

CALIFORNIA LAW REVISION COMMISSION

TENTATIVE RECOMMENDATION

Early Disclosure of Valuation Data and Resolution of Issues in Eminent Domain

July 2000

This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be a part of the public record and will be considered at a public meeting when the Commission determines the provisions it will include in legislation the Commission plans to recommend to the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made in the tentative recommendation.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN September 15, 2000.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

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1 SUMMARY OF RECOMMENDATION

2 This recommendation proposes a number of improvements in the law intended
3 to facilitate resolution of eminent domain cases without the need for trial. Specific
4 proposals include requiring an exchange of valuation data 90 days before trial
5 coupled with a process enabling early resolution of legal disputes and
6 authorization of voluntary alternative dispute resolution. To the same end, the
7 recommendation requires more detailed disclosure of prelitigation appraisal
8 information together with disclosure of positions on loss of business goodwill.

9 This recommendation was prepared pursuant to Resolution Chapter 81 of the
10 Statutes of 1999.

Contents

EARLY DISCLOSURE OF VALUATION DATA AND RESOLUTION OF ISSUES IN EMINENT DOMAIN	1
BACKGROUND	1
MORE DETAILED PRETRIAL APPRAISAL INFORMATION	2
Prelitigation Appraisal	2
Prejudgment Deposit Appraisal	3
EXCHANGE OF VALUATION DATA	3
Timing of Data Exchange	4
Proposed Revision	4
BUSINESS GOODWILL ISSUES	5
Exchange of Valuation Data	5
Calculation of Loss of Goodwill	7
Offer and Demand	7
EARLY RESOLUTION OF LEGAL ISSUES	8
Existing Law	8
Statutory Procedure	8
Timing Issues	9
Trial Judge	9
ENCOURAGE ALTERNATIVE DISPUTE RESOLUTION	10
Condemnor Reluctance To Use ADR	10
Limited Time Available For ADR	10
PROPOSED LEGISLATION	11
Code Civ. Proc. §§ 1250.410-1250.430 (amended). Article heading	11
Code Civ. Proc. § 1250.410 (amended). Pretrial settlement offers	11
Code Civ. Proc. § 1250.420 (added). ADR authorized	12
Code Civ. Proc. § 1250.430 (added). Stay of trial during ADR	12
Code Civ. Proc. § 1255.010 (amended). Deposit of probable compensation	12
Code Civ. Proc. § 1258.220 (amended). Date of exchange	13
Code Civ. Proc. § 1258.260 (amended). Contents of statement of valuation data	13
Code Civ. Proc. § 1260.040 (added). Resolution of legal issues affecting valuation	15
Gov't Code § 7267.2 (amended). Precondemnation offer	15

1 EARLY DISCLOSURE OF VALUATION DATA
2 AND RESOLUTION OF ISSUES IN EMINENT
3 DOMAIN

4 BACKGROUND

5 In almost all condemnation cases, the primary issue is the amount of
6 compensation. Evidence is introduced in support of each party's contention of the
7 value of the property taken and damages to the remainder. Valuation disputes may
8 arise from such matters as differing interpretations of sales data and differing
9 opinions of highest and best use, probability of changes in zoning, probability of
10 dedication, feasibility of development, and legal compensability of loss.¹

11 Existing California law seeks to encourage settlement of eminent domain
12 valuation disputes by requiring the parties to make their final offers and demands
13 before the commencement of trial.² Attorney fees may be awarded to the property
14 owner if the final pretrial demand of the property owner was reasonable and the
15 final pretrial offer of the condemnor was unreasonable.³

16 Other inducements to settlement include special provisions for exchange of
17 valuation data by the parties. As a general rule, conventional discovery techniques
18 have been of little value in generating useful information concerning the key
19 points of disagreement between the parties. This is because the critical evidence in
20 eminent domain proceedings is expert opinion testimony, and valuation experts
21 who may be called to testify at trial resist formulating an opinion for that purpose
22 until the time of trial. For this reason, California has adopted special discovery
23 rules for eminent domain proceedings, which provide for an early exchange of
24 valuation data on demand of a party.⁴

25 While the parties do not always take advantage of the availability of the
26 exchange procedure for various tactical reasons, there is a strong incentive to use it
27 due to the operation the litigation expense statute. Because an award of litigation
28 expenses is predicated on the reasonableness of the parties, each party must make
29 a good faith effort to understand and respond to the other's case. A party who does
30 not seek to review the opponent's case in advance of trial is at risk of being
31 determined not to have acted reasonably in the proceeding.

32 The various incentives for the parties to resolve the eminent domain dispute
33 without the need for a lengthy and expensive trial have been reasonably
34 successful. During the three year period from July 1, 1996, to June 30, 1999, for

1. See, e.g., Matteoni, *Trial Preparation and Trial*, 1 Condemnation Practice in California 2d § 9.2 (Cal. Cont. Ed. Bar 1999).

2. Code Civ. Proc. § 1250.410.

3. Ibid.

4. Code Civ. Proc. §§ 1258.210-1258.300.

1 example, there were 3,783 eminent domain cases filed statewide.⁵ Of the 3,477
2 pending eminent domain cases disposed of statewide during that period, 3200
3 (92%) were either disposed of before trial or after trial as uncontested matters.
4 Only 277 (8%) were disposed of after trial as contested matters.

5 The governing statutes, while salutary, are not free of problems. In particular, the
6 provisions applicable to the exchange of valuation data could be improved, as well
7 as pretrial procedures for resolving legal disputes affecting valuation. The Law
8 Revision Commission proposes in this recommendation a number of revisions of
9 the law intended to facilitate resolution of eminent domain cases without the need
10 for trial.

11 MORE DETAILED PRETRIAL APPRAISAL INFORMATION

12 There are two statutorily-required appraisals performed by the condemnor before
13 the litigation positions of the parties are solidified in their final pretrial offers and
14 demands:

15 • Under the Relocation Assistance Act, before a condemnor commences
16 proceedings it must appraise the property and provide the owner a written
17 statement of, and summary of the basis for, the amount it offers as just
18 compensation.⁶

19 • After the proceeding is commenced, the condemnor ordinarily makes a
20 prejudgment deposit of probable compensation, based on the condemnor's
21 appraisal of the property. The condemnor must give the property owner notice of
22 the deposit and "a written statement or summary of the basis for the appraisal."⁷

23 The data provided to the property owner in these two instances lacks sufficient
24 detail to enable a property owner to evaluate and act rationally in response to the
25 condemnor's offer. Most agencies do not provide a list or a representative number
26 of comparable sales. A requirement that the condemning agency provide the
27 elementary data supporting the appraisal would engage the parties in early
28 discussion, with a greater chance for a negotiated settlement.

29 **Prelitigation Appraisal**

30 Existing law requires that, in the case of the prelitigation offer, in addition to
31 providing the statement and summary, the condemnor must also allow the property
32 owner to review a copy of the appraisal itself.⁸ The review right is limited,
33 however, to appraisals of owner-occupied residential property of not more than
34 four dwelling units. This limitation substantially undercuts the usefulness of the

5. These numbers are drawn from Judicial Council statistics for the three-year period including fiscal years 1996-97, 1997-98, and 1998-99. All percentages are rounded to the nearest whole.

6. Gov't Code §§ 7267.1-7267.2.

7. Code Civ. Proc. §§ 1255.010-1255.020.

8. Gov't Code § 7267.2(a).

1 review right. Valuation of small residential properties is the least difficult and least
2 contested of eminent domain issues; it is valuation of large residential and
3 commercial properties that is most difficult, where full disclosure of appraisal
4 information would be most useful for understanding the parties' positions.

5 The Commission recommends that the prelitigation appraisal be made available
6 to the property owner regardless of the type of property involved.⁹ To ensure that
7 the condemnor is not harmed by this disclosure, the Commission further
8 recommends that the appraisal be inadmissible as evidence of value or as an
9 admission of the condemnor. Its use at trial would be strictly limited to
10 impeachment of an expert who prepared the appraisal.

11 **Prejudgment Deposit Appraisal**

12 More adequate information about the basis of the prejudgment deposit appraisal
13 is also appropriate. The summary of the appraisal prepared by the condemnor
14 should contain basic information — the highest and best use of the property on
15 which the appraisal is based, the key comparable sales on which the appraisal is
16 based, and if there are damages to the remainder, an explanation and calculations
17 illustrating how the compensation for damages and offsetting benefits to the
18 remainder were determined. The law should be revised to require this.

19 EXCHANGE OF VALUATION DATA

20 The valuation exchange statute was first enacted in 1967 on recommendation of
21 the Law Revision Commission.¹⁰ The Commission pointed out the unique
22 problems of eminent domain discovery, the effective use of exchange procedures
23 in Los Angeles, and the need for uniformity throughout the state. An early
24 exchange of valuation data would provide a relatively inexpensive means of
25 eminent domain discovery, reduce the necessity for interrogatories and
26 depositions, and provide a number of other advantages:¹¹

27 First, it will tend to assure the reliability of the data upon which the appraisal testimony is based.
28 The parties will have had an opportunity to test the data through investigation prior to trial. The
29 opportunity for pretrial investigation should curtail the time required for the trial and in some cases
30 may facilitate settlement. Second, if the exchange of information takes place prior to the pretrial
31 conference, the conference may serve a more useful function. Having checked the supporting data
32 in advance, the parties may be able to stipulate at the pretrial conference to highest and best use, to
33 the comparability of other sales, to the admissibility of other evidence, and perhaps even to the
34 amounts of certain items of damage.

9. Existing law provides that the property owner may “review” a copy of the appraisal. The scope of the review requirement is unclear. A copy of the appraisal should be provided to the property owner outright.

10. 1967 Cal. Stat. ch. 1104.

11. *Discovery in Eminent Domain Proceedings*, 8 Cal. L. Revision Comm’n Reports 19, 21 (1967)

1 **Timing of Data Exchange**

2 Since enactment of the valuation data exchange statute, there has been a
3 consistent trend to push the data exchange ever earlier in the proceedings. As
4 enacted, the statute provided for an exchange 20 days before trial¹² — too close to
5 the time of trial to be of practical use to the parties. The defect was corrected in
6 1975, providing for a mutual exchange 40, rather than 20, days before trial.¹³

7 Legislation enacted in 1999 pushes the exchange back to 60 days before trial.¹⁴
8 The time period was extended to give both parties an adequate opportunity to
9 examine each other's valuation data and depose expert witnesses before making a
10 final pretrial offer or demand. The intent was to facilitate reasonable offers and
11 demands, resulting in a greater number of settlements; it could also yield reduced
12 court costs.¹⁵

13 The purpose of the pretrial exchange of valuation data — to provide each party
14 with the relevant facts on which the opposition will base its valuation opinion — is
15 not always accomplished. Critics have noted a number of obstacles to effective
16 exchange of data, including that further discovery following an exchange is
17 ordinarily necessary. However, because the exchange does not occur until late in
18 the pretrial process, discovery may be needed very close to the commencement of
19 trial.¹⁶

20 **Proposed Revision**

21 While the 60-day period will allow more time for the parties to make an
22 evaluation of the case and will address some of the defects that have been noted in
23 the exchange statute, the 60-day period is unlikely to allow adequate time for
24 application of pretrial resolution techniques such as judicial determination of
25 valuation-related legal issues and use of alternative dispute resolution.

26 The Law Revision Commission recommends that the presumptive date for
27 exchange of valuation data should be 90 days before trial. This period should be
28 more adequate in facilitating pretrial resolution of eminent domain cases. In
29 addition, absent pretrial resolution, the period will allow the parties to make better-
30 reasoned final offers and demands.

31 In some cases, the 90-day exchange could occur so early in the proceedings that
32 the parties will not have had sufficient time to retain appraisal experts, complete
33 initial discovery, and obtain appraisals from their expert witnesses. To guard
34 against that possibility, all parties should be provided a minimum of nine months
35 after the case is filed before they may be required to exchange valuation data. The

12. Former Code of Civil Procedure Sections 1272.01-1272.09.

13. Code Civ. Proc. § 1258.220.

14. 1999 Cal. Stat. ch. 102 § 2.

15. See *Senate Floor Analysis of SB 634* (6/17/99).

16. See, e.g., Matteoni, *Trial Preparation and Trial*, 1 *Condemnation Practice in California* 2d § 9.14 (Cal. Cont. Ed. Bar 1999); Kanner, *Sic Transit Gloria: The Rise and Fall of Mutuality of Discovery in California Eminent Domain Litigation*, 6 *Loyola L.A. L. Rev.* 447 (1973).

1 court should retain authority to provide further relief from the 90-day limit if the
2 facts in the case so warrant.

3 BUSINESS GOODWILL ISSUES

4 The following discussion duplicates the Commission’s pending recommendation
5 relating to claimed losses of business goodwill.¹⁷

6 Exchange of Valuation Data

7 The Eminent Domain Law provides for a pretrial exchange of valuation data on
8 demand of a party.¹⁸ The parties must provide a statement of valuation data for
9 each witness who will testify on (1) the value of the property taken, (2) any dam-
10 age or benefit to the remainder, or (3) the amount of “any other compensation
11 required to be paid” by specified statutes, including Chapter 9 (commencing with
12 Section 1263.010).¹⁹ Chapter 9 includes provisions that require compensation to
13 be paid for loss of business goodwill.²⁰

14 Thus the statutes on their face require goodwill valuation data to be included in
15 the data exchanged. However, a Court of Appeal opinion suggests that the statutes
16 might be made more clear on this point. In *City of Fresno v. Harrison*,²¹ the city
17 argued that its failure to provide goodwill valuation data did not violate the statute,
18 “since it is ambiguous whether the special eminent domain discovery statutes
19 applied to cases for recovery of goodwill under section 1263.510”.²² This interpre-
20 tation derives from the city’s observation that the specific types of information
21 required to be exchanged (which are listed in Code of Civil Procedure Section
22 1258.260) include factors more relevant to valuing tangible than intangible prop-
23 erty and damage.

24 Code of Civil Procedure Section 1258.260 provides:

25 1258.260. (a) The statement of valuation data shall give the name and
26 business or residence address of the witness and shall include a statement
27 whether the witness will testify to an opinion as to any of the matters listed
28 in Section 1258.250 and, as to each such matter upon which he will give
29 an opinion, what that opinion is and the following items to the extent that
30 the opinion on such matter is based thereon:

- 31 (1) The interest being valued.
32 (2) The date of valuation used by the witness.
33 (3) The highest and best use of the property.

17. See *Compensation for Loss of Business Goodwill in Eminent Domain: Selected Issues*, 29 Cal. L. Revision Comm’n Reports 719 (1999).

18. Code Civ. Proc. §§ 1258.210-1258.300.

19. Code Civ. Proc. § 1258.250(d).

20. Code Civ. Proc. §§ 1263.510-1263.530.

21. 154 Cal. App. 3d 296, 201 Cal. Rptr. 219 (1984).

22. 154 Cal. App. 3d at 302.

1 (4) The applicable zoning and the opinion of the witness as to the
2 probability of any change in such zoning.

3 (5) The sales, contracts to sell and purchase, and leases supporting the
4 opinion.

5 (6) The cost of reproduction or replacement of the existing improve-
6 ments on the property, the depreciation or obsolescence the improvements
7 have suffered, and the method of calculation used to determine
8 depreciation.

9 (7) The gross income from the property, the deductions from gross
10 income, and the resulting net income; the reasonable net rental value
11 attributable to the land and existing improvements thereon, and the esti-
12 mated gross rental income and deductions therefrom upon which such
13 reasonable net rental value is computed; the rate of capitalization used;
14 and the value indicated by such capitalization.

15 (8) If the property is a portion of a larger parcel, a description of the
16 larger parcel and its value.

17 (b) With respect to each sale, contract, or lease listed under paragraph
18 (5) of subdivision (a), the statement of valuation data shall give:

19 (1) The names and business or residence addresses, if known, of the
20 parties to the transaction.

21 (2) The location of the property subject to the transaction.

22 (3) The date of the transaction.

23 (4) If recorded, the date of recording and the volume and page or other
24 identification of the record of the transaction.

25 (5) The price and other terms and circumstances of the transaction. In
26 lieu of stating the terms contained in any contract, lease, or other docu-
27 ment, the statement may, if the document is available for inspection by the
28 adverse party, state the place where and the times when it is available for
29 inspection.

30 (6) The total area and shape of the property subject to the transaction.

31 (c) If any opinion referred to in Section 1258.250 is based in whole or
32 in substantial part upon the opinion of another person, the statement of
33 valuation data shall include the name and business or residence address of
34 such other person, his business, occupation, or profession, and a statement
35 as to the subject matter to which his opinion relates.

36 (d) Except when an appraisal report is used as a statement of valuation
37 data as permitted by subdivision (e), the statement of valuation data shall
38 include a statement, signed by the witness, that the witness has read the
39 statement of valuation data and that it fairly and correctly states his opin-
40 ions and knowledge as to the matters therein stated.

41 (e) An appraisal report that has been prepared by the witness which
42 includes the information required to be included in a statement of valua-
43 tion data may be used as a statement of valuation data under this article.

44 The Court of Appeal notes that, of the factors listed in this section, those which
45 may apply to goodwill are (1) the interest being valued, (2) the date of valuation,
46 (3) the gross income, deductions and net income, and (4) the rate of capitalization
47 and resulting value. The court states, "It is likely that section 1258.260 was written
48 without contemplation of business goodwill valuation problems. If it is not explicit
49 on the subject, as the trial court thought, it should be amended. However ill-fitting

1 the words may be, the intent is clearly to expose fully the expert’s opinion on the
2 subject concerned.”²³

3 It is a straightforward matter to remove any uncertainty, and the Law Revision
4 Commission recommends that this be done.

5 **Calculation of Loss of Goodwill**

6 There is no fixed method for valuing goodwill. The cases have held that the fol-
7 lowing techniques, among others, may be used:

- 8 • Market analysis.²⁴
- 9 • “Excess income” method.²⁵
- 10 • Capitalized value of net income or profits of business, or some simi-
11 lar method of calculating present value of anticipated profits.²⁶

12 It would be helpful to require that, in the exchange of valuation data, a goodwill
13 valuation expert identify the method used to determine goodwill and summarize
14 the data supporting the opinion.

15 **Offer and Demand**

16 The Eminent Domain Law requires that at least 20 days before trial, the parties
17 file and serve on each other their final offers and demands of compensation in the
18 proceeding.²⁷ The statute does not define what is included in the meaning of the
19 term “compensation”. If the plaintiff’s offer is unreasonable and the defendant’s
20 demand reasonable in light of the evidence admitted and the compensation
21 awarded in the proceeding, the defendant is entitled to litigation expenses.²⁸

22 At least two appellate cases have indicated that the compensation referred to in
23 this section does not include prejudgment interest (or ordinary costs).²⁹ Unfortu-
24 nately, these cases also include loose language (dictum) to the effect that the
25 provision is not intended “to require the offer and demand to cover items other
26 than the value of the part taken and damage, if any, to the remainder.”³⁰ This
27 interpretation would seem to exclude from coverage of the section compensation
28 for loss of goodwill.

29 Notwithstanding the language in the cases, the law intends that the offer and
30 demand include compensation for loss of goodwill. The statute should be revised

23. *Id.* at 302-03.

24. *Community Dev. Comm’n v. Asaro*, 212 Cal. App. 3d 1297, 261 Cal. Rptr. 231 (1989).

25. *People ex rel. Dep’t of Transp. v. Muller*, 36 Cal. 3d 263, 203 Cal. Rptr. 772 (1984).

26. *People ex rel. Dep’t of Transp. v. Leslie*, 55 Cal. App. 4th 918, 64 Cal. Rptr. 2d 252 (1997).

27. Code Civ. Proc. § 1250.410(a).

28. Code Civ. Proc. § 1250.410(b).

29. *Coachella Valley County Water Dist. v. Dreyfuss*, 91 Cal. App. 3d 949, 154 Cal. Rptr. 467 (1979);
People ex rel. Dep’t of Transp. v. Gardella Square, 200 Cal. App. 3d 559, 246 Cal. Rptr. 139 (1988).

30. *Coachella Valley*, 91 Cal. App. 3d at 954; *Gardella Square*, 200 Cal. App. 3d at 568.

1 to make clear that the final offer and demand should include all compensation
2 required by the Eminent Domain Law, including compensation for loss of
3 goodwill. For purposes of clarity, each offer and demand should also indicate
4 whether or not interest and costs are included.

5 EARLY RESOLUTION OF LEGAL ISSUES

6 **Existing Law**

7 It should become apparent at the pretrial conference whether there are questions
8 of law on which the parties disagree that affect valuation of the property.
9 Resolution of matters such as contentions over what constitutes the larger parcel,
10 whether or not there is an impairment of access, or the probability of a zoning
11 change, must be resolved before the jury trial on valuation. The pretrial conference
12 can isolate many of these questions and provide for their determination before trial
13 and, ideally, before valuation data are exchanged and final offers and demands
14 filed.³¹

15 Early resolution of legal issues can be accommodated because legal issues are
16 for court rather than jury determination. Under existing law, bifurcation of legal
17 issues may be achieved through use of various procedural devices.³² The Eminent
18 Domain Law provides structurally for early resolution of right to take issues.³³
19 However, there is nothing in the statute providing for early resolution of legal
20 disputes affecting valuation.

21 It is common for courts to establish local rules to require that in limine motions
22 to exclude evidence be filed and served in advance of the trial date. To expedite
23 testimony before a jury, courts routinely conduct hearings in limine to determine
24 the admissibility of evidence.³⁴ However, some courts resist in limine motions and
25 bifurcation, preferring to hear the matter only once and sort things out at trial.³⁵
26 While this may be efficient for the judge hearing the case, it does not save the jury
27 time, and does not foster early resolution of disputes and settlement of cases.

28 **Statutory Procedure**

29 The Law Revision Commission recommends an express statutory provision for
30 early resolution of legal issues affecting valuation in an eminent domain case.

31. See Matteoni, *Trial Preparation and Trial*, 1 Condemnation Practice in California 2d § 9.12 (Cal. Cont. Ed. Bar 1999).

32. See, e.g., Code Civ. Proc. §§ 598 (where economy and efficiency of handling litigation would be promoted), 1048 (court may order separate trial of issues where conducive to expedition and economy, preserving the right to jury trial); Evid. Code § 320 (court's power to regulate order of proof). Cf. Code Civ. Proc. §§ 588-592 (trial of issues of law and fact).

33. Code Civ. Proc. § 1260.110.

34. For example, Rule 16.10(b)(4) of the Los Angeles County superior court rules endorses the process of a hearing before impaneling the jury.

35. See Matteoni, *Trial Preparation and Trial*, 1 Condemnation Practice in California 2d § 9.24-9.25 (Cal. Cont. Ed. Bar 1999).

1 There is one model for this already in the Eminent Domain Law, although its
2 application is narrow. An “improvement pertaining to the realty” is an
3 improvement installed for use on property taken by eminent domain that cannot be
4 removed without a substantial economic loss; improvements pertaining to the
5 realty must be taken into account in determining compensation.³⁶ The Eminent
6 Domain Law provides for early resolution of a dispute over whether a particular
7 improvement should be characterized as an improvement pertaining to the realty
8 for compensation and other purposes.³⁷

9 The Law Revision Commission recommends addition of a parallel but more
10 general provision for disputes over legal issues affecting valuation.

11 **Timing Issues**

12 There must be sufficient time for the parties to examine any valuation data
13 exchanged, focus on the nature of their dispute, and obtain judicial resolution of
14 any irreconcilable disagreements over legal issues. Resolution of legal issues in a
15 timely fashion will help pave the way for a resolution of the proceeding without
16 the need for a trial.

17 Assuming an exchange of valuation data 90 days before trial, a motion for
18 resolution of legal issues should be permitted 30 days thereafter, or 60 days before
19 trial. There should be enough time during the 30-day period for the parties to
20 complete expert witness depositions and other necessary discovery, before the
21 motion to resolve legal issues must be made.

22 With standard notice, preparation, and hearing times, in routine cases the
23 resolution of legal issues will be completed well before the valuation trial.
24 Ordinarily, this should leave sufficient time for the parties to prepare and exchange
25 new appraisal data, and to develop their final offers and demands.

26 However, where the issues are complex, this schedule may not be possible to
27 meet. The proposed statute would allow the court to extend time for trial, and for
28 submission of final offers and demands, to the extent warranted by the court’s
29 resolution of legal issues.

30 **Trial Judge**

31 The legal issues involved in eminent domain valuation are highly technical and
32 fact-oriented and require specialized knowledge. For this reason, resolution of the
33 legal issues on the trial court’s law and motion calendar may not be appropriate.
34 The proposed law seeks to ensure an appropriate resolution of these legal issues by
35 assigning them to the trial judge in the case.

36. Code Civ. Proc. §§ 1263.205, 1263.210.

37. Code Civ. Proc. § 1260.030.

1 ENCOURAGE ALTERNATIVE DISPUTE RESOLUTION

2 Alternative dispute resolution techniques, particularly mediation, may provide a
3 constructive means for the parties to conclude the case without the time and
4 expense of an eminent domain trial. The Law Revision Commission believes the
5 law should foster use of alternative dispute resolution if mutually agreed to by the
6 parties. The Commission has identified two potential impediments to use of
7 alternative dispute resolution in eminent domain that should be addressed by
8 statute — (1) condemnor reluctance to use alternative dispute resolution, and (2)
9 limited time available for alternative dispute resolution.

10 **Condemnor Reluctance To Use ADR**

11 Historically, some public agencies have resisted alternative dispute resolution.³⁸
12 This may be in part due to agency uncertainty whether it is permissible to
13 relinquish control of public decision-making authority to a nonjudicial process.

14 Existing law explicitly establishes the authority of a public entity to engage in
15 binding arbitration.³⁹ However, the law is silent as to mediation and nonbinding
16 arbitration.

17 The proposed law makes clear that public agency condemnors may, but are not
18 required to, agree to an alternative dispute resolution process, including mediation,
19 binding arbitration, and nonbinding arbitration. This is analogous to the rule
20 applicable in administrative adjudication involving state agencies.⁴⁰

21 **Limited Time Available For ADR**

22 In order for mediation to be effective in eminent domain, it is important that
23 pretrial discovery and resolution of legal issues first be completed. Mediation takes
24 time, and the amount of time remaining after completion of these pretrial
25 procedures may be inadequate for this purpose.

26 The proposed law would allow the court to waive fast track and other trial
27 setting rules if the parties are actively engaged in alternative dispute resolution and
28 agree that additional time would be beneficial.

38. The Commission's experience in its administrative procedure study was that state agencies may be unsure whether they have authority to engage in alternative dispute resolution, for various reasons. See *Administrative Adjudication by State Agencies*, 25 Cal. L. Revision Comm'n Reports 55, 109-110 (1995).

39. Code Civ. Proc. §§ 1273.010-1273.050 (arbitration of compensation in acquisitions of property for public use).

40. Gov't Code § 11420.10.

1 PROPOSED LEGISLATION

2 **Code Civ. Proc. §§ 1250.410-1250.430 (amended). Article heading**

3 Article 6. Settlement Offers and Alternative Dispute Resolution

4 **Code Civ. Proc. § 1250.410 (amended). Pretrial settlement offers**

5 1250.410. (a) At least 20 days prior to the date of the trial on issues relating to
6 compensation, the plaintiff shall file with the court and serve on the defendant its
7 final offer of compensation in the proceeding and the defendant shall file and serve
8 on the plaintiff its final demand for compensation in the proceeding. The offer and
9 the demand shall include all compensation required pursuant to this title, including
10 compensation for loss of goodwill if any, and shall state whether interest and costs
11 are included. Such offers and demands shall be the only offers and demands
12 considered by the court in determining the entitlement, if any, to litigation
13 expenses. Service shall be in the manner prescribed by Chapter 5 (commencing
14 with Section 1010) of Title 14 of Part 2.

15 (b) If the court, on motion of the defendant made within 30 days after entry of
16 judgment, finds that the offer of the plaintiff was unreasonable and that the
17 demand of the defendant was reasonable viewed in the light of the evidence
18 admitted and the compensation awarded in the proceeding, the costs allowed
19 pursuant to Section 1268.710 shall include the defendant's litigation expenses.

20 In determining the amount of such litigation expenses, the court shall consider
21 the offer required to be made by the plaintiff pursuant to Section 7267.2 of the
22 Government Code and any other written offers and demands filed and served prior
23 to or during the trial.

24 (c) If timely made, the offers and demands as provided in subdivision (a) shall
25 be considered by the court on the issue of determining an entitlement to litigation
26 expenses.

27 **Comment.** Subdivision (a) of Section 1250.410 is amended to counteract dictum in cases to the
28 effect that the provision is not intended to require the offer and demand to cover items other than
29 the value of the part taken and damage, if any, to the remainder. See, e.g., *Coachella Valley*
30 *County Water Dist. v. Dreyfuss*, 91 Cal. App. 3d 949, 154 Cal. Rptr. 467 (1979); *People ex rel.*
31 *Dep't of Transp. v. Gardella Square*, 200 Cal. App. 3d 559, 246 Cal. Rptr. 139 (1988).

32 The amendment makes clear that the final offer and demand should include all elements of
33 compensation, including compensation for loss of goodwill. Although interest and costs are not
34 covered by this provision, the amendment also requires, for the purpose of clarity, that each offer
35 and demand also indicate whether or not interest and costs are included.

36 It should be noted that subdivision (b) requires the offer made by the plaintiff pursuant to
37 Section 7267.2 of the Government Code to be considered in determining the amount of litigation
38 expenses. In making the determination, the court should discount differences between that offer
39 and the final offer under subdivision (a), to the extent matters such as claimed loss of business
40 goodwill or eventual interest and costs in the proceeding would not have been known to the
41 plaintiff at the time of the earlier offer.

1 **Code Civ. Proc. § 1250.420 (added). ADR authorized**

2 1250.420. The parties may by agreement refer a dispute that is the subject of an
3 eminent domain proceeding for resolution by any of the following means:

4 (a) Mediation by a neutral mediator.

5 (b) Binding arbitration by a neutral arbitrator. The arbitration is subject to
6 Chapter 12 (commencing with Section 1273.010).

7 (c) Nonbinding arbitration by a neutral arbitrator. The arbitrator's decision in a
8 nonbinding arbitration is final unless within 30 days after the arbitrator's decision
9 a party moves the court for a trial of the eminent domain proceeding. If the
10 judgment in the eminent domain proceeding is not more favorable to the moving
11 party, the moving party shall, notwithstanding any other statute, pay the costs and
12 litigation expenses of the parties in the eminent domain proceeding.

13 **Comment.** Section 1250.420 is drawn from Government Code Section 11420.10 (ADR
14 authorized in administrative adjudication). The section is intended to remove any question about
15 the authority of a public entity to refer an eminent domain dispute for alternative dispute
16 resolution. Alternative dispute resolution pursuant to this section is optional, applicable only on
17 agreement of the parties.

18 Under subdivision (a), the mediator may use any mediation technique.

19 Subdivision (c) parallels the procedure applicable in judicial arbitration. See Code Civ. Proc. §§
20 1141.20-1141.21.

21 Standard protections of confidentiality of communications made in alternative dispute
22 resolution apply to alternative dispute resolution pursuant to this section. See, e.g., Evid. Code §§
23 1115-1128 (mediation); Evid. Code § 703.5 (testimony by arbitrator or mediator).

24 **Code Civ. Proc. § 1250.430 (added). Stay of trial during ADR**

25 1250.430. Notwithstanding any other statute or rule of court governing the date
26 of trial of an eminent domain proceeding, on motion of a party the court may
27 postpone the date of trial for a period that appears adequate to enable resolution of
28 a dispute pursuant to alternative resolution procedures, if it is demonstrated to the
29 satisfaction of the court that all of the following conditions are satisfied:

30 (a) The parties are actively engaged in alternative resolution of the dispute
31 pursuant to Section 1250.420.

32 (b) The parties appear to be making progress toward resolution of the dispute
33 without the need for a trial of the matter.

34 (3) The parties agree that additional time for the purpose of alternative dispute
35 resolution is desirable.

36 **Comment.** Section 1250.430 is intended to allow waiver of trial court delay reduction
37 programs and other case processing requirements in order to facilitate productive alternative
38 dispute resolution. This provision may be applied to foster resolution of some or all of the issues
39 between the parties.

40 **Code Civ. Proc. § 1255.010 (amended). Deposit of probable compensation**

41 1255.010. (a) At any time before entry of judgment, the plaintiff may deposit
42 with the State Treasury the probable amount of compensation, based on an
43 appraisal, that will be awarded in the proceeding. The appraisal upon which the
44 deposit is based shall be one that satisfies the requirements of subdivision (b). The

1 deposit may be made whether or not the plaintiff applies for an order for
2 possession or intends to do so.

3 (b) Before making a deposit under this section, the plaintiff shall have an expert
4 qualified to express an opinion as to the value of the property (1) make an
5 appraisal of the property and (2) prepare a written statement of, or summary of the
6 basis for, the appraisal. The statement or summary shall contain detail sufficient to
7 indicate clearly the basis for the appraisal, including but not limited to all of the
8 following information:

9 (1) The highest and best use on which the appraisal of the property is based.

10 (2) If the appraisal is based on market data, the principal transactions supporting
11 the appraisal.

12 (3) If the appraisal includes compensation for damages to the remainder, the
13 calculations and a narrative explanation supporting the compensation, including
14 any offsetting benefits.

15 **Comment.** Subdivision (b) of Section 1255.010 is amended to prescribe the contents of the
16 written statement or summary of the basis for the deposit appraisal. The requirement in
17 subdivision (b)(3) that the statement or summary include detail relating to damages to the
18 remainder applies as well in a situation where no compensation for damages to the remainder is
19 provided due to a complete offset by benefits to the remainder.

20 **Code Civ. Proc. § 1258.220 (amended). Date of exchange**

21 1258.220. (a) For the purposes of this article, the “date of exchange” is the date
22 agreed to for the exchange of their lists of expert witnesses and statements of
23 valuation data by the party who served a demand and the party on whom the
24 demand was served or, failing such agreement, a date ~~60~~ 90 days prior to
25 commencement of the trial on the issue of compensation or the date set by the
26 court on noticed motion of either party establishing good cause therefor.

27 (b) Unless otherwise agreed to by the parties, the date of exchange shall not be
28 earlier than nine months after the date of commencement of the proceeding.

29 **Comment.** Section 1258.220 is amended to make the exchange date 90, rather than 60, days
30 before trial on the issue of compensation (but not earlier than nine months after the case was
31 filed). As used in subdivision (b), “months” refers to calendar months. Section 17(4).

32 The statutory exchange date of 90, rather than 60, days before trial remains subject to the
33 authority of the court to provide relief on motion of a party and showing of good cause. The
34 practicalities of preparing sufficiently to enable a fair exchange within the prescribed period may,
35 in the circumstances of a particular case, constitute good cause for a later exchange date.

36 **Code Civ. Proc. § 1258.260 (amended). Contents of statement of valuation data**

37 1258.260. (a) The statement of valuation data shall give the name and business
38 or residence address of the witness and shall include a statement whether the
39 witness will testify to an opinion as to any of the matters listed in Section
40 1258.250 and, as to each such matter upon which he the witness will give an
41 opinion, what that opinion is and the following items to the extent that the opinion
42 ~~on such matter is based thereon~~ on them:

43 (1) The interest being valued.

- 1 (2) The date of valuation used by the witness.
- 2 (3) The highest and best use of the property.
- 3 (4) The applicable zoning and the opinion of the witness as to the probability of
4 any change in such zoning.
- 5 (5) The sales, contracts to sell and purchase, and leases supporting the opinion.
- 6 (6) The cost of reproduction or replacement of the existing improvements on the
7 property, the depreciation or obsolescence the improvements have suffered, and
8 the method of calculation used to determine depreciation.
- 9 (7) The gross income from the property, the deductions from gross income, and
10 the resulting net income; the reasonable net rental value attributable to the land
11 and existing improvements thereon, and the estimated gross rental income and
12 deductions therefrom upon which such the reasonable net rental value is
13 computed; the rate of capitalization used; and the value indicated by such the
14 capitalization.
- 15 (8) If the property is a portion of a larger parcel, a description of the larger parcel
16 and its value.
- 17 (9) If the opinion concerns loss of goodwill, the method used to determine the
18 loss and a summary of the data supporting the opinion.
- 19 (b) With respect to each sale, contract, or lease listed under paragraph (5) of
20 subdivision (a), the statement of valuation data shall give:
 - 21 (1) The names and business or residence addresses, if known, of the parties to
22 the transaction.
 - 23 (2) The location of the property subject to the transaction.
 - 24 (3) The date of the transaction.
 - 25 (4) If recorded, the date of recording and the volume and page or other
26 identification of the record of the transaction.
 - 27 (5) The price and other terms and circumstances of the transaction. In lieu of
28 stating the terms contained in any contract, lease, or other document, the statement
29 may, if the document is available for inspection by the adverse party, state the
30 place where and the times when it is available for inspection.
 - 31 (6) The total area and shape of the property subject to the transaction.
- 32 (c) If any opinion referred to in Section 1258.250 is based in whole or in
33 substantial part upon the opinion of another person, the statement of valuation data
34 shall include the name and business or residence address of such other person, his
35 business, occupation, or profession, and a statement as to the subject matter to
36 which his opinion relates.
- 37 (d) Except when an appraisal report is used as a statement of valuation data as
38 permitted by subdivision (e), the statement of valuation data shall include a
39 statement, signed by the witness, that the witness has read the statement of
40 valuation data and that it fairly and correctly states his opinions and knowledge as
41 to the matters therein stated.

1 (e) An appraisal report that has been prepared by the witness which includes the
2 information required to be included in a statement of valuation data may be used
3 as a statement of valuation data under this article.

4 **Comment.** Paragraph (9) is added to Section 1258.260(a) to make clear that the basis for an
5 opinion as to loss of goodwill is to be included in the exchange of valuation data. This codifies
6 the rule in *City of Fresno v. Harrison*, 154 Cal. App. 3d 296, 201 Cal. Rptr. 219 (1984).

7 Technical revisions are also made to the statute for consistency with contemporary statutory
8 drafting techniques.

9 **Code Civ. Proc. § 1260.040 (added). Resolution of legal issues affecting valuation**

10 1260.040. (a) If there is a dispute between plaintiff and defendant over an
11 evidentiary or other legal issue affecting the determination of compensation, either
12 party may move the court for a ruling on the issue. The motion shall be made not
13 later than 60 days before commencement of trial on the issue of compensation.
14 The motion shall be heard by the judge assigned for trial of the case.

15 (b) Notwithstanding any other statute or rule of court governing the date of final
16 offers and demands of the parties and the date of trial of an eminent domain
17 proceeding, the court may postpone those dates for a period sufficient to enable the
18 parties to engage in further proceedings before trial in response to its ruling on the
19 motion.

20 **Comment.** Section 1260.040 is intended to provide a mechanism by which a party may obtain
21 early resolution of an *in limine* motion or other dispute affecting valuation. Nothing in this section
22 precludes the use of other procedures for the same purpose, including, without limitation,
23 bifurcation of issues and control of the order of proof pursuant to statute, or other pretrial
24 procedure pursuant to court rule.

25 **Gov't Code § 7267.2 (amended). Precondemnation offer**

26 7267.2. (a) Prior to adopting a resolution of necessity pursuant to Section
27 1245.230 of the Government Code and initiating negotiations for the acquisition of
28 real property, the public entity shall establish an amount which it believes to be
29 just compensation therefor, and shall make an offer to the owner or owners of
30 record to acquire the property for the full amount so established, unless the owner
31 cannot be located with reasonable diligence. The offer may be conditioned upon
32 the legislative body's ratification of the offer by execution of a contract of
33 acquisition or adoption of a resolution of necessity or both. In no event shall the
34 amount be less than the public entity's approved appraisal of the fair market value
35 of the property. Any decrease or increase in the fair market value of real property
36 to be acquired prior to the date of valuation caused by the public improvement for
37 which the property is acquired, or by the likelihood that the property would be
38 acquired for the improvement, other than that due to physical deterioration within
39 the reasonable control of the owner or occupant, shall be disregarded in
40 determining the compensation for the property. ~~The~~

41 (b) The public entity shall provide the owner of real property to be acquired with
42 a copy of the appraisal on which the offer is based. The appraisal shall also include
43 a written statement of, and summary of the basis for, the amount it established as

1 just compensation. Where the property involved is owner occupied residential
2 property and contains no more than four residential units, the homeowner shall,
3 upon request, be allowed to review a copy of the appraisal upon which the offer is
4 based. Where appropriate, the just compensation for the real property acquired and
5 for damages to remaining real property shall be separately stated.

6 ~~(b)~~ (c) In the trial of the issue of just compensation:

7 (1) The appraisal may not be given in evidence or referred to, nor shall the
8 appraisal be considered to be an admission of the public entity.

9 (2) The appraisal may be used for impeachment of a witness who prepared the
10 appraisal.

11 (3) On objection of the public entity, the person who prepared the appraisal may
12 not be called at trial by the property owner to give an opinion as to compensation.

13 (d) Notwithstanding subdivision (a), a public entity may make an offer to the
14 owner or owners of record to acquire real property for less than an amount which
15 it believes to be just compensation therefor if (1) the real property is offered for
16 sale by the owner at a specified price less than the amount the public entity
17 believes to be just compensation therefor, (2) the public entity offers a price which
18 is equal to the specified price for which the property is being offered by the
19 landowner, and (3) no federal funds are involved in the acquisition, construction,
20 or project development.

21 ~~(e)~~ (e) As used in subdivision ~~(b)~~ (d), “offered for sale” means any of the
22 following:

23 (1) Directly offered by the landowner to the public entity for a specified price in
24 advance of negotiations by the public entity.

25 (2) Offered for sale to the general public at an advertised or published, specified
26 price set no more than six months prior to and still available at the time the public
27 entity initiates contact with the landowner regarding the public entity’s possible
28 acquisition of the property.

29 **Comment.** Section 7267.2 is amended to expand the requirement that the public entity provide
30 the owner of property to be acquired with a copy of the appraisal, and to limit admissibility of the
31 appraisal. Under subdivision (b), the public entity must provide the owner of any type of
32 property, not limited to owner-occupied residential property, with a copy of the appraisal.

33 Subdivision (b) is also amended to make the written statement and summary a part of the
34 appraisal. It is intended that the written statement and summary receive the same treatment as the
35 appraisal for admissibility purposes under subdivision (c).

36 It should be noted that the written statement and summary required by this section are in
37 addition to the other statutory requirements for the appraisal — a written statement independently
38 and impartially prepared by a qualified appraiser setting forth an opinion of defined value of an
39 adequately described property as of a specific date, supported by the presentation and analysis of
40 relevant market information. Section 7260.