 1001, be repealed; and wish to go on record as opposed to any such statutory change for the reasons hereinafter set forth.

The plaintiff-condemnor in Cowan was the State of California acting by and through the Department of Public Works. The project constituting the subject matter of the condemnation was a freeway. It therefore seems meet and proper that, for purposes of analysis and example, the policies and acquisition activities of that agency be discussed.

The Right of Way Manual of the State of California, Department of Public Works, Division of Highways (Operations), Sixth Edition 1968, provides that:

> "This 6th edition of the Right of Way Manual is a compilation of standards of policy and procedure which are presently utilized by the Right of Way Department. . . ."
> (Foreword, p. S)

> "The fundamental operational policy of the Department is that all procedures shall be directed to assure that property owners receive just compensation, utmost courtesy and maximum consideration.
>
> * * * "
>
> (p. 27, Section 1.041) (emphasis added)

"The purchase of required property rights will be made only after a written appraisal of their market value has been completed and approved. The appraisal staff will thoroughly investigate and consider every material fact regarding the market value of the appraisal property. The appraisal will be made in accordance with the highest professional appraisal methods and ethical standards and with constant regard to the rights of the property owner and citizens of the State. It will comply fully with the Constitution, Statutes of the State of California and rules and regulations of the Department. It will be promptly adjusted when new data indicates revisions are appropriate."

(p. 32, Section 2003)

"Acquisition personnel should be assigned, commensurate with the problems involved to make pre-appraisal calls upon property owners. . . ."

* * *

The acquisition agent shall deliver the booklet 'Your Property, Your State, Your Highways.' He should inform the property owner that he is the State representative assigned to purchase the property and that he will answer any questions either at this time or when he calls again after the appraisal is completed."

(p. 90, Section 3.002) (emphasis added)

The Booklet referred to in Section 3.002, supra, to wit, "Your Property, Your State, Your Highways," states:

"Appraisal and acquisition of properties required for highway purposes is the

> responsibility of the Right of Way Department of the division of Highways . . . The right of way agent who handed you this publication was perhaps your first personal contact with the Division of Highways. He is the person who has been assigned to assist you. His initial preappraisal call is to provide you with general information concerning the highway project, and to let you know that a representative from the right of way department's appraisal staff will call in the near future to gather data essential in determining the value of your property.
>
> (pp. 7-8) (emphasis added)

> "A real estate settlement with the Division of Highways is handled in the same manner as any private transaction for the sale of property. . . ."
>
> (p. 11)

> "Of this you can be sure: You will not be approached to discuss the sale of your property until it has had thorough analysis and a sound appraisal to protect your interests. . . ."

> "When the right of way representative calls to discuss the purchase of your property, he will be fully prepared to answer your questions and will provide you with complete information on details and procedures."
>
> (p. 20) (emphasis added)

A report of proceedings of a two-day National Institute of the American Bar Association, on September 20-21, 1968, in St. Louis, Missouri, entitled, Condemnation, Compensation and the Courts (American Bar Assn., 1969) contains a transcript of presentation entitled, "Valuation for Condemnation" by Dexter D. MacBride, then Assistant Chief Right of Way Agent, Division of Highways, Right of Way Dept., State of California. Mr. MacBride, there, after stating

his experience comprehending ". . . about 25 years at federal, state, and city government levels, concerned with public work projects involving airport, highway transit, water power, site expansion facilities . . . [and having] . . . represented property owner and government in the capacity of attorney, appraiser [and] right of way negotiator . . ." (p. 8) makes certain statements germain to the question before your commission, to wit:

> "In terms of this environment and experience, it may be helpful to note that condemnation is a minor (statistically) part of the total process. Generally, the major portion of all governmental acquisition is achieved by contract acquisition (negotiated settlements). In California in an annual State Highway acquisition program of some 10,000 parcels, representing approximately $200 millions, less than 300 parcels may go to condemnation."
>
> (p. 9)
>
> ". . . the governmental representative was vested with a special and particular fiduciary responsibility, and there are few professionals in the world of condemnation, acquisition, valuation who are not aware of the responsibility of government to (1) define the private property required, (2) arrive at a dollar opinion of fair value, (3) offer the fair value to the owner, (4) perform with courtesy, practicality, expedition.
>
> Each who studies these four 'tests' may conclude, according to his experience, as to the success of government at federal, state, city, county levels.
>
> My own conclusion: government has fallen short, especially as to test No. 3,

'Offer fair value to the owner.' . . . ." *

(pp. 16-17)

It is respectfully urged that the pattern represented by the aforesaid policies (and actually implemented in practice according to this writer's experience) is a "sales program" by the condemning agency to prospective condemnees - designed to dissuade those potential condemnees from the necessity of seeking counsel beyond that of "their State representative," who is represented to be committed to "assist" them. In the process, information is secured from the landowner for the appraisal of his property on the representation that the property will receive a ". . . thorough analysis and a sound appraisal to protect [the landowner's] interests. . . ." As suggested by Mr. MacBride, the "sales program" is quite effective -- only about 3% of the State highway acquisitions ultimately going to condemnation.

As to the landowner who, for whatever reason, is not persuaded, of course, the process does not stop. If immediate possession is required, information from the staff appraisal is used, sub rosa, to secure from the Court, ex parte, an order of immediate possession. **

---

*Mr. MacBride's conclusion seems, according to the language following that quoted, intended to except his own agency from the "indictment." The experience of this writer has been such as to preclude such charity. More importantly, however, there is nothing in the Cowan ruling which dissuades proper conduct; rather, as hereinafter set forth, it can only serve as a proper check upon California condemning agencies living up to self-expressed high ideals.

**As your commission is, of course, aware, California has by statute determined upon an ex parte but judicial proceeding to determine "probable just compensation." By this proceeding, no notice is given the landowner until the order of possession is an accomplished fact; and no opportunity is afforded the landowner to cross-examine the declarant whose statements establish probable just compensation. Query: Why should not the appraisal report be required by statute to accompany the ex parte application for immediate possession?

The unpersuaded landowner at this point probably retains an attorney (for whose fees under the existing state of the law he is not entitled to recovery). The attorney, desirous of evaluating his client's position relative to litigation and settlement, would like to review the appraisal of the condemnor's agents who have so ably "assisted" the landowner in collection of information and appraising the property "to protect his interests." But, like so many sales programs, the persuader's charm, being after all only skin deep, persists only so long as there is a chance of a consummated transaction on the persuader's terms. With an attorney in the picture, the unpersuaded landowner finds that not only are his erstwhile "assistants" fickle, but the data and appraisal information (to which he himself contributed under representations it was in his best interests) suddenly but assuredly becomes confidential, non-disclosable, and the private and inviolate property of the condemning agency. The information collected, assimilated, and evaluated by the utilization not only of the information taken from the landowner but also of the resources of the State* at the command of the condemning agency, to be sure, may be used by the condemning agency (regarding security deposit background, and later at trial); but, God-forbid that at this point its disclosure be insisted upon "to protect [the landowner's] interests."

Cowan represented a step toward insuring that condemning agencies live up to their self-styled and professed idealism and professionalism.**

It is respectfully urged that if the agencies, in their "sales program," are not misleading the prospective

---

* of which the landowner is a member whose only "wrong" consists of being non-persuaded by the sales program aforesaid in the interest of "progress."

** That such checks are indeed required needs no further graphic illustration than the argument of the condemning agency on appeal in Cowan that ". . . the danger of having their own appraisers called by the other side, would cause condemnors to seek to make unreasonably low security deposits." (Cowan, supra, at p. 1006)

condemnees then they cannot be significantly harmed by the Cowan ruling; whereas, if they are misleading the prospective condemnees then is it not important that at least the 3% non-persuaded serve as a check upon their activities?

In closing, under circumstances wherein the condemnor espouses that "all procedures shall be directed to assure that property owners receive just compensation," me-thinks the condemnor protesteth too much the Cowan ruling.

Respectfully submitted,

DESMOND, MILLER & DESMOND

By

RICHARD F. DESMOND

JRLJr:RFD:bk

EXHIBIT V

LAW OFFICES
THORPE, SULLIVAN, CLINNIN & WORKMAN
1200 ROWAN BUILDING
458 SOUTH SPRING STREET
LOS ANGELES, CALIFORNIA 90013
TELEPHONE (213) 680-9940

JOHN G. THORPE
ROGER H. SULLIVAN
ROBERT G. CLINNIN
HENRY K. WORKMAN
VINCENT W. THORPE
PHILIP L. SIRACUSE
MICHAEL J. BELCHER
JOHN J. DEE

OF COUNSEL
DAVID A. WORKMAN

PLEASE REFER TO
OUR FILE NO.

July 31, 1970

California Law Revision Committee
School of Law
Stanford University
Stanford, California 94305

Re: Condemnation Law and Procedure

Gentlemen:

I have just been handed a copy of Law Revision Commission Memorandum 70-59 concerning the subject: "Study 36.35 - Condemnation (Possession Prior to Final Judgment and Related Problems)." I have not had the opportunity to examine the proposed provisions of §1268.10, but the purpose of those provisions is made clear at pages 7 and 8 of Memorandum 70-59.

Mr. Roger Sullivan of this firm specializes in the trial of eminent domain cases, and I have also had considerable experience in this field. It so happens that I handled the successful appeal in People v. Cowan, 1 Cal. App. 3d 1001, to which you refer at pages 7 and 8 of your Memorandum.

It is my belief that attorneys representing condemnees would uniformly disagree with your comments and with the proposed provisions of §1268.10. And, to a man, they would endorse the objections raised by Mr. Forn in his letter attached as Exhibit V to your Memorandum.

Please understand that condemnees and their attorneys are not at all concerned about the prospect that staff appraisers may grow increasingly conservative in their appraisals which determine the security deposit as a result of Cowan. This is so for three reasons. First, I think we can assume that in many instances condemnors will play fair with the condemnees who are, after all, a part of the public served by the various condemning bodies. In other words, I think many staff appraisers will make an honest evaluation for the purpose of the affidavit.

Second, as noted in Cowan, the security deposit can always be raised by the Court on an appropriate motion by the condemnee made under the provisions of CCP §1243.5(d).

Third, the size of the security deposit is really not a matter of any great concern to condemnees who are primarily interested in the ultimate award, upon which adequate interest will be paid to the extent the security deposit falls short.

As a matter of fact, the only oppressive feature of the procedure for withdrawal of security deposit is the possibility that the condemnor will present substantially lower valuation testimony at trial. This leaves the condemnee who has withdrawn the deposit, in the reasonable belief that it represents the condemnor's honest opinion of just compensation, literally holding the bag. Without the right to call the staff appraiser who authored the affidavit, the condemnee cannot safely withdraw the entire security deposit. If Cowan tends to make staff appraisers more conservative that is far better than putting condemnors in a position where they can play "low ball" at trial with impunity.

In conclusion, I cannot share your concern that Cowan will have an adverse effect on condemnees. Affidavits supporting security deposits should be made by competent appraisers, not attorneys, and such appraisers should be subject to call as valuation witnesses in the event the condemnor thereafter elects to present substantially lower valuation testimony.

Very truly yours,

HENRY K. WORKMAN

HKW:cec
cc: Gideon Kanner, Esq.