#36.90 9/12/73

First Supplement to Memorandum 73-72

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

Attached as Exhibit I is a letter from the Commission's consultant, Mr. Kanner, concerning the relation of the work product doctrine to discovery of an appraiser's report in eminent domain.

With respect to the problem raised by Mr Kanner--that, under Swartzman, expert opinion is not discoverable until following an exchange while after the exchange further discovery is precluded--the staff draft provides that the exchange is to take place at an earlier time and further discovery is to be allowed without requirement of court order to within 10 days before trial.

Respectfully submitted,

Nathaniel Sterling
Staff Counsel

First Supplement to
Memorandum 73-72

EXHIBIT I

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September 7, 1973

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

Re: Memorandum 73-61

Gentlemen:

Permit me to offer a word of disagreement with the premise of the above Memroandum.

I find no authority (the citations of Mack and Swartzman in the Memorandum notwithstanding) making it "fairly well established" that an appraiser's report falls within the work product exception to discovery. What I do find, suggests the contrary:

People v. Donovan (1962) 57 Cal 2d 346, 354-357 (re attorney-client theory of shielding the report from discovery),

Oceanside Union School Dist. v. Superior Court (1962) 58 Cal 2d 180, 192 (re work product theory of shielding the report from discovery).

and see San Diego Professional Ass'n. v. Superior Court (1962) 58 Cal 2d 194, 204-205.

I am not aware of any later decisions that have explicated the principles of the above-cited cases vis-a-vis the 1963 enactments (i.e., the addition to CCP §2016(b), and §2016(g)).

Mack mentions the enactment of CCP §2016(g), but in the final analysis merely holds that the report of an appraiser retained as a non-witness adviser to counsel is not discoverable (this is a general rule; see Scotsman Mfg. Co. v. Superior Court (1966) 242 Cal App 2d 527).

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It is not clear just what Swartzman holds on this point. Viewed objectively, it is not unfair to say that in its tirade against Mr. Swartzman, the court painted itself into a logical corner. It articulated a rule somewhat similar to Mack and Scotsman (i.e., that the expert's opinion is irrelevant until he is called as a witness, or until "it becomes reasonably certain" that he will be a witness — see 231 Cal App 2d at 203). Thus, the court in effect forbade discovery of the appraisers' opinions by means other than court-ordered exchange (in the name of mutuality), and approved the Los Angeles County bifurcated pretrial procedure. Recall, however, that under that procedure it is only when the report is lodged with the court, that it becomes "reasonably certain" which appraisers will be called as witnesses. Swartzman apparently overlooked that the final pretrial order under the Los Angeles procedure also forbids all further discovery. Thus, the upshot of Swartzman is:

1. You cannot conduct discovery of the opposing appraiser's opinion until after the exchange takes place,

but,

2. when the exchange takes place, the court orders (in the final pretrial conference order) that no further discovery may be conducted.

Just when discovery is to be conducted, thus remains something less than clear — at least in Los Angeles County.

This, and other aspects of mutuality of discovery in eminent domain, have been the subject of a law review article that I have written, and which is now in the galley proof stage. I have asked the editor for a set of page proofs for your use, and will supply them when such proofs become available.

Sincerely,

GIDEON KANNER
for
FADEM, KANNER, BERGER & STOCKER

GK:cl