

Memorandum 73-72

Subject: Study 36.90 - Condemnation (Pretrial and Discovery--Exchange of Information)

Attached to this memorandum is another copy of Memorandum 73-61 containing a discussion of problems in discovery in eminent domain and sample provisions designed to deal with those problems as well as recommendations for revision of the California exchange of valuation data statute. Also attached to this memorandum is a staff draft of provisions relating to discovery and exchange of valuation data in eminent domain proceedings. This memorandum highlights the key provisions of the staff draft.

Timing of exchange. Under existing law, a demand for exchange must be made no later than 50 days preceding trial and the actual exchange takes place no later than 20 days preceding trial. Because the State Bar Committee had advised that these time limits are not adequate for effective discovery, the staff draft pushes these times back from trial. The parties must serve their demands within 30 days after a defendant files his answer. The court may relieve the parties from this deadline upon a showing of good cause, such as the complaint has been substantially amended so as to make discovery more necessary.

The actual date of the exchange is to be worked out by the parties to the exchange. If the parties are unable to agree to a date, they may have the court set a date, which should be approximately 40 days prior to trial. This will allow adequate time for subsequent discovery; see discussion below.

Mutuality of exchange. At a previous meeting, the Commission decided that a person who serves a demand for exchange need not himself supply valuation data unless a counterdemand is served on him. In other words, a demand-

to-produce system was adopted in place of the present mutual exchange system. The reason for the Commission's decision was that the Commission was advised that a lawyer had served a demand to exchange but failed to provide his data because he thought he did not have to do so unless the other party served a cross-demand.

The staff draft does not incorporate this prior Commission decision because the State Bar Committee has indicated that mutuality of exchange is essential and because we believe that the Commission's objective can be achieved in a much simpler and more direct way: The draft statute makes quite clear that a person serving a demand for data must himself supply data, thereby preserving the mutuality of the exchange. The draft also omits the cross-demand procedures which apparently have been the source of the confusion whether a person who serves a demand is obligated to exchange data without a cross-demand made on him.

Deletion of cross-demand. The existing statute permits any person on whom a demand for information is served to make a cross-demand within 40 days prior to the day set for trial. This is basically a device to relieve a plaintiff who was not expecting to exchange data and who is served at the last minute by some minor party and would thus be required to give substantial information without getting anything of value in exchange. It enables the plaintiff to get the information of a major party.

The staff sees little need for this safety-valve. It apparently has given rise to the misimpression that a party who serves a demand need not exchange his own data unless a cross-demand is served on him. Moreover, deletion of the cross-demand will force an early decision on exchange based on the merits of the exchange in a particular case rather than on a waiting-game to see whether a demand is served. Also, the draft gives the court authority

to permit a party to demand after the statutory time for making the demand has passed.

Content of valuation data statement. We have received some suggestions that the material furnished in the statements of valuation data be further elaborated, e.g., more material on reasons supporting opinions and calculations, more detail on severance damages, and the like. The staff believes that this goal is a legitimate one but that it can best be achieved through further discovery following exchange of basic data rather than through elaboration of the data exchanged.

We do note, however, that, with the Commission's tentatively recommended provision for award of loss of goodwill, an expert called to testify as to the loss will be required to give his opinion, but there is little in the way of supporting data for this item required by the statement of valuation data. Perhaps some basic elements of goodwill loss can be incorporated in the statement sometime after we have gained some experience under the provision.

Sanctions for failure to exchange. There has been some concern that the courts have been unwilling to enforce the sanction for failure to exchange data when demanded. The sanction is that experts not listed may not testify and evidence not exchanged is not admissible. Because the courts are reluctant to impose such a harsh sanction, the staff draft incorporates express authority for the courts to allow continuances and to award costs and expenses to a party where the court allows testimony over his objection that the subject of the testimony was not exchanged as demanded.

Differing procedures adopted by counties. The Commission has previously decided that counties should be able to supplant the exchange procedure by their own court rules if the substituted procedure is adequate and approved by the Judicial Council. The staff draft incorporates such a provision which

is general in nature and deletes the special legislation for Los Angeles County. There is no doubt that the Los Angeles County rules, as presently constituted, will qualify for an exemption by the Judicial Council.

Further discovery following exchange. To make the exchange of valuation data more effective, the parties should be able to undertake further discovery into the data disclosed in the exchange. There are presently two major blocks to this goal--the work product rule and the 30-day cutoff of discovery prior to trial by Rule 222 of the California Rules of Court. The staff draft permits discovery of expert opinion on matters related to the data exchanged provided the expert is to be a witness at trial and permits such discovery to within 10 days of trial without the need for a court order. This is in accord with the major recommendation of the State Bar Committee.

The further discovery provided in the staff draft would be allowed only after exchange procedures have been invoked and would supplement those procedures. It would not affect in any way the normal discovery in eminent domain that could go on absent or parallel with the exchange and followup.

Compensation for experts in discovery. The State Bar Committee has suggested that, when the condemnor initiates any discovery procedures on expert witnesses other than the statutory exchange, the condemnor pay the reasonable expenses of the condemnee's expert in preparing for and responding to the discovery. The committee expressly rejected the converse principle--that, where the condemnee initiates discovery, it must pay for the condemnor's expert witness expenses. The Federal Rules of Civil Procedure have similar provisions whereby the basic data of experts may be discovered as of right, and further discovery may be allowed on court order; where further discovery is ordered, the party seeking discovery must pay the expert a reasonable fee for the time spent responding.

The staff notes that California has recently adopted a provision relating to reimbursement for discovery of experts generally, not just in eminent domain. Government Code Section 68092.5, enacted in 1968, provides in relevant part that an expert witness required under subpoena to give a deposition as to his opinion in a civil proceeding shall receive reasonable compensation for his time spent including traveling time. The entire text of Section 68092.5 is set out in Exhibit I. While this provision does not go as far as the State Bar would go in awarding expert witness fees, the staff believes it is adequate and, therefore, has incorporated no special provision in the draft statute.

Respectfully submitted,

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EXHIBIT I

Assembly Bill No. 867

CHAPTER 1126

*An act to amend Section 68092.5 of the Government Code,
relating to expert witness fees.*

[Approved by Governor October 19, 1971. Filed with
Secretary of State October 19, 1971.]

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

SECTION 1. Section 68092.5 of the Government Code is amended to read:

68092.5. (a) A person who is not a party to the action and who is required to testify before any court or tribunal, or in the taking of a deposition, in any civil action or proceeding, solely as to any expert opinion which he holds upon the basis of his special knowledge, skill, experience, training or education, and who is qualified as an expert witness shall receive reasonable compensation for his entire time required to travel to and from the place where the court or other tribunal, or in the taking of a deposition, the place of taking such deposition, is located and while he is required to remain at such place pursuant to subpoena. The court may fix the compensation for such appearance, in addition to such witness fees otherwise allowed by law, at such amount as seems reasonable to the court, upon motion by any party to the action or by the person required to testify and such fees shall be paid by the party requiring such witness to attend, but such fees shall not be allowable costs or disbursements.

(b) In the event the proceeding at which the expert witness has been notified his attendance is required is continued or canceled in advance of the time for which it is scheduled, such witness shall be notified of the continuance or cancellation by the party requiring his attendance by the quickest and most reliable means of giving notice under the circumstances. In the event such party fails to give notice as required by this subdivision, then the expert witness shall be entitled to receive the compensation specified in subdivision (a) of this section, notwithstanding his failure to give any testimony.

(c) An express contract entered into between a person and the party requesting or requiring him to testify, relating to compensation, shall be enforceable and shall prevail over the provisions of this section.