Study EmH-455 November 16, 1999

First Supplement to Memorandum 99-66

Litigation Expenses in Eminent Domain Cases

Attached are the following materials relating to litigation expenses in eminent domain cases:

These materials address issues raised in Memorandum 99-66.

Kanner Memorandum

Our eminent domain consultant Gideon Kanner makes the following points:

(1) The trigger for awarding litigation expenses that we are currently contemplating — litigation expenses would be allowed if the compensation awarded in the proceeding exceeds the condemnor's final offer by more than 25% — is not the only trigger that makes sense, and other formulae are also reasonable. Thus, a trigger that the compensation awarded is closer to the property owner's demand than to the condemnor's offer would work, as well as a formula that bases attorney's fees on a percentage of the amount by which the compensation awarded exceeds the condemnor's offer. The point is that a bright line rule is preferable to a "reasonableness" determination.

(2) Whatever trigger is chosen, it should not be based on artificial "final" offers and demands of the parties. There are a number of appraisals performed by the condemnor at different points before trial that have purposes other than to set a basis for determining entitlement to litigation expenses. Prof. Kanner suggests that the condemnor's good faith prejudgment deposit in court of probable compensation should be the basis for determining entitlement to litigation expenses. As an alternative, the condemnor's pretrial exchanged valuation data could serve as the basis. In any event, the law should not allow the condemnor to increase the offer *during trial* (as the existing statute does) and thereby influence the award of litigation expenses.

(3) Recent statistics from Utah are consistent with the few statistics we have in California that demonstrate systematic undervaluation by the condemnor and the need for an adequate litigation expense remedy to encourage fair settlements. [An October 24, 1999, study by the *Salt Lake Tribune* of 200+ cases filed by the Utah Department of Transportation during the preceding 5 years found that 80% of the property owners who contested UDOT's appraisal won substantially greater compensation in court — a median increase of 41%.]

(4) As a matter of public policy, it should be kept in mind that the property owner is an innocent party whose property is being taken for public use, who is often not fully and fairly compensated for that privilege, and who is too often required to bear the added expense of litigation just to receive the compensation to which the property owner is entitled. The law needs to be improved.

Institute for Legislative Practice Statistics

The Institute for Legislative Practice has provided us with more complete statistics than were available at the time Memorandum 99-66 was written. The revised statistics are generally consistent with those provided in Memorandum 99-66.

The revised statistics confirm that eminent domain awards tend to fall somewhere in the middle range between the final offer of the plaintiff and final demand of the defendant. Jury verdicts average 10% higher than the midway point, and bench verdicts come in 1% below the midway point. The average jury verdict is about 41% higher than the plaintiff's offer and the average bench verdict is about 33% above the plaintiff's offer. [The 41% figure is identical to that found in the Utah study.]

With respect to court costs to litigate, the revised statistics show an average jury trial time of 9.4 days, at an estimated cost to the public of $30,500. "One way of viewing the data is that, on average, the courts are devoting approximately $30,000 to resolve by jury trial a dispute involving a difference of opinion amounting to approximately $430,000." Exhibit p. 14.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

MEMORANDUM

DATE: November 10, 1999
TO: California Law Revision Commission
FROM: Gideon Kanner
RE: Memorandum 99-66 (Attorney Fees in Eminent Domain Cases)

PLEASE DISTRIBUTE THIS MEMORANDUM TO MEMBERS OF THE COMMISSION BEFORE THE NOVEMBER 30, 1999 MEETING.

I have reviewed Commission Memorandum 99-66, and it appears that some clarification and additional comments are in order, since Memorandum 99-66 appears to suggest that I am committed to the "percentage trigger" formula as the sole basis for determination of litigation expenses. Actually, that is not correct; there is a good deal more flexibility to my position. When I made my suggestion, I was responding to the obvious concerns that the present system under CCP § 1250.410 is not operating well. It is uncertain, it has spawned needless litigation, and it lends itself to strategic behavior by parties, particularly the condemnor (as I explain in more detail presently). Finally, after the Supreme Court's recent destabilization of what little predictability existed in the § 1250.410 statutory scheme, the present law became entirely subjective with each trial judge.[1]

And so, I recommended that an award of litigation expenses be made if the award is at least 25% above the condemnor's offer. I did so for two reasons. **First,** I was working under the impression that because of its clarity and ease of administration, and the fact that this method is used by a number of other states, the staff and the Commission were viewing favorably a

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1 In *Los Angeles County Metro. Transp. Auth. v. Continental Development* (1997) 16 Cal.4th 694 , the Supreme Court laid down a new rule that enables trial judges to downgrade (or de facto disregard) the economics of the parties' appraisals, and to make the litigation expense award hinge on such subjective notions as the good faith of the condemnor (or its appraiser) in preparing its appraisal. Thus, under the present regime a condemnor's appraisal that is "out to lunch" economically, can nonetheless carry the day on the issue of litigation expenses if the judge decides that, though dead-wrong, it was prepared in good faith and with care.

That, of course, subverts the principal purpose of § 1250.410, namely to protect condemnees from having to incur litigation expenses when compelled to do so by condemnors' inadequate offers that are unreasonable in light of the evidence and the award.

percentage trigger scheme. **Second,** I recommended the 25% figure because I was being overly conservative. Staff studies indicated that the highest trigger percentage figure used by other states is 15%, so I made it even higher in order to accommodate staff concerns about resistance to legislation that would increase payments to condemnees. Nonetheless, what legitimate policy considerations suggest that California should raise the bar higher than any other state in the Union has never been explained, and I suggest that this is so for the best of reasons: there are none.

The staff has now broadened its view to include within the scope of the Commission's consideration the who-is-closer-to-the-verdict criterion as the basis for awarding litigation expenses, and the Florida sliding scale (33% to 20% of the overage) approach to quantifying the amount of attorneys' fees. See, § 73.092(1)(c), Fla.Stats. 1987.

The first of these two suggestions is reasonable, even if less favorable to the condemnees than the percentage trigger approach. The second one (though only applicable once the right to litigation expenses has been established) is also reasonable. It has the virue of being mathematically calculable, and dispenses with the present inefficient process of conducting discovery, submitting records, presenting expert evidence on fees by affidavit or at a separate hearing, etc. Florida courts have recognized the virtue of making the amount of the fees arithmetically calculable; see *State D.O.T. v. Knaus* (Fla.App. 1999) 737 So.2d 1130. This approach also has fewer decision points in it, thereby reducing the prospects of appeals. The latter point alone is important because as staff studies indicate, the issue of entitlement to and calculation of fees under CCP § 1250.410 at this time accounts for more reported appeals than any other provision of the Eminent Domain Law. Thus, adoption of the Florida approach to fee calculation would also eliminate the concerns voiced at pp. 5-6 of Memorandum 99-66 (courts bearing the costs of inefficient procedures).

However, it should be noted that this approach has a significant downside in the case of small cases. Please recall that a major inspiration for the enactment of § 1250.410 was the conceded unfairnesss of cases like *County of Los Angeles v. Ortiz* (1974) 6 Cal.3d 141, where a condemnee's entire small equity of a few thousand dollars is consumed by the cost of securing the just compensation righly due. The problem with the Florida sliding scale approach is that in the case of modest properties where the economic stakes

are low, allowing the small condemnees only 33% of the increase in their already small award as litigation expenses, is unlikely to enable them to secure competent representation and thus is likely to leave them to the tender mercies of unscrupulous condemnors, just as in the "bad old days." Yet, it is the condemnees in such small cases who are least able to bear the inadequacy of compensation, and are most vulnerable to condemnors' strong-arm tactics. Therefore, if the Florida fee calculation approach is chosen, I suggest that further consideration be given to enactment of some minimum dollar amount awardable as litigation expenses in cases where the difference is, say, $25,000 or less (the exact figure should be determined in light of empirical data that I believe can be gathered by canvassing the condemnation bar).

The bottom line of all this is that the present system, a product of compromise worked out a quarter century ago, proved to be the proverbial "horse built by a committee" (i.e., a camel). It is uncertain, it promotes rather than avoids appeals, it does not promote settlements to the extent it should, and it encourages behavior by the parties that is based on fee avoidance strategies rather than accomplishment of settlements. There is no objectively supportable reason for perpetuating it, particularly after the improvident and destabilizing impact of the *Metropolitan Development* case which subordinates the quantifiable numerical aspects of the § 1250.410 approach to the vague and subjective criterion of a trial judge's evaluation of the good faith and care in the preparation of an appraisal report, and expressly authorizes trial judges, if they so choose, to deem plainly and grossly incorrect appraisals to be reasonable and prepared with care.[2]

Conclusion: the present system should be replaced with another one that lends itsef to more predictable and more efficient application that serves the legislative purpose of indemnifying condemnees forced to litigate

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2 The fact is that the present formula provides judges with the opportunity to engage in undisclosed, subjective decisions that irrespective of the inadequacy of the offer the condemnee "got enough," thereby de facto trumping the legislative intent behind the § 1250.410 statutory scheme. All a judge needs to do is say that the condemnor's offer (however objectively, numerically inadequate) was "reasonable," or that the condemnee's demand (however close to the award) was "not reasonable," and that's that. The present scheme, no matter what it says, de facto makes the award and its amount discretionary with the judge, even as it purports to set up standards and criteria that de facto need not be followed, even though their litigation consumes much time, effort and resources.

inadequate offers, without consuming as much judicial time and effort as the present one. The percentage trigger formula and the who-is-closer-to-the-award formula both meet these criteria. Though either is acceptable, I favor the former because the latter (who is a better guesser?) detracts from the policy of encouraging settlements early on and still encourages some strategic behavior.

However, all this leaves a big loose end. The present law determines entitlement to litigation expenses by reference to a special offer made 30 days before trial under CCP § 1250.410, and that gives rise to problems. To appreciate those fully, let me briefly review the offer process as it now exists. The condemnor gets to make the following offers:

> **First,** the prelitigation offer under Gov't. Code § 7267.1 based on an appraisal performed by the condemnor (Gov't. Code § 7267.2(a).
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> **Second,** it is a well nigh universal practice that condemnors make a deposit under § 1255.010 at the commencement of condemnation proceedings. Ironically, thought that deposit is supposed to be a good faith estimate, *based on an appraisal,* of "the probable compensation that will be awarded in the proceeding" (§ 1255.010(a)), it is not admissible in evidence (§ 1255.060) thereby giving the condemnor a "free pass" to make inadequate deposits without being called to effective account.[3] Section 1255.010(a) requires that before making such a deposit the condemnor have a qualified expert prepare an appraisal and express in a written statement the basis for his opinion (see § 1255.010(b)). Though not formally denominated as an "offer" such a deposit is manifestly a statement of the condemnor's appraiser and of the entity employing him that the amount

[3] In theory, § 1255.030(a) provides for motions to alter the amount of the deposit but in practice that is no remedy because at the time of the deposit the condemnee usually has no appraisal (or even an appraiser) and is in no position to effectively challenge the amount of the deposit with competenet evidence. Moreover, should a condemnee be able to do so, that would require the preparation of and the putting on of a mini-valuation trial that would only add to the expenses incurred by the condemnee to secure what he or she should have received in the first place.

deposited is a good faith estimate of just compensation and as such capable of acceptance.

Thus, at the beginning of a condemnation proceeding the condemnor is required by law to perform as many as *three* appraisals. Isn't that enough? Shouldn't we be able to say that after three bites at the valuation apple the condemnor should be held to its figure?

Third, at least 40 days before trial the parties (including the condemnor) are required on demand to prepare their respective statements of valuation data (§ 1258.210) and exchange them (§ 1258.220). This is done in virtually every case. In Los Angeles County (where historically, most eminent domain cases are filed) this is not optional; an exchange of appraisal opinions and data is mandatory under a local court policy, and is administered by a special eminent domain department of the Superior Court.[4]

Historically, as a matter of practice, at this point the condemnor presents the formal opinion of a retained independent appraiser who is usually not the condemnor's regular employee, and whose opinion of value becomes the basis of the condemnor's valuation case to be presented to the jury.[5]

Here again, though not formally denominated as "offers" such statements are the functional equivalent thereof because they are formal representations of each party's opinion of value that will be offered into evidence at trial. Should the respective opinions of value overlap, the case would be over. I am aware of one case where the condemnor's exchanged valuation figure overlapped

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4 For a description of the historical development of that system see Gideon Kanner, Sic Transit Gloria: *The Rise and Fall of Mutuality of Discovery in California Eminent Domain Litigation*, 6 Loy. L.A. L.Rev. 447, 452-454 (1973).

5 In that connection please bear in mind that under Evidence Code § 813 value may only be shown by opinions of qualified witnesses, so that in the typical case the appraiser's opinion is the case.

with the condemnee's, and the trial court ruled as a matter of law that the case was over because there was no issue left to try to a jury.

Fourth, under § 1250.410, at least 30 days before trial, both sides are required to file their respective "final"[6] offer and demand on which the award of litigation expenses *vel non* will be determined.

Fifth, the parties may later file additional offers and demands "prior to or during trial"[7] and those may then be considered by the court in determining the amount of litigation expenses, if the trial court chooes to award theml; § 1250.410(b).

Thus, if a new system is to meet the criteria of rationality, predictability, and of providing incentives to settlement, the "offer" against which the award is to be measured must also be reconsidered and reformed.

I believe that the present system of making the one offer that counts only 30 days before trial should be scrapped along with the other complexities of § 1250.410. The purpose of the fee-shifting statute is to discourage lowball offers that force the parties to incur the expenses of appraisal and trial preparation in cases that shouldn't be tried, and to motivate the parties to discount the probable outcome as best they can without incurring the considerable cost of full-bore trial preparation. A meaningful offer that meets

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6 I use quotation marks because though "final" insofar as determination of condemnor's liability for litigation expenses is concerned, it is subject to being supplemented by additional offers which under § 1250.410(b) bear on the amount of litigation expenses awarded by the court, so that to that extent the "final" offers are not really final.

7 I respectfully but forcefully submit that this provision in the law serves no purpose except to facilitate strategic behavior by the parties. A major reason behind the adoption of CCP § 1250.410 was to recompense condemnees faced with inadequate offers and to encourage settlements before trial (which is why the offer and demand must be filed 30 days before trial). But having forced its adversary to go to trial with an inadequate offer, and having thus forced the condemnee to incur the considerable expenses of trial preparation, a condemnor should not now be given what is in fact the fifth or sixth bite at the apple; i.e., the opportunity to reduce the amount of the condemnee's recovery of litigation expenses by filing supplemental offers once it becomes evident in trial that the condemnor's case is not persuasive, or perhaps even not in good faith.

these criteria should therefore come at a time when settlement will accomplish these economic efficiencies. The present system delays the meaningful offer until after the parties have incurred the substantial expenses of formal appraisal and trial preparation (including often in limine motions). This is inefficient and unfair to the condemnee.

Shifting the time of the offer to an earlier time will not be unfair to the condemnor for a number of reasons. Please keeep in mind that condemnors usually have staff appraisers who prepare appraisals before the condemnation resolution is even passed. Indeed, they are required to do so by Gov't. Code § 7267.1. Also, unlike condemnees, they also have available to them a number of independent appraisers whom they regularly employ. Last but not least, condemnors also have a much longer lead time in which to prepare a proper appraisal, since they initiate the acquisition process at a time of their choosing. In contrast, the typical condemnee has no stable of available appraisers, must select one on a forced draft basis, usually after the condemnation action is filed, and in the great majority of cases experiences a condemnation once in a lifetime. Thus, the relative burdens are grossly unequal; it is a lot easier for the condemnor to come up with a reliable appraisal early in the game -- indeed the law requires it to do so -- than it is for the typical condemnee.[8]

I would therefore propose that the condemnor's second "offer" (i.e., the good faith court deposit) be deemed the determinative event on which to base the award of litigation expenses. I have chosen that figure not only because it is the condemnor's second or third statement of valuation supported by an appraisal, but also because by law it is required to represent the condemnor's good faith and "realistic" estimate of the just compensation due the condemnee (see *Redevelopment Agency v. Gilmore*, 38 Cal.3d 790, 805 (1985). Given these solemn statutory criteria, that figure does not lend itself to being "blown off" as merely unreliable litigational posturing. If a condemnor

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[8] For an egregious example of the harshness with which courts can demand expeditious appraisal preparation from condemnees, see *Swartzman v. Superior Court* (1964) 231 Cal.App.2d 195 (condemnee ordered to select and hire an appraiser, have him complete an appraisal and have that appraisal exchanged pursuant to a court discovery order, all in 60 days). See, 6 Loy.L.A. L. Rev. at 454, for an exposition of the factual details of that case.

It seems only fair to observe that if a condemnee can be ordered to perform a final, binding appraisal on such short notice, it does not seem unfair to require condemnors to do the same within a period of time that spans at least a year or two.

chooses not to treat it seriously, it -- not the condemnee -- should bear the consequences of choosing to disregard its solemn statutory obligation.

Recall further that the condemnor's deposit carries with it substantial benefits to it, not the least of which is the permanent securing of an advantageous date of value. See § 1263.110(a) (date of deposit becomes the date of value no matter when the case is tried and no matter how market values may change in the interim). Also, the deposit enables the condemnor to take immediate pretrial possession if it chooses to do so, under § 1255.410. In short, the deposit under § 1263.110 is by law decreed to be a solemn act with enormous benefits to the condemnor and correlative adverse consequences to the condemnee. It is therefore no more than fair to impose on the condemnor the duty of having to treat that deposit (and the appraisal on which it is based) seriously, and not as a perfunctory act that must be gotten over with to gain an advantageous date of value or early possession. As the Civil Code puts it: "He who takes the benefit must bear the burden" (Civil Code § 3521).

Alternatively, if that approach is not acceptable to the Commission, the disclosed valuation figure the condemnor intends to present at trial (under § 1258.230 or under the Los Angeles County Eminent Domain Policy Memorandum; see *Swartzman, supra*) should at the very least be deemed the "offer," against which the reasonableness of the condemnor's position should be gauged in determining entitlement to litigation expenses. That figure is presented after the case has been fully prepared for trial and should be treated seriously.

Insofar as the present law also allows the making of suplemental offers that may be considered by the court in fixing the *amount* of the entire amount of litigation expenses, I suggest that this is not a fair procedure, certainly not to the extent that § 1250.410 permits such supplemental offers to be made as late as during trial. Having forced the condemnee into a costly trial, the condemnor should not be heard to say something like "Yes, we unfairly forced you to spend large sums in preparation for trial, and to actually litigate at great cost, but now that we have seen how the case plays in open court we are upping our inadequate pretrial offer in order to diminish your recovery of litigation expenses which we now may have to pay." This is a prime example of what I mean by the term "strategic behavior" -- i.e., offers being made not to accomplish settlement but for the purpose of speculating

on a favorable outcome, and failing that, dimimishing an award of litigation expenses to which the condemnee would be otherwise entitled.

I have also reviewed Prof. Kelso's preliminary memo on eminent domain settlement statistics, but inasmuch as it is now conceded that additional data need to be considered (and are being assembled) I will refrain from commenting on that memo at this time.

You should have received by now the articles from the *Salt Lake Tribune*, that -- in Bernie Witkin's immortal words -- bring us sad but dependable news for the bald. The practice of making lowball offers and of undercompensating condemnees is prevalent, and it needs to be addressed candidly. Even Prof. Kelso's admittedly preliminary data suggest that the situation in California is not fundamentally different from Utah -- condemnees who don't cave in and litigate their just compensation, succeed in most cases in obtaining a substantial increase over the condemnors' inadequate prelitigation offer, all of which is consistent with the studies made over the years. If that is how the condemning agencies mean to conduct themselves, no reason appears why they should not be called upon to pay the true cost of their behavior when they are called to account in court.

Last but not least, some fundamentals need to be kept in mind. Eminent domain cases are different than other litigation. The defendant-condemnee is not in court because of anything he or she may have done. These are cases in which citizens from all walks of life are dragged into court for the purpose of having their property forcibly taken from them in order to create a public benefit, or in the case of redevelopment, to create private economic benefits. As both the courts and commentators have recognized, the true cost of public improvents encompasses not just the cost of the land and the costs of construction, but also the quantifiable harm imposed in innocent citizens whose property is taken from them in the proess. Thus, one would think that the law governing such proceedings should be fair and predictable, and should take such losses into account. After all, a condemnation proceeding is nothing less than the enforcement of a vital provision of the Bill of Rights. As things stand now, however, most condemnees do not receive the promised full and fair compensation for their losses, and, adding insult to injury, in too many cases they are compelled to spend substantial sums of money to receive even the limited compensation to which they are indisputably entitled.

The Commission has before it the opportunity to rectify an injustice. The experiment embodied in CCP § 1250.410 has gone on for a quarter of a century and it is now clear that, though better than what we had before 1974, it isn't working; certainly not as fairly or efficiently as it should. It's time for a change.

Jury Verdicts in California Eminent Domain Cases:
Some Descriptive Statistics
Institute for Legislative Practice
(November 11, 1999)

I. Research Focus

In order to assist the California Law Revision Commission's consideration of proposed changes to California's eminent domain law, we collected from Westlaw and Lexis databases all verdict reports of eminent domain cases in California over the last twelve years. The raw data was examined to develop descriptive statistics regarding average judgments in both jury and bench trials, the relationship between judgments and final offers by plaintiffs and defendants, the length of trials, the length of jury deliberations, and the average expense of eminent domain trials.

II. Data Collection

The data for this empirical study was obtained from the Westlaw database for the California Jury Verdict Reporter and the Lexis database for California jury verdict reports. We reviewed cases dating from early 1985 through April 15, 1999. After removing duplicate cases and discarding cases because of missing or incomplete data, we were left with an overall sample of 237 eminent domain trials.. We divided the sample into jury (n=229) and bench (n=8) trials. The small sample of bench trials counsels caution in interpreting those results. According to Judicial Council statistics, over roughly the same period of time covered by our sample, there were approximately 1,150 eminent domain dispositions after a contested trial. Thus, the 237 cases we reviewed represents a sample of approximately 20% of all eminent domain contested trials over the same period.

III Results

A. Verdict Amounts

The mean[1] of jury verdicts in the sample of eminent domain cases was $1,604,392. *See* Table A. The distribution of jury verdicts was skewed in the positive direction (skewness=8.642) as a result of several very large verdicts (the five highest jury verdicts were $55,661480, $17,776,075, $16,388,000, $13,550,000, and $12,782,418). To remove the distorting effect of these few large judgments, we report the trimmed mean[2] for the sample, which equals $929,384.

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[1] The "mean" is a measure of the central tendency of a sample. It is the arithmetic average of the sample which is calculated by dividing the sum of the verdicts by the number of verdicts.

[2] Trimmed mean figures are calculated after discarding the highest and lowest 5% of the sample. Trimmed means better reflect the central tendency of the data and are appropriate when a sample is highly skewed

	Mean Judgment	Trimmed Mean	Plaintiff's Offer to Judgment	Defendant's Offer to Judgment	Verdict to Settlement Ratio
Jury (n=229)	$1,604,392	$929,384	.71	1.39	1.10
Bench (n=8)	$831,626	$829,829	.75	4.9	.99

Table A. Verdicts in Eminent Domain Cases in California – 1988 to 1999

The mean of bench verdicts was $831,626. Because the distribution of the few bench verdicts was not highly skewed (skewness=.104), the trimmed mean, $829,829, is very close to the mean.

The jury verdict reports indicate what the plaintiff's and defendant's last settlement offers were. This information can be used to compare settlement offers with the actual verdict entered by the jury or court. We found that, on average, the plaintiff's offer was 71% of the final verdict in jury cases, and the defendant's offer was 139% of the final verdict in jury cases (these numbers were calculated using the "trimmed" sample to avoid the distorting effect of outliers). In other words, plaintiffs ordinarily offer less than the final verdict, and defendants ordinarily ask for more than the final verdict.

In order to represent the relationship between final settlement offers and the final verdict in a single number, we divided the final verdict by the average of the plaintiff's and defendant's last offer. This calculation produced what we have labeled the Verdict to Settlement Ratio. The Verdict to Settlement Ratio of 1.10 for jury verdicts indicates that, on average, jury verdicts exceed the average of plaintiff's and defendant's last offers by 10% (a ratio of 1.00 would mean that the jury verdicts exactly equal the average of plaintiff's and defendant's last offers). This means that, on average, juries are awarding damages that are slightly closer to the defendant's last offer than to the plaintiff's last offer, although the difference is not substantial.

For bench verdicts, on average, the plaintiff's offer was 75% of the bench judgment, and the defendant's offer was 409% of the bench judgment (this high number resulted from two extremely high demands that were 13 times larger than the ultimate judgment). On average, the Verdict to Settlement Ratio was 0.99, very close to the average of the plaintiff's and defendant's last offers.

At Professor Gideon Kanner's suggestion, we separately analyzed cases where the total verdict was in excess of $1,000,000. The hypothesis was that in large-dollar cases, the government and property owner and their counsel might behave somewhat differently in making demands and offers than in lower dollar amount cases. There were

73 $1,000,000-plus cases in the sample. The mean jury verdict in this restricted sample was $4,412,705, and the trimmed mean was $3,343,201. On average, the plaintiff's offer (based on trimmed mean cases) was 70% of the jury's verdict, and the defendant's offer was 113% of the jury's verdict. These figures suggest that the government treats $1,000,000-plus cases in the same way as they treat $1,000,000 and under cases. In both types of cases, the government on average offers around 70% of the jury's verdict. By contrast, the property owner in $1,000,000-plus cases made demands that were significantly closer to the jury's verdict, only 113% of the verdict compared to 162% of the verdict for defendant's offers in $1,000,000 and below cases (based on a sample of 156 cases). This difference in mean demands is statistically significant at the 95% confidence level (p=.001).

The Verdict to Settlement Ratio was 1.16 in $1,000,000-plus cases and 1.06 for the $1,000,000 and below cases. These numbers indicate that in the $1,000,000-plus category, the jury verdicts are 16% higher than the average of the government's and property owner's last offers, and in $1,000,000 and under cases, jury verdicts are a modest 6% higher than the average of the government's and property owner's last offers. The difference is statistically significant at the 95% confidence level (p=.044). Because the government on average offers 70% of the verdict in both categories of cases, the difference is attributable to the fact that property owners in the $1,000,000-plus cases tend to make lower demands compared to the average verdict than property owners in $1,000,000 and under cases.

B. Trial Length

The mean duration of jury trials was 8.4 days, and the trimmed mean duration was 7.3 days. *See* Table B. The four longest eminent domain jury trials took 60, 40, 35, and 35 days to complete. The four shortest eminent domain jury trials lasted 1.5, 2, 2, and 2 days. A brief review of the descriptions of the cases suggests that trial length depends in large part upon the complexity of the case and the number of parties involved. The cases with greater trial days typically involved multiple parties and complex issues involving commercial property. The mean duration of bench trials was only 4.1 days, and the trimmed mean duration was 3.9 days.

	Mean Trial Days	Trimmed Mean Trial Days	Maximum # Days	Minimum # Days
Jury (n=229)	8.4	7.3	60	1.5

Bench (n=8)	4.1	3.9	12	_

Table B. Eminent Domain Cases – Time of Trial

C. Length of Jury Deliberations

The mean duration of jury deliberations was .93 days, and the trimmed mean was .81 days. The longest deliberation lasted 7 days, and the shortest deliberation was less than 1 hour.

D. Average Expense

On average, an eminent domain jury trial will last 9.4 days including deliberations. In courts reserving Fridays for law and motion matters, this translates into roughly two weeks to take a jury case through trial to verdict. Although bench trials come to disposition sooner than jury trials, an eminent domain bench trial consumes an entire week on average.

Informed estimates suggest that it costs approximately $3,000 to $3,500 per day to run a courtroom, including salaries and overhead (but excluding the cost of attorneys for the plaintiff and defendant). Using an average of $3,250 as the cost per day, the typical eminent domain jury trial costs about $30,550. The typical bench trial costs about $13,000.

The average difference between the plaintiff's and defendant's last offers based on the trimmed sample is $428,812. One way of viewing the data is that, on average, the courts are devoting approximately $30,000 to resolve by jury trial a dispute involving a difference of opinion amounting to approximately $430,000.

Respectfully submitted,

Todd A. Schaffer & J. Clark Kelso