Study Em-459 March 22, 2001

First Supplement to Memorandum 2001-24

Evidence of Prejudgment Deposit Appraisal in Eminent Domain: Comments on Tentative Recommendation

Attached to this supplemental memorandum is a letter from Gideon Kanner responding to the remarks of June Ailin (see Memorandum 2001-24, Exhibit p. 3).

Prof. Kanner disagrees with Ms. Ailin's characterization of the prejudgment deposit as being in the nature of a settlement offer. The deposit merely enables the condemnor to obtain prejudgment possession and fixes the date of valuation. (Staff Note: The property owner's withdrawal of a deposit is not an acceptance of an offer; the withdrawal does not waive the property owner's claim for greater compensation. See Code Civ. Proc. § 1255.260.)

Prof. Kanner argues that it is important for the property owner to test the credibility of an appraisal witness by showing prior inconsistent statements, as may be done in litigation generally. This is particularly true in eminent domain cases where property valuation may only be shown by expert testimony.

Prof. Kanner is likewise unimpressed with the argument that local entities cannot afford to hire two appraisers — one for the prejudgment deposit and a different one for trial. There is nothing to preclude a local entity from using the same appraiser; the appraiser will have to be honest and the local entity will not be able to "lowball" the property owner. Prof. Kanner quotes from a New Jersey court that "judicial estoppel prevents the State from taking a different position at trial concerning the value of the property from that which it had assumed when it made its offers and deposited with the court clerk what it considered to be the property's fair market value." This is consistent with existing California law as interpreted in the *Pinole Point* case, which would be codified in the Commission's tentative recommendation.

Respectfully submitted,

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March 11, 2001

Re: Memorandum 2001-24
Prejudgment Deposit – Response to Letter of June Ailin

I have a copy of Ms. Ailin's letter to the Commission, dated February 27th, 2001. Most of her contribution replows familiar ground, so I will not address that part of it.

I write only to make two points:

First, contrary to Ms. Ailin's suggestion, the prejudgment deposit is not a settlement offer, and is not entitled to protection from disclosure as such. A condemnee has no right to accept the deposit amount and terminate the proceeding. The purpose of the prejudgment deposit is (a) to enable the condemnor to take prejudgment possession if it so desires, (b) to "buy" an advantageous date of value (by freezing the date of issuance of summons as the date of value for all time), and (c) to comply with Art. I, § 19 of the California Constitution when prejudgment possession is sought. The policies that protect settlement offers from disclosure at trial have nothing to do with this situation. Therefore, the suggestion that the inconsistency inherent in an appraiser singing one tune when providing the basis for a deposit but intoning another one when testifying as an expert witness at trial, should be protected by law from disclosure, lacks legal and ethical merit. Evidence Code § 769 makes inconsistent witness statements admissible in all other cases, and no reason appears why the rule should be different in eminent domain cases. The witness' credibility is always important, and in eminent domain cases *it is usually the whole case* because under Evidence Code § 813, value – the only issue before the jury -- can only be shown by opinion evidence of qualified witnesses. Moreover, in the worst case scenario, the rule urged by Ms. Ailin would facilitate outright perjury.

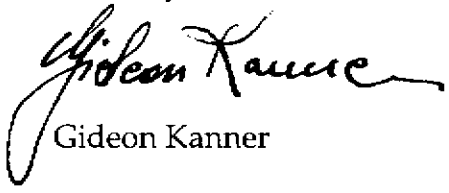
Second, Ms. Ailin's suggestion that the substantial rights of condemnees be sacrificed to make the procedure more convenient to condemnors does not withstand scrutiny either. There is nothing in the proposed law revision that would prevent condemnors from using the same appraiser for preparation of the valuation statement necessary to secure a prejudgment deposit order and then for trial. They remain perfectly free to do so. It's just that their chosen appraisers

would not be able to blow hot and cold on the same issue – i.e., tell one economic story to the judge, and another, different one to the jury. This sort of jiggery-pokery would further facilitate the denounced practice of "lowballing" or "sandbagging" – i.e., the practice of having one condemnor's appraiser testify to a higher figure in connection with a prejudgment deposit, and then having another one testify at trial to a lower figure to put pressure on the condemnee. As noted in the leading California text (Condemnation Practice in California, Vol. 1, § 9.62, pp. 445-446 (CEB 1999)) this practice has been widely denounced as improper. It is also in violation of the Uniform Relocation Assistance Act's prohibition of coercive tactics. This is true *even when two appraisers are used to pull it off*. Ms. Ailin's proposal would now make things worse by making this process cheaper and opening the door to demonstrably perjurious appraisal testimony, while shielding the untruthful witnesses from cross-examination. If that isn't a denial of due process, then what is?

I am unable to improve on the observation of the New Jersey court in *State v. Fairweather*, 689 A.2d 817 (1997): "Although it is clear that the offers themselves are not evidential under the statute, judicial estoppel prevents the State from taking a different position at trial concerning the value of the property from that which it had assumed when it made its offers *and deposited with the court clerk what it considered to be the property's fair market value.*" (Emphasis added). *Pinole Point* is consistent with this view; *World Wide Enterprises* is not. The fact that the Court of Appeal vacated and depublished the latter opinion upon being more fully informed by additional briefing speaks for itself.[1]

The present rule is harsh and unconstitutional, and the court in the *Pinole Point* case properly drew a line beyond which the interpretation of statutes cannot go without colliding with the Constitution. For Ms. Ailin to come along now and object to this wholesome limitation on such improprieties imposed by *Pinole Point*, and argue that things should be made worse on the basis of an ill-considerdd and since depublished Court of Appeal case, does not commend itself to the Commission's favorable consideration.

Sincerely,



Gideon Kanner

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[1] As the Commission may be aware, I was the author of the *amicus curiae* letter-brief addressed to the *World Wide Enterprises* court, that resulted in the grant of rehearing, and evidently inspired the Redevelopment Agency to settle immediately by increasing its compensation by a six-figure increment. A copy of that letter was supplied to the Commission at the time, and I am sure Nat Sterling can provide the Commissioners with copies.