

STATE OF CALIFORNIA

# CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION AND STUDY

*relating to*

Condemnation Law and Procedure

---

Number 4—Discovery in Eminent Domain Proceedings

January 1963

CALIFORNIA LAW REVISION COMMISSION  
School of Law  
Stanford University  
Stanford, California

#### **NOTE**

This pamphlet begins on page 701. The Commission's annual reports and its recommendations and studies are published in separate pamphlets which are later bound in permanent volumes. The page numbers in each pamphlet are the same as in the volume in which the pamphlet is bound. The purpose of this numbering system is to facilitate consecutive pagination of the bound volumes.

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STATE OF CALIFORNIA  
CALIFORNIA LAW REVISION COMMISSION

January 2, 1963

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To HIS EXCELLENCY, EDMUND G. BROWN  
*Governor of California*  
and to the *Legislature of California*

The California Law Revision Commission was authorized by Resolution Chapter 42 of the Statutes of 1956 to make a study to determine whether the law and procedure relating to condemnation should be revised in order to safeguard the property rights of private citizens.

The Commission herewith submits its recommendation and a research study on one portion of this subject—discovery in eminent domain proceedings. This is the fourth in a series of reports on this subject. The previous reports—prepared for the 1961 Legislative Session—deal with evidence in eminent domain proceedings, taking possession and passage of title in eminent domain proceedings, and reimbursement for moving expenses when property is acquired for public use.

The research study that accompanies this recommendation was prepared by the Commission's research consultant, the law firm of Hill, Farrer and Burrill of Los Angeles. Only the recommendation (as distinguished from the research study) is expressive of Commission intent.

Respectfully submitted,

HERMAN F. SELVIN, *Chairman*



## TABLE OF CONTENTS

	Page
RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION RELATING TO DISCOVERY IN EMINENT DOMAIN PROCEEDINGS.....	707
A STUDY RELATING TO PRETRIAL CONFERENCES AND DISCOVERY IN EMINENT DOMAIN PROCEEDINGS ____	715

(A detailed Table of Contents for the study  
will be found on page 715.)





# RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION

relating to

## CONDEMNATION LAW AND PROCEDURE

### Number 4—Discovery in Eminent Domain Proceedings

One of the major improvements in the procedural law of this State in recent years has been the enactment of adequate discovery legislation. Effective discovery techniques serve two desirable purposes. First, they enable a party to learn and to determine the reliability of the evidence that will be presented against him at the trial. Second, they make the pretrial conference more effective because each party has greater knowledge of what he can expect to prove and what the adverse party can be expected to prove against him.

Until the decision of the Supreme Court in *County of Los Angeles v. Faus*<sup>1</sup> the need for adequate discovery procedures in eminent domain litigation was not acute; for, until that decision, valuation data was inadmissible on direct examination. Hence, the only valuation data that would be introduced against a party was that which the party himself asked to be introduced through cross-examination. Since the *Faus* case, however, the development of workable discovery rules in these cases has become imperative. Unless the valuation data to be related on direct examination of an expert witness can be discovered and its reliability tested through investigation prior to trial, the only means available to test the reliability of such data is lengthy—and often fruitless—cross-examination during trial.

Nonetheless, the use of discovery in eminent domain proceedings has not kept pace with its use generally in other civil proceedings. Until recently, this was in part attributable to decisions<sup>2</sup> which severely limited the extent to which the opinion of an expert, and the data upon which the opinion was based, could be discovered in an eminent domain case. These decisions made discovery ineffective in eminent domain litigation because the principal issue involved in such cases—the value of the property taken or damaged—is a matter of expert opinion. It is now clear, however, that the opinion of the expert and the pertinent valuation data in an eminent domain case are discoverable.<sup>3</sup>

Despite the fact that no legal impediment remains to the use of broad discovery in eminent domain litigation, two major obstacles to the use of discovery in these cases still exist. The first involves compensating the expert for his time in preparing for and giving his deposition. It

<sup>1</sup> 48 Cal.2d 672, 312 P.2d 680 (1957).

<sup>2</sup> *E.g.*, *Rust v. Roberts*, 171 Cal. App.2d 772, 341 P.2d 36 (1959).

<sup>3</sup> *San Diego Professional Ass'n v. Superior Court*, 58 Cal.2d —, 23 Cal. Rptr. 384, 373 P.2d 448 (1962); *Oceanside Union School Dist. v. Superior Court*, 58 Cal.2d —, 23 Cal. Rptr. 375, 373 P.2d 439 (1962); *People v. Donovan*, 57 Cal.2d 346, 19 Cal. Rptr. 473, 369 P.2d 1 (1962); *Mowry v. Superior Court*, 202 Cal. App.2d —, 20 Cal. Rptr. 698 (1962).

seems unfair for one party to impose this expense upon the adverse party against his will. Even if the problem of allocating this expense were readily soluble, the amount of the expense involved in taking the deposition of an expert often would make this form of discovery impractical.

The other major obstacle is that the pertinent valuation data frequently is not accumulated until after the normal time for completion of discovery—the time of the pretrial conference. There are three reasons why this data is not available until a few days before the time of the actual trial. First, the parties usually are unwilling to incur the expense of having the expert complete his appraisal until shortly before the actual trial, for they seek to avoid this expense until it is clear that the case cannot be settled. Second, an appraisal report completed a considerable time before the trial must be brought up to date just before the trial, and this involves additional expense. Third, an appraiser who completes his appraisal a considerable time before the trial may find that he has forgotten many of the details by the time of the trial and may need to devote a substantial amount of time to reviewing his appraisal just before trial in order to refresh his memory.

The Commission believes that the obstacles to effective discovery in eminent domain cases may be overcome by legislation providing for a pretrial exchange of written statements containing pertinent valuation data. This technique is not novel; a variation of this procedure is now used in some federal district courts in eminent domain proceedings and similar procedures are provided by the statutes of some other states. Analogous procedures are provided by California statutes relating to other fields where the problems are comparable. For example, Code of Civil Procedure Section 454 provides that, upon demand, a copy of an account sued upon must be delivered to the adverse party; and, if such delivery is not made, the party suing upon the account may not give any evidence thereof at the trial. Similarly, Code of Civil Procedure Section 2032 provides for a compulsory exchange of physicians' reports under certain circumstances; and, if the report of an examining physician has not been exchanged, the court may exclude his testimony at the trial.

The Commission recognizes that pretrial exchange of valuation data will require a party to prepare a substantial portion of his case somewhat earlier than is now the practice—*i.e.*, by the time the information is required to be exchanged rather than by the time of the trial. But the recommended procedure has several offsetting advantages. First, it will tend to assure the reliability of the data upon which the appraisal testimony given at the trial is based, for the parties will have had an opportunity to test such data through investigation prior to trial. Such pretrial investigation should curtail the time required for the trial and in some cases may facilitate settlement. Second, if the exchange of information takes place prior to the pretrial conference, the conference will serve a more useful function in eminent domain proceedings. For example, the parties, having checked the supporting data in advance, may be able to stipulate at the pretrial conference to highest and best use, to what sales are comparable, to the admissibility of certain other evidence and, perhaps, even to the amounts of certain items of damage.

Of course, this desirable objective can be fully achieved only if the Judicial Council amends the pretrial rules to provide for the holding of pretrial conferences in eminent domain cases subsequent to the time for exchange of the valuation data.<sup>4</sup>

The procedure recommended above for the pretrial exchange of valuation data is supplemental to other discovery procedures. Nevertheless, the Commission anticipates that the procedure herein recommended will provide all the information that is necessary in the ordinary case and that other methods of discovery will be used only in unusual cases.

For the foregoing reasons, the Commission makes the following recommendations:

1. At least 45 days prior to the trial, any party to an eminent domain proceeding should be permitted to serve on any adverse party a demand to exchange valuation data. Thereafter, at least 20 days prior to the trial, both the party serving the demand and the party on whom the demand is served should be required to serve on each other statements setting forth specified valuation data, such as the names of expert witnesses, the names of the witnesses who will testify as to the value of the property, the opinions of the valuation witnesses and certain of the data upon which the opinions are based.

A person served with a demand, within five days from such service, should be able to serve another demand—a cross-demand—on any other party interested in the same parcel of property. This right will protect a party from being required to reveal his valuation data to a person with but a nominal interest in the proceeding while receiving no important information in return.

Compliance with these requirements will be relatively inexpensive. Appraisal reports ordinarily contain all the valuation data required to be listed in the statement and copies of the reports can be made a part of the statement. Of course, the required listing of data is not intended to enlarge the extent to which such data may be admissible as evidence in the actual trial of an eminent domain case.

2. If a demand and a statement of valuation data are served, a party should not be permitted to call a witness to testify on direct examination during his case in chief to any information required to be listed upon a statement of valuation data unless he has listed the witness and the information in the statement he served on the adverse party. Nor should the party be permitted to call an expert witness to testify on direct examination during his case in chief unless he has listed the witness in such statement.

This sanction is needed to enforce the required exchange of the statements of valuation data. The same procedural technique is used to enforce the required exchange of physicians' statements under Code of Civil Procedure Section 2032 and to enforce the required service of a copy of the account under Code of Civil Procedure Section 454. The

<sup>4</sup> The proposed statute provides for the exchange of valuation data not less than 20 days prior to trial. Under existing pretrial procedures, this time limit does not provide assurance that the data will be exchanged prior to the pretrial conference. As valuation opinions are subject to change as more data are acquired, it is desirable to have the completion of discovery, and hence the pretrial conference, as near to the actual trial as possible.

The Commission has made no recommendation in regard to pretrial conferences in eminent domain proceedings because such conferences are governed by court rules promulgated by the Judicial Council.

sanction, however, should be limited to a party's case in chief so that cross-examination and rebuttal are unaffected by the required exchange of valuation data, for it is often difficult to anticipate the evidence required for proper rebuttal or cross-examination.

3. The court should be authorized to permit a party to call a witness or to introduce evidence not listed in his statement of valuation data upon a showing that such party made a good faith effort to comply with the statute, that he diligently gave notice to the adverse party of his intention to call such witness or to introduce such evidence, and that prior to serving the statement he (1) could not in the exercise of reasonable diligence have determined to call the witness or have discovered or listed the evidence or (2) failed to determine to call the witness or to discover or list the evidence through mistake, inadvertence, surprise or excusable neglect. These are similar to the standards now applied by the courts under Code of Civil Procedure Section 657 (for granting a new trial upon newly discovered evidence) and under Code of Civil Procedure Section 473 (for relieving a party from default), and it is appropriate for the court to apply the standards here.

4. Section 1247b of the Code of Civil Procedure, which now requires the condemner in partial taking cases to serve a map of the affected parcel upon the condemnee if requested to do so, should be amended so that the condemnee may obtain the map prior to the time for the service of his statement of valuation data. The map will be helpful to the condemnee in the preparation of his statement of valuation data.

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The Commission's recommendation would be effectuated by enactment of the following measure:

*An act to amend and renumber Section 1246.1 of, to amend Section 1247b of, and to add Sections 1246.1, 1246.2, 1246.3, 1246.4, 1246.5, 1246.6 and 1246.7 to, the Code of Civil Procedure, relating to eminent domain proceedings.*

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

SECTION 1. Section 1246.1 of the Code of Civil Procedure is amended and renumbered to read:

~~1246.1~~ 1246.9. Where there are two or more estates or divided interests in property sought to be condemned, the plaintiff is entitled to have the amount of the award for said property first determined as between plaintiff and all defendants claiming any interest therein; thereafter in the same proceeding the respective rights of such defendants in and to the award shall be determined by the court, jury, or referee and the award apportioned accordingly. The costs of determining the apportionment of the award shall be allowed to the defendants and taxed against the plaintiff except that the costs of determining any issue as to title between two or more defendants shall be borne by the defendants in such proportion as the court may direct.

SEC. 2. Section 1246.1 is added to the Code of Civil Procedure, to read:

1246.1. (a) Any party to an eminent domain proceeding may, not later than 45 days prior to the day set for trial, serve upon any adverse party to the eminent domain proceeding and file a demand to exchange valuation data.

(b) A party on whom a demand is served may, not later than five days after the service of the demand, serve upon any adverse party to the eminent domain proceeding and file a cross-demand to exchange valuation data relating to the parcel of property described in the demand.

(c) The demand or cross-demand shall:

(1) Describe the parcel of property upon which valuation data is sought to be exchanged, which description may be made by reference to the complaint.

(2) Include a statement in substantially the following form: "You are required to serve and file a statement of valuation data in compliance with Sections 1246.1 and 1246.2 of the Code of Civil Procedure not later than 20 days prior to the day set for trial and, subject to Section 1246.5 of the Code of Civil Procedure, your failure to do so will constitute a waiver of the right to introduce on direct examination during your case in chief any matter required to be set forth in your statement of valuation data."

(d) Not later than 20 days prior to the day set for trial, each party who served a demand or cross-demand and each party upon whom a demand or cross-demand was served shall serve and file a statement of valuation data. A party who served a demand or cross-demand shall serve his statement of valuation data upon each party on whom he served his demand or cross-demand. Each party on whom a demand or cross-demand was served shall serve his statement of valuation data upon the party who served the demand or cross-demand.

SEC. 3. Section 1246.2 is added to the Code of Civil Procedure, to read:

1246.2. The statement of valuation data shall contain:

(a) The name and business or residence address of each person intended to be called as an expert witness by the party.

(b) The name and business address of each person intended to be called as a witness by the party to testify to his opinion of the value of the property described in the demand or cross-demand or as to the amount of the damage or benefit, if any, to the larger parcel from which such property is taken and the name and business or residence address of each person upon whose statements or opinion the opinion is based in whole or in substantial part.

(c) The opinion of each witness listed as required in subdivision (b) of this section as to the value of the property described in the demand or cross-demand and as to the amount of the damage or benefit, if any, which will accrue to the larger parcel from which such property is taken and the following data to the extent that the opinion is based thereon:

(1) The highest and best use of the property.

(2) The applicable zoning and the opinion of the witness concerning probable change thereof.

(3) A list of the offers, contracts, sales of property, leases and other transactions supporting the opinion.

(4) The cost of reproduction or replacement of the property less depreciation and obsolescence and the rate of depreciation used.

(5) The gross and net income from the property, its reasonable net rental value, its capitalized value and the rate of capitalization used.

(6) Where the property is a portion of a larger parcel, a description of the larger parcel from which the property is taken.

(d) With respect to each offer, contract, sale, lease or other transaction listed under paragraph (3) of subdivision (c) of this section:

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

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

(3) The date of the transaction.

(4) If recorded, the date of recording and the volume and page where recorded.

(5) The consideration and other terms of the transaction. The statement in lieu of stating the terms contained in any contract, lease or other document may, if such document is available for inspection by the adverse party, state the place where and the times when it is available for inspection.

SEC. 4. Section 1246.3 is added to the Code of Civil Procedure, to read:

1246.3. (a) A party who has served and filed a statement of valuation data shall diligently give notice to the parties upon whom the statement was served if, after service of his statement of valuation data, he:

(1) Determines to call an expert witness not listed on his statement of valuation data;

(2) Determines to call a witness not listed on his statement of valuation data for the purpose of having such witness testify to his opinion of the value of the property described in the demand or the amount of the damage or benefit, if any, to the larger parcel from which such property is taken;

(3) Determines to have a witness called by him testify on direct examination during his case in chief to any data required to be listed on the statement of valuation data but which was not so listed; or

(4) Discovers any data required to be listed on his statement of valuation data but which was not so listed.

(b) The notice required by subdivision (a) of this section shall include the information specified in Section 1246.2 and shall be in writing; but such notice is not required to be in writing if it is given after the commencement of the trial.

SEC. 5. Section 1246.4 is added to the Code of Civil Procedure, to read:

1246.4. Except as provided in Section 1246.5, if a demand to exchange valuation data and one or more statements of valuation data are served and filed pursuant to Section 1246.1:

(a) No party required to serve and file a statement of valuation data may call an expert witness to testify on direct examination during the

case in chief of the party calling him unless the name and address of such witness are listed on the statement of the party who calls the witness.

(b) No party required to serve and file a statement of valuation data may call a witness to testify on direct examination during the case in chief of the party calling him to his opinion of the value of the property described in the demand or cross-demand or the amount of the damage or benefit, if any, to the larger parcel from which such property is taken unless the name and address of such witness are listed on the statement of the party who calls the witness.

(c) No witness called by any party required to serve and file a statement of valuation data may testify on direct examination during the case in chief of the party who called him to any data required to be listed on a statement of valuation data unless such data is listed on the statement of valuation data of the party who calls the witness, except that testimony that is merely an explanation or elaboration of data so listed is not inadmissible under this section.

SEC. 6. Section 1246.5 is added to the Code of Civil Procedure, to read:

1246.5. The court may, upon such terms as may be just, permit a party to call a witness or to introduce evidence on direct examination during his case in chief, where such witness or evidence is required to be but is not listed in such party's statement of valuation data, if the court finds that such party has made a good faith effort to comply with Sections 1246.1 and 1246.2, that he has complied with Section 1246.3, and that, by the date of the service of his statement of valuation data, he:

(a) Would not in the exercise of reasonable diligence have determined to call such witness or discovered or listed such evidence; or

(b) Failed to determine to call such witness or to discover or list such evidence through mistake, inadvertence, surprise or excusable neglect.

SEC. 7. Section 1246.6 is added to the Code of Civil Procedure, to read:

1246.6. The procedure provided in Sections 1246.1 to 1246.5, inclusive, does not prevent the use of other discovery procedures in eminent domain proceedings.

SEC. 8. Section 1246.7 is added to the Code of Civil Procedure, to read:

1246.7. Nothing in Sections 1246.1 to 1246.6, inclusive, makes admissible any matter that is not otherwise admissible as evidence in eminent domain proceedings.

SEC. 9. Section 1247b of the Code of Civil Procedure is amended to read:

1247b. Whenever in a ~~condemnation~~ *an eminent domain* proceeding only a portion of a parcel of property is sought to be taken ~~and upon~~, *the plaintiff, within 15 days after* a request of a defendant to the plaintiff, ~~made at least 30 days prior to the time of trial, the plaintiff shall~~ prepare a map showing the boundaries of the entire parcel, indicating thereon the part to be taken, the part remaining, and shall serve an exact copy of such map on the defendant or his attorney ~~at least fifteen (15) days prior to the time of trial.~~





**A STUDY RELATING TO  
PRETRIAL CONFERENCES AND DISCOVERY  
IN EMINENT DOMAIN PROCEEDINGS\***

**TABLE OF CONTENTS**

	Page
INTRODUCTION .....	717
THE PURPOSE OF PRETRIAL PRACTICE .....	718
THE PRETRIAL CONFERENCE .....	719
The Exchange of Comparable Sales for the Purpose of the Pre- trial Conference .....	723
The Determination of the Highest and Best Use At the Time of the Pretrial Conference .....	724
The Disclosure of Appraisal Reports at the Time of the Pretrial Conference .....	727
Tentative Conclusions and Recommendations in Regard to Pre- trial Conferences in Condemnation Cases .....	730
DISCOVERY FOR PURPOSES OF TRIAL .....	731
Discovery and the Simplification and the Narrowing of the Issues for Trial .....	732
Discovery and the Elimination of "Surprise" .....	733
Discovery and the Ascertainment of "Facts" .....	736
The General Philosophy Behind Liberal Disclosure .....	736
The Present Status of the Law in California and Elsewhere ..	737
An Analysis of the Objections to a Liberal Discovery Policy ..	743
The "Work Product" Argument .....	743
The Argument of "Unfairness" .....	745
The <i>Faus</i> Case and the Fair Exchange of Sales Data .....	747
SUMMARY .....	753

\* This study was made at the request of the California Law Revision Commission by the law firm of Hill, Farrer and Burrill of Los Angeles. The opinions, conclusions and recommendations are entirely those of the author and do not necessarily represent or reflect the opinions, conclusions or recommendations of the Law Revision Commission.



## INTRODUCTION

The purpose of this study is to explore and analyze the present rules and practices relating to pretrial conferences and the scope of discovery in condemnation actions. Do these present practices aid the court's determination of just compensation as well as facilitate equitable settlements? Or conversely, do they hinder an expedient determination of just compensation and impair settlements? Finally, how may both the rules of evidence established in *County of Los Angeles v. Faus*<sup>1</sup> be better effectuated and the rights of the parties be more securely safeguarded?

There is a lengthy discussion of the evidentiary implications of the *Faus* case in the study prepared for the Law Revision Commission relating to evidentiary problems in eminent domain cases.<sup>2</sup> In the *Faus* case, the court held that in a condemnation proceeding "evidence of the prices paid for similar property in the vicinity" is "admissible on (a) direct examination, and (b) cross-examination of a witness who is presenting testimony on the issue of the value of the condemnee's property."<sup>3</sup> The court, quoting from Professor McCormick, stated that such evidence is admissible "within safeguarding limits" and that:

These safeguards are the following: The sales of the other tracts must have been sufficiently near in time, and the other land must be located sufficiently near the land to be valued, and must be sufficiently alike in respect to character, situation, usability, and improvements, to make it clear that the two tracts are comparable in value and that the price realized for the other land may fairly be considered as shedding light on the value of the land in question. Manifestly, the trial judge in applying so vague a standard must be granted a wide discretion.<sup>4</sup>

It would appear, at least on the surface, that the trial judge must make determinations with respect to these "safeguards" before the evidence of price can be admitted, and the questions involved in making that determination are, to a large extent, questions of fact. Accordingly, the rules of discovery may be brought into play. Moreover, certain other questions, such as, for example, the date of valuation, the date of taking, the probability of rezoning, and what constitutes the larger parcel, which are mainly questions of law or mixed questions of law and fact, involve matters that concern the scope and effect of pretrial conferences.

To a great extent, therefore, the efficacy of evidentiary rules controlling the trial of a condemnation case is dependent upon the pretrial conference and discovery devices.

Both the courts, here and elsewhere, and the experts in the field are in apparent disagreement as to whether these pretrial conference prac-

<sup>1</sup> 48 Cal.2d 672, 312 P.2d 680 (1957).

<sup>2</sup> See *Recommendation and Study Relating to Evidence in Eminent Domain Proceedings*, 3 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, Recommendation and Study at A-1, A-32 *et seq.* (1961).

<sup>3</sup> *County of Los Angeles v. Faus*, 48 Cal.2d 672, 676, 312 P.2d 680, 683 (1957).

<sup>4</sup> *Id.* at 678, 312 P.2d at 684, quoting from McCormick, EVIDENCE § 166, at 349 (1954).

tices should be limited or extended. Although the general broadening of the scope of pretrial conferences and discovery is being witnessed in California and other jurisdictions,<sup>5</sup> some authorities, as will be pointed out below, believe that the trial of a condemnation case is different enough from the trial of other kinds of actions to demand separate treatment. Most, but not all, of these authorities would limit rather than extend the scope of pretrial conferences and discovery rights in eminent domain proceedings.

On the other hand, for many years now New York City, which has adopted the *Faus* rule by legislation, has had additional statutory "safeguards" providing for the control and use of comparable sales by pretrial conferences and discovery procedures.<sup>6</sup> Other jurisdictions have adopted the same "safeguards" through the use of local court rules.<sup>7</sup>

These two inconsistent views, the variations within and between them, and the arguments and logic behind them, are set forth below.

### THE PURPOSE OF PRETRIAL PRACTICE

Mr. Chief Justice Earl Warren of the United States Supreme Court, while addressing the American Law Institute in May 1956, stated that the courts "must adopt modern methods of court administration . . . and . . . adequate pre-trial procedure, and the judges must personally be the inspiration to the bar and litigants for the prompt administration of justice."<sup>8</sup> In September of the same year, Mr. Chief Justice Phil S. Gibson of the California Supreme Court, in a report to Governor Knight, stated that steps were urgently needed "to modernize and make more efficient the administration of justice in this State, including a comprehensive pre-trial procedure and an early improvement in our discovery statutes."<sup>9</sup> In adopting the modern pretrial conference rules, which went into effect January 1, 1957, the Judicial Council of California reported:

No claim is made that these rules are perfect. They are not static but are subject to prompt amendment or change as their use and experience indicates. Nor is claim made that pre-trial alone will cure all our procedural or administrative ills. When correctly applied it will have marked beneficial effect, but it is only when implemented with proper discovery and other modern methods that the goal of a just determination of every cause, fairness in administration and the elimination of unjustifiable expense and delay can be achieved.<sup>10</sup>

Condemnation actions fall within the scope of the modern rules relating to pretrial conferences promulgated by the Judicial Council. As seen above, the adoption of these rules was not thought to be a panacea; the implementation of the pretrial conference for the purpose of efficiency, just determination of the action and creation of a favorable climate for settlement was thought to be, to a great extent, dependent

<sup>5</sup> See, e.g., report on the two-year New Jersey study on the pretrial effectiveness, Los Angeles Metropolitan News, June 13, 1960, p. 1.

<sup>6</sup> NEW YORK CITY ADMIN. CODE § 15-16.0; N.Y. Laws 1937, ch. 929, p. 159.

<sup>7</sup> See discussion in text at 719-22, 728-30 *infra*.

<sup>8</sup> CAL. SUPER. CT. RULES, Appendix: California Manual of Pre-Trial Procedure 533, 535 (Deering 1960).

<sup>9</sup> *Ibid.*

<sup>10</sup> *Id.* at 536.

upon the degree of effectiveness of discovery procedures. Indeed, pre-trial conference procedures cannot be disassociated from discovery practices.

Unfortunately, the newly adopted pretrial conference procedures have not usually produced the beneficial results in California condemnation actions that the proponents of these procedures had hoped for or envisioned. To a great extent, the pretrial rules have often been ignored or treated lightly by all parties concerned, primarily because the nature of a condemnation action does not easily or conveniently lend itself to this type of procedure. There are authorities and experts who would seek to speed the presently slow progress of pretrial conferences in condemnation actions either by enforcing the rules more rigidly or by extending the scope of discovery to effect a more meaningful pretrial conference.

### THE PRETRIAL CONFERENCE

Almost all experts agree that today pretrial conferences in condemnation actions accomplish little. For example, Harry T. Dolan, former Special Assistant to the Attorney General of the United States, has stated that:

[I]t is not believed that the general use of pretrial procedure is particularly helpful in a condemnation action. Usually the only issue presented for trial is the narrow issue of just compensation, which is largely resolved on the basis of so-called "expert opinion." Any legal issue raised by an answer must, under the Rules [Federal Rule 71A(h)], be heard and decided by the court in advance of the trial of the issue of compensation. Usually there are no disputes as to ownership of the property or the nature, extent, or character of the estate or interest taken; nor is there any controversy as to the date of taking, the date of fixing compensation, or the date possession was acquired.<sup>11</sup>

Condemnors, as well as attorneys for condemnees, are of the opinion that pretrial conferences, by and large, are neither very much utilized nor profitable insofar as condemnation is concerned. They believe that the pretrial conference procedures are expensive and prolong litigation without commensurable benefit; the prime issues of the case are not really decided in pretrial conferences.<sup>12</sup>

Regardless of the controversy over the effectiveness of pretrial conference procedures, the fact remains that the superior courts of California have set out and seek to abide by rules designed for the purpose of expediting lawsuits, making more efficient and less expensive the judicial process, and facilitating settlements wherever possible.

The pretrial conference rules for California are fairly general. And, at least as compared with the local federal court rules for the Southern District of California,<sup>13</sup> the attorneys for both parties are allowed great freedom in reaching, by their own methods, the goals that pre-

<sup>11</sup> Dolan, *Federal Condemnation Practice—General Aspects*, 27 APPRAISAL J. 15, 18 (1959).

<sup>12</sup> Interviews between authors and Jack M. Howard and Norval Fairman, April 25, 1960; interview between authors and Leslie R. Tarr, April 11, 1960; interview between authors and George C. Hadley, April 4, 1960.

<sup>13</sup> See S.D. CAL. R. CIV. PROC. Rules 9, 10.

trial conference seeks. The crux of these general rules is Rule 210 of the California Rules of Court, set forth below:

(a) Each party appearing in any case shall attend the pre-trial conference by counsel, or if none, in person, and shall have a thorough knowledge of the case, be prepared to discuss it and to make stipulations or admissions where appropriate.

(b) They shall confer in person or by correspondence before the date assigned for this conference to reach agreement upon as many matters as possible.

(c) They shall prepare and submit to the pre-trial conference judge, at or before the conference, a joint written statement of the matters agreed upon and a joint or separate written statement of the factual and legal contentions to be made as to the issues remaining in dispute.

The generality of the above rules may be compared with the rather detailed requirements that are applicable to eminent domain actions in the United States District Court for the Southern District of California. Under Rule 9 of the Rules of Civil Procedure of that federal district court, the following is but part of the extensive procedure that must be followed by both parties in a condemnation action:

(d) Meetings of Counsel: Not later than 40 days in advance of pre-trial conference, the attorneys for the parties appearing in the case shall hold at least one meeting at a mutually convenient time and place for the purpose of formulating a proposed pre-trial order in accordance with subdivision (j) of this rule. Each attorney shall then exhibit to opposing counsel all documents and things embraced within Rule 34 of the Federal Rules of Civil Procedure (or Admiralty Rule 32 as the case may be), other than those to be used for impeachment, intended to be offered at the trial by each party represented; each photograph, map, drawing and the like shall bear, upon the face or the reverse side thereof, a concise legend stating the relevant matters of fact as to what is claimed to be fairly depicted thereby, and as of what date. Each attorney shall also then make known to opposing counsel his contentions regarding the applicable facts and law.

(e) Memorandum of Contentions of Fact and Law: Not later than 20 days in advance of pre-trial conference, each party appearing shall serve and file with the Clerk a "MEMORANDUM OF CONTENTIONS OF FACT AND LAW" containing (1) a concise statement of the material facts involved as claimed by such party, including:

\* \* \*

(d) in eminent domain proceedings, (1) the date of taking, (2) the legal description of the estate or interest taken, (3) any claimed benefit proximately resulting from the taking, (4) any claimed damage proximately resulting from severance, (5) the highest and best use claimed for the property taken, and (6) the identity of each appraiser and other witness intended to be called to testify on any issue as to value, shall be set forth;

\* \* \*

(h) Additional Disclosure in Eminent Domain Proceedings: In eminent domain proceedings, additional pre-trial disclosure shall be made as follows:

(1) not later than 30 days in advance of pre-trial conference, each party appearing shall lodge with the Clerk, under seal, the original and one copy for the Judge, and sufficient additional copies for service on all other parties appearing, of a summary "STATEMENT OF COMPARABLE TRANSACTIONS" containing the relevant facts as to each sale or other transaction to be relied upon as comparable to the taking, including the alleged date of such transaction, the names of the parties thereto, and the consideration therefor; together with the date of recordation and the book and page or other identification of any record of such transaction; and such statements shall be in form and content suitable to be presented to the jury as a summary of evidence on the subject. As soon as such statements shall have been lodged by all parties appearing in connection with the particular parcel or parcels of property in issue, the Clerk shall unseal the statements, regularly file the originals, and forthwith serve a copy of each party's statement by United States mail on the attorneys for the other parties appearing. Each copy so served shall bear the Clerk's stamp showing the filing date of the original;

(2) not later than the date of filing of the statements required under paragraph (1) of this subdivision (h), each party shall lodge with the Clerk, under seal, for examination by the Judge *in camera*, the original and one copy of a "SCHEDULE OF WITNESSES AS TO VALUE" setting forth: (a) the various opinions as to value which will be relied upon at the trial; (b) the names of all persons, including expert appraisers and owners and former owners, intended to be called to give opinion evidence as to value; and (c) the opinion expected to be given by each;

(3) not later than 10 days after the date of filing of the statements required under paragraph (1) of this subdivision (h), each defendant claiming compensation by reason of the taking of any particular parcel or parcels of property in issue, or of any interest therein, shall serve and file with the Clerk a "STATEMENT AS TO JUST COMPENSATION" setting forth a brief schedule of the defendant's contentions as to: (a) the minimum fair market value in cash, at the time of taking, of the estate or interest taken; (b) the maximum amount of any conceded benefit proximately resulting from the taking; and (c) the minimum amount of any claimed damage proximately resulting from severance; and

(4) not later than 5 days after defendants shall have served and filed the statements required under paragraph (3) of this subdivision (h), plaintiff shall serve and file with the Clerk a "STATEMENT AS TO JUST COMPENSATION" setting forth a brief schedule of plaintiff's contentions as to: (a) the

maximum fair market value in cash, at the time of the taking, of each estate or interest taken in each parcel involved; (b) the maximum amount of any conceded damage proximately resulting from severance; and (c) the minimum amount of any claimed benefit proximately resulting from the taking.

By analyzing the differences between these two rules and going behind them to ascertain how they are in practice effectuated, we are able to see to what degree they are in agreement and wherein the federal rule, at least as applied in the United States District Court for the Southern District of California, is markedly more detailed and more encompassing.

To begin with, in practice there seems to be little disagreement among practitioners working under the California and federal procedures as to the necessity for revealing in pretrial conference the following elements that enter into a condemnation trial:<sup>14</sup>

(a) The ownership of the property (if there are any differences on this matter, they may be decided either at pretrial conference or at the trial; but usually there is no disagreement on this matter).

(b) The nature, extent or character of the estate or interest taken, including whether a taking is of a whole parcel or a part thereof.<sup>15</sup>

(c) The date on which the action was commenced.

(d) The date of the issuance of the summons, the date of the recording of the *lis pendens* and the effective date of any order of immediate possession.

(e) The date of valuation.<sup>16</sup>

Whenever any of these questions arise, counsel for both parties usually are willing to stipulate. If there is no prior agreement, the judge in a state court pretrial conference often can aid the parties in reaching agreement, or in the federal court, can determine these unresolved questions of fact and law. In regard to these factors, at least, in both the federal and California courts, pretrial conference narrows the issues and saves time that would otherwise have to be consumed in the course of the trial and enables the parties to prepare their cases more adequately.

The similarities between the California and federal jurisdictions, however, do not appear to go any further. Other matters, more crucial and more controversial, are treated quite differently by the two jurisdictions. To a great extent, these two different views are irreconcilable because the federal courts, at least in Southern California, appear to have adopted the philosophy of a broad pretrial conference and discovery program, whereas the California courts, to a great extent, abide

<sup>14</sup> See generally Dolan, *supra* note 11; Memorandum No. 59-7 prepared by Holloway Jones, Ass't Chief, Calif. Div. of Highways, Dep't of Public Works, April 22, 1960; *Directions by the Court for a Pre-Trial Hearing in Condemnation Matters*, United States District Court for the Southern District of California (Southern Division), made available to the authors by Judge James M. Carter of the United States District Court for the Southern District of California.

<sup>15</sup> Most authorities agree that the court should decide the legal question of the larger parcel prior to the time of the trial either at the pretrial conference or at the hearing set for this purpose. See Memorandum No. 59-7, *supra* note 14.

<sup>16</sup> Prior to *People v. Murata*, 55 Cal.2d 1, 357 P.2d 833 (1961), there was no authoritative interpretation of Code of Civil Procedure Section 1249 insofar as it pertains to new trials. That case held that the date of valuation on a new trial is the same as the date of valuation used for the first trial. Other problems relating to the interpretation and application of Section 1249 and to the determination of the date of valuation will be discussed in a later study relating to that subject.



by the "adversary proceeding" philosophy of a condemnation suit.<sup>17</sup> Although we shall go into the specific implications of these different philosophies in greater detail in a subsequent part of this study when we discuss discovery at length, we might also note here some of the factors that are treated differently in pretrial conferences because of this conflicting philosophy.

#### The Exchange of Comparable Sales for the Purpose of the Pretrial Conference

The foremost disagreement, that of the exchange of comparable sales, is bound up with the nature of the pretrial conference, although it is basically a question as to the scope of discovery. Prior to August 1961, most but not all California courts refused to force any of the parties to disclose prior to trial those comparable sales that they had obtained or expected to use at trial. As stated above, the local federal court rules in Southern California compel disclosure of these facts; and, in a series of decisions<sup>18</sup> beginning in August 1961, the appellate courts of California have made it clear that the disclosure of such facts—and even the disclosure of expert opinion—may be compelled through the use of ordinary discovery procedures. Any reflection on the matter would show almost immediately that the entire nature of the pretrial conference is determined by whether disclosure of these sales is a prerequisite pretrial conference procedure. If neither party is compelled to reveal its comparable sales, then the pretrial conference itself becomes extremely limited and can concern itself essentially only with questions of law and indisputable questions of fact.

Nondisclosure of comparable sales has an additional adverse effect aside from thwarting pretrial conference purposes of expediting the trial, narrowing the issues and facilitating settlements. The *Faus* case adopted a necessarily vague standard for the determination of whether a sale relied upon is comparable and, therefore, admissible. "Manifestly," the court said, quoting Professor McCormick, "the trial judge in applying so vague a standard must be granted a wide discretion."<sup>19</sup> While the court has the discretion to decide whether a sale is comparable either at the time of the trial in his chambers on voir dire or during the trial itself,<sup>20</sup> it would appear that the propitious time for this determination would be prior to the trial, since, if the court should decide certain sales are inadmissible for one reason or another, counsel for the parties are then in a better position to prepare their cases for trial. Furthermore, if a sale should be held inadmissible, it would be better not to have any evidence surrounding it revealed to the jury prior to its rejection.

<sup>17</sup> Interview between authors and Jack M. Howard and Norval Fairman, April 25, 1960; interview between authors and Judge John J. Ford of the Second District Court of Appeal, July 21, 1959; see Dolan, *supra* note 11; Memorandum No. 59-7, *supra* note 14.

<sup>18</sup> Greyhound Corp. v. Superior Court, 56 Cal.2d 355, 15 Cal. Rptr. 90, 364 P.2d 266 (1961); People v. Donovan, 57 Cal.2d 346, 19 Cal. Rptr. 473, 369 P.2d 1 (1962); Suezaki v. Superior Court, 58 Cal.2d —, 23 Cal. Rptr. 368, 373 P.2d 432 (1962); Oceanside Union School Dist. v. Superior Court, 58 Cal.2d —, 23 Cal. Rptr. 375, 373 P.2d 439 (1962); San Diego Professional Ass'n v. Superior Court, 58 Cal.2d —, 23 Cal. Rptr. 384, 373 P.2d 448 (1962); Mowry v. Superior Court, 202 Cal. App.2d —, 20 Cal. Rptr. 698 (1962).

<sup>19</sup> County of Los Angeles v. Faus, 48 Cal.2d 672, 678, 312 P.2d 680, 684 (1957).

<sup>20</sup> See People v. Murray, 172 Cal. App.2d 219, 342 P.2d 485 (1959).

In like manner, questions as to the admissibility of other valuation methods and data (*e.g.*, capitalization and reproduction factors) also affect the nature and scope of a pretrial conference for the same or similar reasons that are discussed above in regard to comparable sales. While these aspects of the trinity approach to valuation are discussed at length later in reference to discovery, it should be emphasized here that a broad disclosure rule may often have the effect of narrowing the issues and, perhaps, facilitating settlement at the time of the pretrial conference.

#### The Determination of the Highest and Best Use At the Time of the Pretrial Conference

Whether the parties should be compelled to disclose their positions as to the highest and best use of the property to be taken also affects to a very great extent the nature of the pretrial conference. The question, however, must be broken down into two parts: (1) Should the parties be compelled to disclose their theory of highest and best use? (2) Should the pretrial conference judge be allowed to determine what is the highest and best use of the property?

There seems to be little opposition to requiring the parties to reveal their respective positions as to the highest and best use. Counsel for each of the parties is usually willing now to reveal his position on this question; indeed, the local federal court rules in Southern California compel such disclosure,<sup>21</sup> and the California Supreme Court has suggested that such disclosure may be compelled by a demand for admissions pursuant to Section 2033 of the Code of Civil Procedure.<sup>22</sup> On the other hand, there is presently little inclination to grant the pretrial conference judge the right and power to decide at the time of the pretrial conference what the highest and best use of the property is and to make that decision a binding one.<sup>23</sup> The first reason for the opposition to such a policy is that the question of the highest and best use is essentially a fact question and cannot be determined except by the trier-of-fact (almost invariably a jury) and certainly cannot be determined without a consideration of various other information and data. Second, the question of highest and best use is a matter of expert opinion; and the appraiser, most authorities in the field argue, should stand or fall on his opinion, including that of highest and best use.<sup>24</sup>

In this regard, one condemnor has noted:

Agreement upon certain issues may be pressed by the court or opposing counsel which we feel are not appropriate issues for agreement. An example is "the highest and best use of the property." Such an evidentiary matter is dependent upon the view of our expert witnesses and ordinarily we should refrain from committing ourselves to the highest and best use which would be binding at the trial if placed in the pre-trial order.<sup>25</sup>

<sup>21</sup> See S.D. CAL. R. CIV. PROC. Rule 9(e).

<sup>22</sup> *Greyhound Corp. v. Superior Court*, 56 Cal.2d 355, 381, 15 Cal. Rptr. 90, 102, 364 P.2d 266, 278 (1961) (dictum).

<sup>23</sup> Interview between authors and Judge John J. Ford, July 21, 1959; Memorandum No. 59-7, *supra* note 14.

<sup>24</sup> Interview between authors and Jack M. Howard and Norval Fairman, April 25, 1960.

<sup>25</sup> Memorandum No. 59-7, *supra* note 14.

Finally, counsel for both parties are usually reluctant to have a binding determination as to highest and best use made at the time of the pretrial conference because such an early determination entails the expenditure of additional work and appraisal costs that might not have to be spent if a settlement is reached before trial. In other words, the necessity of performing these tasks before the pretrial conference results in a concurrent expenditure of funds that often has the unfortunate effect of hindering settlement. For this reason, counsel for both parties at times are hesitant to formulate their own final contentions on these points.

But, while the reasons for refusing to make a final and binding determination of highest and best use at the time of pretrial conference are indeed formidable, nonetheless, the failure to make such a determination has a considerable effect upon the judge's determination as to whether or not any particular sale is comparable. It is impossible in most instances to rule on the question of comparability, or to decide on the admissibility of capitalization and reproduction data, without first determining what is the highest and best use of the property to be taken, or, at the very least, what are plausible uses. *Unless, therefore, there can be binding determinations on these points, the pretrial conference becomes and remains an ineffectual forum for the application of the "safeguards" that the Faus case set forth.* Rather, the pretrial conference becomes and remains primarily a means for settling less controversial questions and, to a limited extent, facilitating settlements; the difficult, time-consuming problems must remain and be heard at the time of trial. This appears to be the only conclusion that can be drawn if a policy of "disclosure but non-binding determinations" at the time of the pretrial conference is adopted. While "disclosure," in and of itself, is probably beneficial to the parties and may possibly facilitate settlements, it can hardly be said to be a factor which significantly expedites the judicial process.

As it is now clear that California has adopted a broad discovery rule, the prime policy question is whether the pretrial conference can take advantage of such disclosure and permit the pretrial conference judge to make binding determinations as to controverted factual matter, such as comparable sales, in order to settle these issues prior to trial.

The major impediment to the determination of comparable sales and adjunct questions at the time of the pretrial conference is, as noted above, the problem that a determination of these questions involves the consideration and the introduction of a considerable amount of evidence. But, even if it could be said that such a procedure is warranted insofar as it might tend to expedite the trial and narrow the issues, there are even greater obstacles to the determination of these questions at the time of the pretrial conference. The one that is most difficult to overcome is that in counties with multi-judge courts it is often difficult for the presiding judge to assign the same judge to conduct both the pretrial conference and the actual trial. On this point, speaking about lawsuits in general and not about condemnation actions in particular, the Judicial Council has stated:

There is some advantage in having the same judge conduct the actual trial who pre-tried the case. The knowledge he has gained of the case enables him to start the trial without preliminaries.

This is often difficult, however, in multi-judge courts and is almost impossible in large courts using the master calendar system. Here experience shows the advantage of assigning judges as pre-trial specialists, leaving their associates to continuity of trial work. Under this procedure the trial judge quickly reads the pre-trial conference order which completely advises him of what has been agreed upon and as to the remaining areas of controversy. Indeed some lawyers prefer the system of pre-trying their cases before one other than the trial judge as they feel they can more frankly discuss certain matters, particularly terms of settlement.<sup>26</sup>

Unfortunately, the advantages of having different judges for these purposes are far outweighed by the disadvantages, at least insofar as condemnation actions are concerned. It is extremely difficult, if not impossible, for the pretrial conference judge to determine comparable sales, as an example, without having determined such questions as the highest and best use. Consequently, most of the controversial determinations that are made by the pretrial conference judge can only be tentative and not final; and the unsatisfactory result of this situation is that the trial judge must begin on his own and the findings of the pretrial conference judge in most of these instances must be discarded. Such a process is not only time-consuming but also time-wasting.

Experts in the field of condemnation, recognizing this, have approached the judiciary for the purpose of overcoming this obstacle to a more expeditious handling of a condemnation case.<sup>27</sup> The Judicial Council apparently, for reasons indicated in the above quotation, has concluded that there is no feasible method by which the same judge can handle the pretrial conference as well as the trial, except in rare and major cases.

A close observer and leading authority in the area, Federal District Judge James M. Carter, has suggested a possible way to overcome the obstacle presented above. He suggests that a clerk be assigned to go through the files of the pending condemnation cases in the superior courts and see what actions on the docket need special treatment. After segregating these cases, they could be assigned to a judge for the purpose of both pretrial conference and trial. This would enable the judge in pretrial conference to make binding rules. The weakness in this method is that it is not often possible for a clerk to make an examination of the pleadings and, from the pleadings alone, ascertain whether the particular case will necessitate special treatment.

Another suggestion advanced by Judge Carter is to allow both parties to apply to the court to have the same judge conduct the trial and the pretrial conference. The weakness of this alternative is that most attorneys would resort to this opportunity and the master calendar system would undoubtedly be injuriously upset.<sup>28</sup>

Furthermore, from a practical point of view, it is often difficult to determine whether a particular sale is comparable to the property being

<sup>26</sup> CAL. SUPER. CT. RULES, *Appendix: California Manual of Pre-Trial Procedure*, 533, 537 (Deering 1960).

<sup>27</sup> A special committee representing the Los Angeles Bar Association, Committee on Condemnation, conferred with Los Angeles County Superior Court Judges Philbrick McCoy and Louis H. Burke on November 13, 1959, concerning this and related questions.

<sup>28</sup> Interview between authors and Judge James M. Carter, of the United States District Court for the Southern District of California, June 4, 1960.

taken, or whether the particular capitalization rate is proper, or to determine any other controversial fact question at the time of the pretrial conference. It is difficult because pretrial conferences are usually held at least five to six weeks prior to trial.<sup>29</sup> At that date, most condemnees—and probably many condemnors as well—are unprepared to make binding concessions that will necessarily affect the outcome of the case. They usually have not analyzed the merits and weaknesses of their case and adopted a carefully reasoned theory of value and damages. One reason for this delay in arriving at a final theory of the case is, as indicated before, that such a practice would involve the expenditure of time and appraisal costs that might not, in case of settlement, be incurred. Moreover, oftentimes the experts that are hired for either the condemnor or the condemnee have not at that early stage made a final appraisal.<sup>30</sup>

It would appear, therefore, that aside from strict questions of law and aside from those noncontroversial questions of fact mentioned at the beginning of this section, the pretrial conference is not the ideal forum for making binding determinations on disputed questions in eminent domain proceedings. Rather, it would appear that, aside from clearing up noncontroversial questions of fact and deciding questions of law in order to shorten the period of trial, the prime aim of the pretrial conference in these proceedings is to facilitate settlement.

#### The Disclosure of Appraisal Reports at the Time of the Pretrial Conference

The foregoing conclusion brings us to the third major category of matters which might be disclosed for the purpose of the pretrial conference—the appraisal reports. While this question mainly concerns the scope of the discovery process, it also has a marked effect upon a prime justification for the pretrial conference—facilitating settlements.

Some authorities believe that settlements may more easily be arrived at by “laying all one’s cards on the table.”<sup>31</sup> If such a policy is conducive to settlement, the pretrial conference would appear to be an appropriate time and place for this purpose. Indeed, Rule 213 of the Rules of the Superior Court indicates that, while the pretrial conference judge should not necessarily “knock heads together,” he and counsel for the parties should use this opportunity to avoid further litigation and to reach a settlement.

<sup>29</sup> CAL. RULES OF COURT, Rule 220.

<sup>30</sup> Judge James M. Carter indicated that experts, working under the provisions of Federal Rule 9, usually abide by the rule and prepare their work far enough in advance to meet its requirements. Practitioners in the field have expressed some reservation about expediting appraisal reports far in advance for trial. At times, as indicated in the text, the completion of a final appraisal report can be a drawback to settlement insofar as the parties, particularly the condemnee, after defraying appraisal costs, are somewhat more reluctant to forego trial. While complete knowledge, usually obtainable only from a final appraisal report, is almost always conducive to proper negotiations leading to settlement, (Continuing Education of the Bar Lectures, State Bar of California, by John N. McLaurin, on Negotiations, June 1960, at Los Angeles) paradoxically, the very expenditure for gaining this information at times hinders settlement.

<sup>31</sup> See CAL. CONTINUING EDUCATION OF THE BAR, CALIFORNIA CONDEMNATION PRACTICE, McLaurin, *Negotiations*, 105, 112-13 (1960); Carter, *Pre-Trial in Condemnation Cases—A New Approach*, 40 J. AM. JUD. Soc’y 78 (1956).

The California courts apparently are now committed to the position that an adverse party's appraisal reports are subject to discovery.<sup>32</sup> But, whether a party should be compelled to reveal his appraisal report, the contents of which concern the heart and substance of almost all condemnation actions, is probably the most controversial question discussed in this study. There appear to be as many differing views on this point as there are authorities in the field. Almost all of these authorities, however, believe in some disclosure for the purpose of creating a climate conducive to settlement. Most attorneys representing condemnees and a number of those who speak for condemnors are not averse to the exchange of information on comparable sales, highest and best use, income and profit data, and other types of valuation facts.<sup>33</sup> At the same time, for reasons detailed in this study in the section on discovery, attorneys generally are opposed to the disclosure of the expert's report as such, particularly the expert's opinion on value of and damages to the subject property. It is still too early to determine whether the broad discovery rules declared by the California courts will have a significant effect upon the settlement of condemnation cases at pretrial.

Despite the reservations of the majority of practitioners in the field regarding full disclosure for settlement purposes, the fact remains that the limited disclosure policy formerly followed by most California courts made the pretrial conference an insignificant factor in arriving at settlements of condemnation cases. The limited policy of disclosure virtually nullified one of the prime purposes of the pretrial conference—settlement.<sup>34</sup>

Other jurisdictions (as well as California) have adopted a broad discovery policy; and it appears that one of the main reasons for this is to facilitate settlement agreements. The local federal court rules for the Southern District of California are an example of the attempt to broaden disclosure for the purposes of settlement as well as for purposes of discovery in general.<sup>35</sup> As noted above, these rules require the parties, before the pretrial conference, to exchange those comparable sales to be relied on at the time of the trial; and each must specify the highest and best use claimed for the property taken. In addition, each party must reveal, *in camera*, the opinion of value that

<sup>32</sup> *Oceanside Union School Dist. v. Superior Court*, 58 Cal.2d —, 23 Cal. Rptr. 375, 373 P.2d 439 (1962); *San Diego Professional Association v. Superior Court*, 58 Cal.2d —, 23 Cal. Rptr. 334, 373 P.2d 443 (1962).

<sup>33</sup> Minutes of Los Angeles Bar Association, Committee on Condemnation, August 5, 1959 (the Committee voted 8-2 in favor of an exchange of comparable sales at pretrial conferences with limitations to be discussed); in Memorandum to Holloway Jones, Ass't Chief, Calif. Div. of Highways, Dep't of Public Works, from Norval Fairman entitled *Experience of the San Francisco Office of the Division of Contracts and Rights of Way with the use of Discovery in Eminent Domain Proceedings to April 20, 1960*, the author points out that the Division of Highways has made use of written interrogatories for the purpose of discovering "The operating details of a business (gross sales, income, expenses, rental of cabin units, etc.) and, . . . to discover factual data relating to the commercial mining potential of a property (mining studies made, mineral production of ore during mining operations, etc.)."

<sup>34</sup> In an interview between authors and Jack M. Howard and Norval Fairman on April 25, 1960, the interviewees expressed the belief that, at the most, the pretrial conference has on rare occasions accelerated a settlement that probably otherwise would have been made.

<sup>35</sup> It is to be noted that Rule 9 of the United States District Courts for the Southern District of California is not generally followed in other federal courts in this State. Minutes of the Los Angeles Bar Association, Committee on Condemnation, June 3, 1959, statement of Francis Whelan.

its experts will testify to. Finally, the condemnee must state his minimum contentions of fair market value and damages and his maximum contentions as to special benefits, and the condemnor must state its maximum contentions of fair market value and damages and its minimum contentions as to special benefits. Judge James M. Carter, a chief supporter of the policy behind these rules (though not of all their specific provisions), has written that they generally work out well in practice and have to some extent proven valuable in fostering settlement agreements.<sup>36</sup>

The State of Wisconsin, rejecting all objections, radically revamped its condemnation statutes. The new legislation became effective in April 1960. It includes an extremely liberal discovery rule, one of the many purposes of which would appear to be the promotion of settlement agreements between the parties and the prevention of unnecessary litigation. It might be noted that there is little support for the principle of broad liberality—declared by the California courts and codified in the Wisconsin discovery statute—among practitioners in this State, particularly insofar as it calls for the exchange of appraisal *opinion* as well as factual data.<sup>37</sup> The Wisconsin statute reads, in part, as follows:

- (7) A commission in condemnation or a court may in their respective discretion require that both condemnor and owner submit to the commission or court at a specified time in advance of the commission hearing or court trial, a statement covering the respective contentions of the parties on the following points:
- (a) Highest and best use of property.
  - (b) Applicable zoning.
  - (c) Designation of claimed comparable lands, sale of which will be used in appraisal opinion evidence.
  - (d) Severance damage, if any.
  - (e) Maps and pictures to be used.
  - (f) Costs of reproduction less depreciation and rate of depreciation used.
  - (g) Statements of capitalization of income where used as a factor in valuation, with supporting data.
  - (h) Separate opinion as to fair market value, including before and after value where applicable by not to exceed 3 appraisers.
  - (i) A recitation of all damages claimed by owner.
  - (j) Qualifications and experience of witnesses offered as experts.
- (8) A condemnation commission or a court may make regulations for the exchange of the statements referred to in sub. (7) by the parties, but only where both owner and condemnor furnish same, and for the holding of prehearing or pretrial conference between the parties for the purpose of simplifying the issues at the commission hearing or court trial.<sup>38</sup>

<sup>36</sup> See 6 NICHOLS, EMINENT DOMAIN 32-36 (Supp. 1959); Carter, *Pre-Trial in Condemnation Cases—A New Approach*, *supra* note 31.

<sup>37</sup> Pruitt, *Lawyers' Work Product*, 37 CAL. STATE BAR J. 228 (1962); but see Friedenthal, *Discovery and Use of an Adverse Party's Expert Information*, 14 STAN. L. REV. 455 (1962).

<sup>38</sup> See WIS. STAT. § 32.09 (1959).

Maryland has adopted a rule, applicable in all civil proceedings, which permits the discovery of the reports of any experts the opposing party intends to call at trial. If no report is available, the expert's deposition may be taken, and he may be questioned about his findings and opinions.<sup>39</sup>

The exchange of appraisal reports, with the inclusion of the experts' final opinions of value and damages, does not appear to be sanctioned by any jurisdictions except California, Maryland and Wisconsin. Even under the local federal court rules discussed above, there is no exchange of appraisal reports *per se*; rather, the parties are required to submit these reports *in camera*. While, as will be pointed out later, there are serious practical objections to requiring a full disclosure of an expert's report, the submission of these opinions of value and damages to the presiding judge, *in camera*, does not appear to be either improper or prejudicial. Indeed, there is at least some indication that such a practice may facilitate settlement.<sup>40</sup>

Although a complete analysis and final conclusions and recommendations regarding the subject of pretrial conferences cannot be spelled out here until detailed attention is paid to the efficacy, appropriateness and status of discovery in general, some tentative conclusions and recommendations may now be advanced in regard to the pretrial conference.

#### Tentative Conclusions and Recommendations in Regard to Pretrial Conferences in Condemnation Cases

(1) Presently, it is the general consensus of practitioners and authorities in this field that the pretrial conference in condemnation actions has not fulfilled the desires and goals that were envisioned by its proponents. It may be concluded, albeit regrettably, that the pretrial conference has the tendency to prolong and to increase the expense of a condemnation action; and whether the benefits are commensurable is questionable.

<sup>39</sup> Maryland Rules of Procedure § 410c.

<sup>40</sup> For example, Judge James M. Carter in *Pre-Trial in Condemnation Cases—A New Approach*, *supra* note 31, at 79, noted one particular case in which the *in camera* disclosure was made, and commented on its results:

"The order was made and complied with. The results were interesting, gratifying and justified the time expended by counsel and the Court. Eleven parcels were involved. One was settled forthwith. The *en camera* reports showed that in eight parcels a sharp conflict existed as to the presence and marketability of rotary mud suitable for oil or water well drilling purposes. The values assigned by the experts varied greatly. These so called 'mud parcels' went to trial and verdict. [See *United States v. Land In Dry Bed of Rosamond Lake, Cal.*, 143 F. Supp. 319 (1956).]

"There were two large parcels which did not contain 'mud,' one of 480 acres and the other of 160 acres. When the Court inspected the *en camera* reports, the following were the values assigned:

<i>Government's Experts</i>	<i>Defendant's Experts</i>
#1 480 acre parcel	
Expert A \$38,700	Expert C \$47,916
Expert B 48,000	Expert D 47,900
#2 160 acre parcel	
Expert A \$12,000	Expert C \$12,000
Expert B 12,000	Expert D 12,000

"The Court thereupon wrote counsel that as to parcel No. 2 their expert's valuations were identical and that as to parcel No. 1 the figures were so close that the Court suggested they 'show their hands' and settle. Both were settled. It is to be noted that one Government expert was slightly higher than either defense expert as to parcel No. 1.

"Judge William C. Mathes of this court subsequently used the same approach and a similar pre-trial order. The order was made shortly before trial of seven parcels (none involving 'mud'). Five were settled. Judge Mathes was later informed by the United States Attorney that the remaining two would have been settled had the order been made earlier in the proceedings."



(2) The pretrial conference can seldom narrow the controversial issues—those relating to just compensation—because these are generally fact questions that must be decided by the trial court. Even if the pretrial conference court were bent upon hearing all this factual evidence, because of the inability of the court system to arrange for the same judge to conduct the trial and the pretrial conference and because of the practicalities surrounding the preparation of a condemnation action, the scope of a pretrial conference must necessarily be a limited one.

(3) Certain questions of fact or law which are seldom controverted can be and are settled at the pretrial conference. However, agreement on these issues seldom involves any considerable amount of time at trial and in the past were probably handled adequately by stipulation. On the other hand, the pretrial conference judge can sometimes offer assistance to the parties in reaching agreement on disputed matters.

(4) The exchange of comparable sales, a very significant factor in light of the *Faus* case, has limited utility for the purpose of a pretrial conference. This is so because, as noted above, the pretrial conference judge and the parties are not in a position to reach agreement or decide the questions of comparability and highest and best use. The exchange of information on comparable sales, highest and best use, and other factual and opinion matters may be valuable for other purposes, but it is of little value for the purposes of a pretrial conference.

(5) The facilitation of a settlement appears to be the most profitable use that can be made of the pretrial conference in eminent domain proceedings. It would seem helpful to the pretrial conference judge and should not be prejudicial to the parties (particularly when a different judge will preside at the trial if a settlement is not reached) to reveal to the judge as much information as possible, including the opinions of value held by the experts for each of the parties. It is believed, however, for reasons outlined below, that the pretrial conference judge should receive such information only *in camera*.

(6) While the exchange of comparable sales and similar information can have little binding effect at the time of the pretrial conference and probably is of limited aid for the purpose of bringing about a settlement, it may assist in effectuating the rule in the *Faus* case in particular, and in fostering the goals of the discovery process in general. Thus, while the discovery process would seem to have few advantages for the purpose of the pretrial conference, it might well be very important for purposes of trial. Whether such an exchange of information has as many disadvantages as advantages and whether it would be "legal" and proper to require such disclosure is the subject of the next section of this study.

#### DISCOVERY FOR PURPOSES OF TRIAL

As the previous section indicated, a liberal discovery rule, aside from being a limited aid to settlement, is not particularly effective in facilitating the pretrial conference stage of a condemnation action. Its advantages and propriety for purposes of a trial, however, now become the subjects of this phase of our inquiry.

Initially, it is necessary to pose the question: What benefits will result from the exchange of comparable sales and similar data? In answering this question it is, in turn, necessary to list the possible advantages of a liberal discovery policy, both in general and in regard to this matter. Whatever benefits such a policy might produce fall into four major categories:

1. Does it help to simplify and narrow the issues with which the court and jury are confronted?

2. Does it eliminate "surprise," and is the elimination of surprise conducive to a just determination of value?

3. Does it enable the parties to discover certain important facts that they otherwise would not learn or would have great difficulty in finding out or would have to go to a considerable or unwarranted expense in discovering?

4. Does it, particularly in light of the *Faus* case, help to expedite the trial?

And, assuming any or all of these questions are answered in the affirmative, are there any substantial countervailing factors that would compel a conclusion that the scope of discovery in condemnation cases should be a very restricted one?

The first two questions do not present as difficult or complex considerations as the latter questions, which involve numerous and very controversial matters. Insofar as possible, we shall deal with each of these questions in the order presented.

#### Discovery and the Simplification and the Narrowing of the Issues for Trial

One of the major arguments advanced by proponents of a broad discovery rule is that it tends to simplify and narrow the issues that the court and jury will be confronted with at trial. In the landmark case of *Hickman v. Taylor*,<sup>41</sup> Mr. Justice Murphy stated in his decision:

The various instruments of discovery now serve (1) as a device . . . to narrow and clarify the basic issues between the parties . . .<sup>42</sup>

In many fields of law, this contention may serve as an adequate ground for liberal discovery rules. In the field of condemnation, however, this argument can seldom serve as a justification for discovery.

Many attorneys, in approaching the pretrial conference judge in a condemnation case, are prone to state:

Your Honor, this is a simple condemnation case, the date of taking is stipulated to and the only issue to be tried is the fair market value of the property as of the date of taking.<sup>43</sup>

While condemnation actions are not quite that simple and in fact can become quite involved, the complexity results not so much from the

<sup>41</sup> 329 U.S. 495 (1947); 4 MOORE, FEDERAL PRACTICE § 26.02, at 1014-1016 (2d ed. 1950) [hereinafter referred to as MOORE].

<sup>42</sup> *Hickman v. Taylor*, *supra* note 41, at 501. The Supreme Court of California in *Greyhound Corp. v. Superior Court*, *supra* note 18, asserted that this was a prime reason for the adoption of both the federal and the California discovery statutes.

<sup>43</sup> Carter, *Pre-Trial in Condemnation Cases—A New Approach*, *supra* note 31.

number or difficulty of the issues but from the confusion and contradiction of the fact and opinion evidence presented to the court and jury.

A general proposition, as the Supreme Court of the United States has emphasized, is that in "an eminent domain proceeding, the vital issue—and generally the only issue—is that of just compensation."<sup>44</sup>

The exchange of comparable sales, as such, does not serve to simplify or narrow the issues. It may have some advantageous results, but this is not one of them. By the same token, the revelation of each of the parties' contentions as to "the highest and best use" does not serve to narrow the issues for the purpose of trial, in large part because a party may testify to another use at the trial and also because each party is usually aware of the other party's position on this point.<sup>45</sup>

Indeed, it is doubtful that discovery rules are directed toward anything other than facts that determine whether an issue exists; pretrial discovery, it can and has been argued, is not related to an issue already framed—such as the amount of damage or of just compensation.<sup>46</sup>

Regardless of any other purpose that discovery might fulfill, since generally in condemnation actions the issue of just compensation is really the only issue in front of the jury, the discovery rule can hardly serve to simplify or narrow the *issues*. Consequently, it is necessary to conclude that this ground cannot serve as an argument for a broad discovery rule in condemnation cases.

#### Discovery and the Elimination of "Surprise"

Surprise, its importance or its elimination, is the second aspect of the question whether the discovery of the other party's appraisal information should be permitted. The elimination of surprise is one of the keystones of the rationale for a discovery rule; and the retention of the element of surprise is used at times as a reason for disfavoring a broad discovery rule.

Those favoring discovery have argued that:

The deposition-discovery procedure simply advances the stage at which the disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise.<sup>47</sup>

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The sporting theory of litigation thrives on surprise—including surprise witnesses. Elimination of this sort of tactics is a legitimate purpose of the discovery rules.<sup>48</sup>

As against this liberal viewpoint concerning the propriety of surprise in trials, those who favor the "adversary" type of trial<sup>49</sup> and those who believe that surprise leads to truth have strong reservations

<sup>44</sup> *McCandless v. United States*, 298 U.S. 342, 348 (1936); and see Dolan, *Federal Condemnation Practice*, *supra* note 11.

<sup>45</sup> See *Rust v. Roberts*, 171 Cal. App.2d 772, 778, 341 P.2d 46, 50 (1959).

<sup>46</sup> *Cf. Maple Drive-In Theater Corp. v. Radio-Keith-Orpheum Corp.*, 24 Fed. Rules Serv. 16.21, Case 1 (S.D. N.Y. 1957).

<sup>47</sup> *Hickman v. Taylor*, 329 U.S. 495, 507 (1947).

<sup>48</sup> 4 MOORE § 26.19, at 1079. The court in the *Greyhound* case, *supra* note 18, rejected the "sporting theory of litigation"—namely, surprise at the trial—though it asserted this was not a retreat from the adversary nature of the trial of a lawsuit, 56 Cal.2d at 376-77, 15 Cal. Rptr. at 99-100, 364 P.2d at 275-76.

<sup>49</sup> Interview between authors and Judge John J. Ford, July 21, 1959; interview between authors and Jack M. Howard and Norval Fairman, April 25, 1960.

about any policy that would weaken this "potent instrument." Mr. Justice Ashburn, in *Unger v. Los Angeles Transit Lines*,<sup>50</sup> noted the "ultimate philosophy" of the discovery rules but expressed his disagreement with them insofar as they seek to preclude the element of surprise. He asserted that:

Every experienced trial lawyer knows that surprise is one of the most potent instruments for uncovering, blasting out, the truth that there is, but the theorists who have evolved our discovery rules dub it "the sporting theory of litigation" and have condemned it. Whether we individually like it or not, such is the situation and the law of California is that disclosure of witnesses may be compelled in circumstances such as those presented at bar.<sup>51</sup>

But, at this stage of our study, it is not necessary to take sides on this aspect of the controversy. For once again, as a practical proposition, any party that does a fairly diligent job of preparing for a condemnation case is seldom surprised on any material point at trial. It is true, however, that in the absence of adequate discovery rules a party may have difficulty in determining the names and addresses of witnesses, including experts, known or obtained by the other party. And in the absence of adequate provisions, a condemnee may be unable to ascertain the pertinent facts surrounding a prior sale made to the condemnor. Similarly, a restricted discovery rule would often prevent a condemnor from garnering the necessary data concerning the condemned property in order to make a meaningful capitalization study. Likewise, one party—but not the other—may be aware of an unrecorded comparable sale or of pertinent facts concerning a particular comparable sale that indicate that the sale is not an "open market" transaction.

The present California case law rejects the aforementioned objections to what is generally considered a proper area of discovery—even though it tends to eliminate the element of surprise. For instance, the names of witnesses to an accident, and statements they have given to one of the litigating parties, are subject to disclosure.<sup>52</sup> Similarly, the names of experts, and the opinions and reports they have given to

<sup>50</sup> 180 Cal. App. 2d 172, 4 Cal. Rptr. 370 (1960).

<sup>51</sup> *Id.* at 179, 4 Cal. Rptr. at 375.

<sup>52</sup> *Beesley v. Superior Court*, 58 Cal.2d —, 23 Cal. Rptr. 390, 373 P.2d 454 (1962); *Greyhound Corp. v. Superior Court*, 56 Cal.2d 355, 15 Cal. Rptr. 90, 364 P.2d 266 (1961); *City & County of San Francisco v. Superior Court*, 161 Cal. App.2d 653, 327 P.2d 195 (1958); *Price v. Superior Court*, 161 Cal. App.2d 650, 327 P.2d 203 (1958).

one of the litigating parties, are now subject to disclosure.<sup>53</sup> Although it may be doubtful whether in California practice, as distinguished from federal practice, a party may be compelled to disclose witnesses whom he intends to call at trial,<sup>54</sup> "an exchange of names of witnesses is not likely to cause injustice in the average case."<sup>55</sup> While some commentators believe that such discovery should not be allowed inasmuch as it might lead to harassment of these witnesses,<sup>56</sup> it does offer counsel for the other party the opportunity to prepare a foundation for impeaching such witnesses, including experts, wherever possible.<sup>57</sup> Nonetheless, few attorneys who practice in the eminent domain field, even those advocating a broad discovery policy, desire to see experts' opinions subject to discovery, except under the most unusual circumstances.

Thus, the argument as to surprise revolves chiefly about the question of whether "comparable" sales, factors of considerable importance in most condemnation trials, should be subject to discovery by either or both parties. Comparable sales, since they are a matter of public record, are readily available to each side. Except in those rather infrequent instances when a party may have overlooked a particular sale

<sup>53</sup> *Oceanside Union School Dist. v. Superior Court*, 58 Cal.2d —, 23 Cal. Rptr. 375, 373 P.2d 439 (1962); *San Diego Professional Ass'n v. Superior Court*, 58 Cal.2d —, 23 Cal. Rptr. 384, 373 P.2d 448 (1962). A cogent argument for the discovery of expert information appears in *Friedenthal, Discovery and Use of an Adverse Party's Expert Information*, 14 STAN. L. REV. 455, 485-86: "It is fundamental that opportunity be had for full cross-examination, and this cannot be done properly in many cases without resort to pretrial discovery, particularly when expert witnesses are involved. Unlike two eyewitnesses who disagree, two experts who disagree are not necessarily basing their testimony on their views of the same objective features. . . . Before an attorney can even hope to deal on cross-examination with an unfavorable expert opinion he must have some idea of the bases of that opinion and the data relied upon. If the attorney is required to await examination at trial to get this information, he often will have too little time to recognize and expose vulnerable spots in the testimony. . . ."

"The need for pretrial discovery regarding expert witnesses is further evidenced by the ever-increasing dissatisfaction with the honesty and reliability of expert testimony. Numerous authors have condemned the 'advocate-expert' who by stretching some facts and ignoring others creates a case for his client where none should exist. . . . So serious a problem has it become that a number of jurisdictions have adopted special procedures to overcome it. Generally these measures involve a plan whereby testimony is given by independent court-appointed experts. Such plans do not supply the sole answer, however, for they do not prohibit a party from calling to trial experts of his own. Consequently, even in these jurisdictions there is still a need for cross-examination based on pretrial discovery in order to expose fraudulent or misleading testimony."

<sup>54</sup> Rule 211 of the California Court Rules provides in part:

(e) At the pre-trial conference a party shall not be required to disclose his witnesses, such disclosure being governed by discovery proceedings.

<sup>55</sup> 4 MOORE § 26.19, at 1081; see *Discovery Procedure Symposium*, 5 F.R.D. 403, 406 (1946); cf. 4 MOORE 26.24, at 1159.

<sup>56</sup> See remarks of former Senator George Wharton Pepper:

"I personally see no reason, if you are going to immune from discovery the conclusions of an expert, why his name should be given to an interrogating party. It is different in the case of witnesses as to fact, but in the case of a witness as to opinion, if you are not going to permit the probing of his opinion by discovery process, I see no reason why his name and address should be made available and simply subject him to whatever pressure may be brought upon him by a party who wishes as much as possible to weaken the positiveness of the expert's opinion when it comes to trial." *Discovery Procedure Symposium*, 5 F.R.D. 403, 406 (1946).

In *Hickey v. United States*, 18 F.R.D. 88 (E.D. Pa. 1952), the Federal District Court refused to compel the disclosure of not only the appraiser's report, but his name as well. It appears, however, that the interrogatory coupled these requests in one interrogatory and it is not entirely clear that had these requests been separated, the court would have rejected the request for the name of the appraiser as well as his opinion.

<sup>57</sup> While no authorities seem to discuss this point, quite often counsel for both parties seek to determine the names of the experts employed by the other party in order to independently gather evidence to impeach the credibility of these experts. For example, frequently particular experts tend to be hired solely by either condemnors or condemnees; furthermore, in previous actions they may have made statements or taken positions that they might likely contradict in a subsequent case. To prepare for these contingencies, counsel for each side may properly ascertain the identity of such prospective witnesses.

despite thorough preparation, the parties are seldom surprised by the sales presented at trial. It is true, of course, that if a party fails to employ an expert, he may find himself the victim of numerous "surprise" sales of a comparable nature. And if this failure is due to his lack of funds, it could be argued that he should not thereby be penalized. But it is necessary to conclude that the element of surprise, as it is generally understood, regardless of whether its continuance be good or bad, has limited application to condemnation actions.

#### Discovery and the Ascertainment of "Facts"

Discovery for the purpose of uncovering "facts" not readily or easily available to one party or the other is not only the main thrust and purpose of the discovery rules but is also the crux of most of the controversy pertaining to the exchange of appraisal data and reports in condemnation cases. A detailed analysis of the problem for and against the exchange of this information is, therefore, required.

#### The General Philosophy Behind Liberal Disclosure

In order to put this controversial question in its proper focus, it is initially necessary to set forth the general philosophy behind modern discovery rules. Whether this philosophy should be applied to condemnation actions in *particular* may be another question, but in *general* there is no doubt that, simply stated:

Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession.<sup>58</sup>

And, in answer to those who argue that such a policy "would penalize the diligent and place a premium on laziness,"<sup>59</sup> Judge Jerome Frank in dictum in *Hoffman v. Palmer*<sup>60</sup> stated:

Some lawyers also grumble, saying that it is "unfair" that a lawyer who has diligently prepared his case should be obliged to let counsel for the adversary scrutinize his data. But the reformers are surely right in replying that "unfairness" to a diligent lawyer is of no importance as against much-needed improvement in judicial ascertainment of the "facts" of cases; the public interest in such ascertainment is paramount.

Likewise, another federal judge asserted:

[I]t must be kept in mind that the new Rules of Civil Procedure are fashioned to eliminate the old concept of litigation as a battle of wits and to provide the tools whereby litigants may bring before a court or jury all the facts from which the truth may be more easily ascertained and substantial justice done. To the extent that this search for the truth infringes on the convenience of litigants, such convenience must yield to that extent.<sup>61</sup>

<sup>58</sup> *Hickman v. Taylor*, 329 U.S. 495, 507 (1947).

<sup>59</sup> *McCarthy v. Palmer*, 29 F. Supp. 585, 586 (E.D. N.Y. 1939).

<sup>60</sup> 129 F.2d 976, 997 (2d Cir. 1942).

<sup>61</sup> *Seligson v. Camp Westover, Inc.*, 4 FED. RULES SERV. 26b.211, Case 2 (S.D. N.Y. 1941).

Unquestionably, most courts in this State are in accord with these general views. As the district court of appeal stated in *Grand Lake Drive In v. Superior Court*:<sup>62</sup>

We are in complete accord with the view that the discovery provisions are to be liberally construed. (*Laddon v. Superior Court*, 167 Cal.App.2d 391, 395 [334 P.2d 638]; *Grover v. Superior Court*, *supra*, 161 Cal.App.2d 644, 648.) The federal view that discovery procedures should achieve "(m)utual knowledge of all the relevant facts gathered by both parties" (*Hickman v. Taylor*, *supra*, 329 U.S. 495, 507) may not be so fully applicable in California, since here we continue to rely upon the pleadings, in part at least, for "the pre-trial functions of notice-giving, issue-formulation and fact-revelation" which the pleadings no longer serve in the federal courts. (*Hickman v. Taylor*, *supra*, p. 500.) But the federal statement, at least in some substantial degree, is descriptive of the purpose of the California act which is so largely modelled upon the federal rules relating to discovery.<sup>63</sup>

Few question, as a general principle, the above statement. Many, however, assert that such a policy should have no application insofar as condemnation actions are concerned and particularly insofar as it might pertain to the discovery of the contents of an expert's report.

#### **The Present Status of the Law in California and Elsewhere**

The California discovery statute gives no indication whether or not the knowledge and opinion of an expert in an eminent domain case are discoverable. The applicable language of Section 2016 of the Code of Civil Procedure merely reads:

(a) Any party may take the testimony of any person, including a party, by deposition upon oral examination or written interrogatories for the purpose of discovery or for use as evidence in the action or for both purposes. . . .

(b) . . . the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party, or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts. It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence. All matters which are privileged against disclosure upon the trial under the law of this State are privileged against disclosure through any discovery procedure. This article shall not be construed to change the law of this State with respect to the existence of any privilege, whether provided for by statute or judicial decision, nor shall it be construed to incorporate by reference any judicial decisions on privilege of any other jurisdiction.<sup>64</sup>

<sup>62</sup> 179 Cal. App.2d 122, 3 Cal. Rptr. 621 (1960).

<sup>63</sup> *Id.* at 129, 3 Cal. Rptr. at 627.

<sup>64</sup> See also CAL. CODE CIV. PROC. § 2031.

Thus, although the statute is in its terms deliberately broad, and although the statute is to be liberally construed,<sup>65</sup> many have taken the position that expert opinion and knowledge are not discoverable because they are within an express exception to the statute—privilege. This position was based on what has been termed a “gross misunderstanding”<sup>66</sup> of the nature of the attorney-client privilege and a misinterpretation of two California Supreme Court decisions dealing with the attorney-client privilege.

California’s attorney-client privilege is expressed in subdivision 2 of Section 1881 of the Code of Civil Procedure as follows:

An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment; nor can an attorney’s secretary, stenographer, or clerk be examined, without the consent of his employer, concerning any fact the knowledge of which has been acquired in such capacity.

For the privilege to arise, it must appear that there was a *communication* and that it was intended to be *confidential*.<sup>67</sup>

In *City & County of San Francisco v. Superior Court*,<sup>68</sup> decided in 1951, the Supreme Court applied the attorney-client privilege to knowledge acquired by a physician during a neurological and psychiatric examination that he gave to an attorney’s client for the purpose of reporting his findings to the attorney. The court pointed out that a client may “communicate” to his attorney by exhibiting his body to him; and it is no less a communication to the attorney when the client, at the attorney’s behest, exhibits his body to a physician so that his bodily condition may be correctly interpreted to the attorney. In *Holm v. Superior Court*,<sup>69</sup> decided in 1954, the Supreme Court further explained the privilege. The *Holm* case involved a personal injury action where the employees of the corporate defendant took a written statement from the plaintiff, made a report of the circumstances of the accident, and took photographs of the scene of the accident. These documents were found to have been taken partly for safety purposes but predominately for transmission to the defendant’s attorney. The Supreme Court held that the statement from the plaintiff was not privileged for it was not a communication from the client. The court held that the employees’ report and the photographs were privileged since they were communications from the client (which, being a corporation, could only communicate through its agents and employees) to the attorney and were made in confidence.

These cases were thought by some to stand for the proposition that all photographs, statements of independent witnesses and investigative reports obtained for an attorney in anticipation of litigation or in

<sup>65</sup> *Laddon v. Superior Court*, 167 Cal. App.2d 391, 395, 334 P.2d 638, 640 (1959); *Grover v. Superior Court*, 161 Cal. App.2d 644, 648, 327 P.2d 212, 214 (1958).

<sup>66</sup> The characterization is that of Justice Draper in *Trade Center Properties, Inc. v. Superior Court*, 185 Cal. App.2d 409, 411, 8 Cal. Rptr. 345, 346 (1960).

<sup>67</sup> WITKIN, CALIFORNIA EVIDENCE 464-65 (1958); *Oliver v. Warren*, 16 Cal. App. 164, 166 Pac. 312 (1911) (attorney’s observations and impressions of client’s mental state not privileged).

<sup>68</sup> 37 Cal.2d 227, 231 P.2d 26 (1951). The case is criticized in Friedenthal, *Discovery and Use of an Adverse Party’s Expert Information*, 14 STAN. L. REV. 455, 463-64 (1962), for failing to distinguish the doctor’s observations—his knowledge—from the client’s communications. Cf. *Oliver v. Warren*, *supra* note 67.

<sup>69</sup> 42 Cal.2d 500, 267 P.2d 1025 (1954).



preparation for trial were subject to the attorney-client privilege.<sup>70</sup> The fact that an "expert" prepared the report held privileged in *City & County of San Francisco v. Superior Court*<sup>71</sup> caused some to believe that all experts' reports prepared for purposes of litigation were privileged.<sup>72</sup>

Support for these beliefs appeared in some opinions of the district courts of appeal. Thus, in *Wilson v. Superior Court*,<sup>73</sup> the court indicated that the knowledge acquired by an expert during an examination of a client's property, which examination was made for the purpose of reporting to the client's attorney, would be subject to the attorney-client privilege; however, the court refused to apply the privilege because the expert was also a defendant in the pending litigation and applying the privilege would have deprived the adverse party of his right to compel revelation of his opponent's knowledge. Hence, the court compelled the expert to reveal not only the objective matters he observed during his inspection, but also his opinion concerning the subject matter of his investigation. And in *Jessup v. Superior Court*,<sup>74</sup> the court held that reports of a drowning in a public pool (including reports of statements made by independent witnesses), made to the City of Sunnyvale by its employees in anticipation of possible litigation, were privileged.

When the California discovery legislation<sup>75</sup> was enacted in 1957, a sentence was added to Section 2016 of the Code of Civil Procedure as a result of the belief that the attorney-client privilege protected communications to an attorney, not only from a client, but also from independent witnesses and experts. This sentence reads:

This article shall not be construed to change the law of this State with respect to the existence of any privilege, whether provided for by statute or judicial decision, nor shall it be construed to incorporate by reference any judicial decisions on privilege of any other jurisdiction.

It has been suggested that this sentence was added to repudiate the holding of the United States Supreme Court in *Hickman v. Taylor*,<sup>76</sup> which had held that statements taken by an attorney from independent witnesses were not privileged—since they were not confidential communications from a client—but which had also held that such statements would nonetheless be protected from disclosure to the adverse party in the absence of some showing of a special need because such statements were the "work product" of the attorney. It was thought that this sentence would repudiate that portion of the *Hickman* decision holding statements from independent witnesses not privileged,<sup>77</sup> but, since the belief that California's attorney-client privilege covered such statements was erroneous, all that the addition succeeded in doing was to reject for California practice even the qualified "work product" privilege granted by the federal courts.<sup>78</sup>

<sup>70</sup> Pruitt, *Lawyers' Work Product*, 37 CAL. STATE BAR J. 228, 233-34 (1962).

<sup>71</sup> *Supra* note 68.

<sup>72</sup> *E.g.*, Rust v. Roberts, 171 Cal. App.2d 772, 776-77, 341 P.2d 46, 49-50 (1959).

<sup>73</sup> 148 Cal. App.2d 433, 307 P.2d 37 (1957).

<sup>74</sup> 151 Cal. App.2d 102, 311 P.2d 177 (1957).

<sup>75</sup> CAL. CODE CIV. PROC. §§ 2016-2035.

<sup>76</sup> 329 U.S. 495 (1947).

<sup>77</sup> Pruitt, *Lawyers' Work Product*, 37 CAL. STATE BAR J. 228, 232-236 (1962).

<sup>78</sup> *Greyhound Corp. v. Superior Court*, 56 Cal.2d 355, 15 Cal. Rptr. 90, 364 P.2d 266 (1961).

After the enactment of the California discovery legislation, the confusion and uncertainty concerning the scope of the attorney-client privilege continued unabated. One line of district court of appeal cases held that the names and statements of independent witnesses were not privileged,<sup>79</sup> even when the independent witness involved was an expert.<sup>80</sup> And at least one decision, *Grand Lake Drive In v. Superior Court*,<sup>81</sup> held that the knowledge of an expert acquired during an investigation made for the adverse party's attorney was subject to discovery upon good cause shown.

In contrast, *Rust v. Roberts*<sup>82</sup> held that the names of appraisers employed by one party to an eminent domain proceeding, the appraisers' opinions as to the value of the land involved, the valuation date used by the appraisers, the compensation paid the appraisers, and the party's contentions as to the highest and best use of the property were privileged and not subject to discovery.

These conflicting views were finally resolved by the California Supreme Court in a series of opinions dealing with the scope of the attorney-client privilege and the correct interpretation to be given the California discovery legislation. The Supreme Court first held that a report given by an expert (a physician) to an attorney was not privileged when the report was not prepared for purposes of litigation, but was prepared in the course of the expert's employment as the physician treating the client's injury.<sup>83</sup> The court then held that the names of independent witnesses and the statements taken from them in preparation for litigation are not privileged.<sup>84</sup> Next, the court ruled that the knowledge of an expert is not privileged except where such knowledge is acquired when the expert is acting as a conduit for a communication from a client to an attorney; hence, an expert employed by a party may be called by the adverse party at trial and examined concerning his opinion.<sup>85</sup> Finally, in a group of decisions decided the same day, the court ruled that pictures taken in anticipation of litigation by an agent of one party of a subject matter that is not in itself confidential (the subject of the pictures involved in the case was the adverse party to the action) are not privileged,<sup>86</sup> that the names and addresses of appraisers hired by a party to an eminent domain action and the opinions they have submitted in preparation for litigation are not privileged,<sup>87</sup> and that the reports prepared for an attorney by experts employed by the client or his attorney in preparation for litigation are not privileged where the reports do not reflect confidential communications from the client to the attorney.<sup>88</sup>

<sup>79</sup> *Price v. Superior Court*, 161 Cal. App.2d 650, 327 P.2d 203 (1958); *City & County of San Francisco v. Superior Court*, 161 Cal. App.2d 653, 327 P.2d 195 (1958).

<sup>80</sup> *Jorgensen v. Superior Court*, 163 Cal. App.2d 513, 329 P.2d 550 (1958).

<sup>81</sup> 179 Cal. App.2d 122, 3 Cal. Rptr. 621 (1960).

<sup>82</sup> 171 Cal. App.2d 772, 341 P.2d 46 (1959).

<sup>83</sup> *San Francisco Unified School Dist. v. Superior Court*, 55 Cal.2d 451, 11 Cal. Rptr. 373, 359 P.2d 925 (1961).

<sup>84</sup> *Greyhound Corp. v. Superior Court*, 56 Cal.2d 355, 15 Cal. Rptr. 90, 364 P.2. 266 (1961).

<sup>85</sup> *People v. Donovan*, 57 Cal.2d 346, 19 Cal. Rptr. 473, 369 P.2d 1 (1962).

<sup>86</sup> *Suezaki v. Superior Court*, 58 Cal.2d —, 23 Cal. Rptr. 368, 373 P.2d 432 (1962).

<sup>87</sup> *Oceanside Union School District v. Superior Court*, 58 Cal.2d —, 23 Cal. Rptr. 375, 373 P.2d 439 (1962).

<sup>88</sup> *San Diego Professional Ass'n v. Superior Court*, 58 Cal.2d —, 23 Cal. Rptr. 384, 373 P.2d 448 (1962).

In the course of these opinions, the Supreme Court recognized that much of the material held discoverable would be characterized by the federal courts as the "work product" of the attorney and, hence, subject to a qualified privilege. Although the court held that the "work product" doctrine *per se* had been repudiated in California in Section 2016 of the Code of Civil Procedure, nevertheless, there are limitations on the right to discover this sort of information. In the first place, the material sought to be discovered must be "relevant to the subject matter of the pending action."<sup>89</sup> It must appear that permitting discovery will not do "violence to equity, justice, or the inherent rights of the adversary."<sup>90</sup> Where a showing of such "good cause" is not required as a condition precedent to discovery (as on a motion for inspection pursuant to Section 2031 of the Code of Civil Procedure), a party may obtain protection for his inherent rights upon motion.<sup>91</sup> The trial court may condition the right to discover in order to protect the rights of the parties or may deny discovery altogether. Thus, in *Trade Center Properties, Inc., v. Superior Court*,<sup>92</sup> the court held that a litigant should not be permitted to take the deposition of the adverse party's attorney except upon a showing of "extremely good cause," and a motion to prevent the taking of such a deposition was granted. In *Mowry v. Superior Court*,<sup>93</sup> and again in *Oceanside Union School Dist. v. Superior Court*,<sup>94</sup> the court suggested that an exchange of appraisal information could be required. In the *Oceanside* case such an exchange was not required, but the court noted that there was still ample time before trial for appraisal information to be discovered by both sides. And, in *San Diego Professional Association v. Superior Court*,<sup>95</sup> the court ordered production of a report prepared by a party's expert in preparation for litigation, but conditioned such production upon the payment of a fee (in an amount to be determined by the court) by the party seeking discovery of the report.

In other jurisdictions there appears to be a lack of agreement as to the propriety of compelling a disclosure of this appraisal information. In the federal courts, where most of the litigation on this point has arisen, few district courts appear to have gone along with the policy of the federal district court in Southern California.<sup>96</sup> Generally, neither party has been compelled to reveal the comparable sales data gathered by an expert. On the other hand, as has been noted before, the new Wisconsin statute permits either party the right to discover not only the appraisal data compiled by the other party's expert but his opinion of value as well.<sup>97</sup> And for many years, a New York statute (subsequently to be discussed more fully) has compelled the exchange of comparable sales.<sup>98</sup>

<sup>89</sup> CAL. CODE CIV. PROC. § 2016.

<sup>90</sup> *Suezaki v. Superior Court*, 58 Cal.2d —, 23 Cal. Rptr. 368, 370, 373 P.2d 432, 434 (1962).

<sup>91</sup> CAL. CODE CIV. PROC. § 2019, subdivisions (b) and (d); see *Greyhound Corp. v. Superior Court*, *supra* note 84, *passim*.

<sup>92</sup> 185 Cal. App.2d 409, 8 Cal. Rptr. 345 (1960).

<sup>93</sup> 202 Cal. App.2d —, 20 Cal. Rptr., 698 (1962).

<sup>94</sup> *Supra* note 87.

<sup>95</sup> *Supra* note 88.

<sup>96</sup> Interview between authors and Judge James M. Carter, June 4, 1960; Minutes of Los Angeles Bar Association, Committee on Condemnation, June 3, 1959, statement of Francis Whelan, Attorney, Los Angeles.

<sup>97</sup> See discussion in text, *supra* at 729.

<sup>98</sup> See discussion in text, *infra* at 750-52.

Despite the assurances given by the courts that a party's "inherent rights" will be protected, it appears that the majority of the California bar does not believe experts' opinions should be discoverable. As stated by the San Francisco office of the legal department of the Division of Highways:

The majority of the California Bar felt that such matters should be privileged. Accordingly, in 1953, a bill to expressly amend Section 1881 (2) to include working papers of an attorney, including witnesses' statements, investigators' reports, *appraisers' reports*, and medical and scientific, economic and other reports made by or for the attorney in preparation for trial was introduced in the Legislature (A.B. 572). This bill was part of the State Bar legislative program. The bill was dropped for further study at the suggestion of the Committee on Administration of Justice. By the 1954 session, the Committee reported that the amendment was no longer necessary because "it believes that the recent decision in *Holm v. Superior Court*, [42 Cal.2d 500, 267 P.2d 1025 (1954)], removes many of the problems on 'working papers' of the attorney, and that legislation is not necessary at this time."<sup>99</sup>

While the bar in general may possibly be in favor of a narrower discovery rule, it would appear that most of the active practitioners in the condemnation field, including attorneys representing condemnors, desire that comparable sales data be the subject of mutual disclosure. In August 1959, the Los Angeles Bar Association's Committee on Condemnation voted eight to two in favor of the following proposal as an expression of policy:

That it would be desirable at pre-trial conference for each party to submit and exchange sales transactions intended to be used during trial, subject to these conditions:

(a) submit and exchange only those sales transactions which said party's appraiser intends to rely on in arriving at his conclusion or value (as opposed to sales which he merely investigated or considered).

(b) an appraiser would be prohibited from testifying on direct examination as to the details of any sales transaction not so submitted and exchanged by him at pre-trial;

(c) each party, not less than 5 days prior to the commencement of trial, may object to the comparability or admissibility of any sale so submitted and exchanged, stating with particularity the grounds of such objection;

(d) prior to the jury trial the Court would decide upon the comparability, and consequently the admissibility on direct examination, of the sales so objected to;

(e) sales transactions not so objected to prior to trial would be deemed admissible on direct examination, but the right to question the opposing witness respecting such sales transactions on cross-examination shall in no way be prejudiced.<sup>100</sup>

<sup>99</sup> Memorandum to Holloway Jones from Norval Fairman, *supra* note 33.  
<sup>100</sup> Minutes of Los Angeles Bar Association, Committee on Condemnation, August 5, 1959.

While it may be true that the above resolution appears to be tied up with the pretrial conference, it is not necessarily anchored to such a conference but undoubtedly is directed toward the exchange of comparable sales prior to the time of trial.<sup>101</sup> As will be seen later, there is a striking similarity between the above resolution of the Committee and the New York statute on the same point.<sup>102</sup>

### *An Analysis of the Objections to a Liberal Discovery Policy*

There are three main arguments usually raised against compelling disclosure of the contents of experts' reports in condemnation cases. They are:

Such a practice (1) infringes upon the attorney-client privilege, (2) violates the "attorney's work product" concept, and (3) tends to be unfair to one party or another insofar as it "would penalize the diligent and put a premium on laziness."<sup>103</sup>

The argument based upon attorney-client privilege has been rejected by the California Supreme Court. An analysis of the remaining arguments follows.

#### *The "Work Product" Argument*

The second argument frequently raised against the disclosure of this information is that it infringes upon what is commonly referred to as the "work product" of the attorney for either the condemnor or the condemnee. To begin with, this doctrine apparently does not exist in California. It has been suggested that language was placed in Section 2016(b) of the Code of Civil Procedure for the specific purpose of repudiating the "work-product" rule enunciated by the United States Supreme Court in *Hickman v. Taylor*.<sup>104</sup> Thus, the California Supreme Court recently stated that the court was "inclined to the view that the work product privilege does not exist in this state."<sup>105</sup> The court reasoned as follows:

In its essence, the "work product rule" is a form of federally created privilege. (See case note, 8 U.C.L.A. L. Rev. 472.) The Legislature expressly refused to extend the concepts of privilege when adopting the discovery procedures. Since privilege is created by statute it should not be extended by judicial fiat. While the *Hickman* case, and any other case from a jurisdiction having a similar discovery statute, may be persuasive, and its reasoning accepted where applicable to California . . . such should not be accepted as creating a privilege where none existed. We are therefore inclined to the view that the work product privilege does not exist in this state. This is not to say that discovery may not be denied, in proper cases, when disclosure of the attorney's efforts,

<sup>101</sup> At the time this proposal was made and passed the Condemnation Committee had plans to see members of the Judicial Council in order to discuss, among other things, having the same judge conduct the trial as well as the pretrial conference.

<sup>102</sup> It did not appear in the discussion at the time of adoption of this proposal by the Condemnation Committee that its members were aware of this New York statute provision.

<sup>103</sup> See, e.g., *McCarthy v. Palmer*, 29 F. Supp. 585 (E.D. N.Y. 1939).

<sup>104</sup> See CALIF. CONTINUING EDUCATION OF THE BAR, CALIFORNIA CIVIL PROCEDURE BEFORE TRIAL, Pruitt, *Depositions and Discovery*, 675, 682-83 (1957).

<sup>105</sup> *Greyhound Corp. v. Superior Court*, 56 Cal.2d 355, 401, 15 Cal. Rptr. 90, 115, 364 P.2d 266, 291 (1961).

opinions, conclusions or theories would be against public policy (as in the *Trade Center* situation, *supra*), or would be eminently unfair or unjust, or would impose an undue burden. The California Legislature has designed safeguards for such situations. The sanctions which protect against the abuse of discovery give the trial court full discretion to limit or deny when the facts indicate that one litigant is attempting to take advantage of the other. Facts which give rise to the work product privilege in other jurisdictions may, in some circumstances, indicate an abusive attempt to "ride free" on the opponent's industry. Such facts are not even hinted at herein, and, if they were, the respondent court has resolved them in favor of discovery. Petitioner has not only failed to convince us that "work product" is equated with privilege in California, it has failed to indicate that the reasons underlying that doctrine would be applicable to this proceeding.<sup>106</sup>

Even if the work product privilege did exist in this State, it is doubtful whether this concept applies in condemnation cases since the expert's report can seldom be labeled the work product of the attorney and it has been strongly argued, at least by one court, that the work-product concept applies only to "statements obtained by an attorney for his client in preparation for trial."<sup>107</sup> At any rate, both state and federal decisions would seem to indicate that the "work product" concept is hardly an obstacle to permitting disclosure of sales data. For example, in *United States v. Certain Parcels of Land etc.*,<sup>108</sup> a condemnation case, Judge Mathes, in rejecting the "work product" argument, stated:

Insofar as factual material alone is involved then, the pending motion does not constitute "an attempt to secure the \* \* \* mental impressions contained in the files and the mind of the attorney". *Hickman v. Taylor*, *supra*, 329 U.S. at page 509, 67 S.Ct. at page 392, nor does the supervision or acquisition by plaintiff's attorneys convert the result into "work product" of a lawyer. [Citation omitted.] Hence no privilege appears to prevent defendants from pursuing the usual purpose of pre-trial discovery—to advance the time of acquiring "mutual knowledge of all the relevant facts gathered by both parties."<sup>109</sup>

Similarly, the California courts found the "work product" concept inapplicable as it pertained to the information uncovered by an expert:

We do not accept defendant's contention that the information here sought is the work product of its counsel within the meaning of the rule laid down in *Hickman v. Taylor*, 329 U.S. 495 [67 S.Ct. 385, 91 L.Ed. 451]. There the material sought was wholly from the files of the attorney, all the product of his effort, research, and thought. Such is not the case here. In our case it is the thought, research and effort of Cheek which is sought by plaintiff.

<sup>106</sup> *Id.* at 401, 15 Cal. Rptr. at 115, 364 P.2d at 291.

<sup>107</sup> *De Bruce v. Pennsylvania R. R.*, 6 F.R.D. 403, 404 (E.D. Pa. 1947).

<sup>108</sup> 15 F.R.D. 224 (S.D. Cal. 1954).

<sup>109</sup> *Id.* at 236.

Although defense counsel may have exercised ingenuity in determining that "slipperiness" of the walk could be tested, this is not enough, as we read Hickman, to make the examination and tests of Cheek the work product of counsel. Thus we need not determine whether the "work product" rule of Hickman should be adopted in this state.<sup>110</sup>

It can be seen, therefore, that the "work product" argument should in no way nullify a policy calling for disclosure of factual data, especially sales information.

### *The Argument of "Unfairness"*

The principal argument advanced by opponents to compulsory disclosure of appraisal data is that such a policy would be unfair to one party or the other. There is a great deal of merit to this argument, but before discussing it, an equally cogent argument compels consideration. It is unfair *not* to compel disclosure.

Though the argument has not been broached formally in any reported case in this field nor has it been raised in any publication, at least to the knowledge of these authors, it was, in effect, advanced in the form of a bill considered at the 1959 Session of the California Legislature. That bill, as amended read:

Where the state, or any of its agencies, seeks to acquire property pursuant to any law and commences negotiations with the owner of the property in contemplation of the subsequent condemnation thereof if necessary, the state agency or officer involved in the negotiations shall offer a fair and equitable price for such property. In connection with such offer, the negotiator shall make available to the owner of the property, upon his written request therefor, the appraisal or reports relating to the value of such property upon which the offer is based.<sup>111</sup>

There are unquestionably strong equitable reasons to compel the condemnor to reveal the appraisal information he has obtained at the time of the commencement of the action.<sup>112</sup> It is a well known fact that numerous property owners are hesitant to or are prevented from contesting the offers made for their properties by the condemnor. Quite frequently this may occur because they lack sufficient funds to hire an appraiser to prepare a report and to serve as a witness at the trial, because the value of the property generally would not justify such expenditure. Consequently, many condemnees are forced to accept the offer of the condemnor, whether or not such an offer actually represents market value.

On the surface, it would not appear to be inequitable that the condemnor disclose this information. The cost of staff appraisals and appraisals made by independent experts for condemnors are paid with public funds. If public funds are being used "against" a member of the public, in this case a condemnee, there would seem to be little

<sup>110</sup> Grand Lake Drive In v. Superior Court, 179 Cal. App.2d 122, 129, 3 Cal. Rptr. 621, 627 (1960).

<sup>111</sup> Cal. Senate Bill No. 69, as amended in the Senate, May 28, 1959. Referred to Senate Committee on Judiciary, May 28, 1959.

<sup>112</sup> Interview between authors and Jerrold Fadem, May 27, 1960; see letter to California Law Revision Commission from Attorney James E. Cox, June 20, 1960.

reason to withhold these findings from such condemnee, particularly insofar as these findings would tend to inform him of the validity of the condemnor's offer. And if the offer is supported by such appraisal data, there would be no need for him to contest the taking and to expend his own funds unnecessarily. On the other hand, if there be reasonable grounds to indicate that the appraisal data upon which the offer was made are incomplete or misleading, the condemnee could then contest the award. Thus, it would seem that from an equitable point of view, the condemnee should not have to incur expenditures unnecessarily; he should not have to act "in the dark."

Despite this argument, which appears to be based upon sound logical and equitable considerations, we find it necessary to reject such a position. It is believed that it would often be difficult, and at times impossible, to distinguish the situation where a condemnee seeks an expert's report secured by a condemnor from the situation where any individual, involved in a suit against any governmental agency, seeks to obtain any and all information uncovered by a governmental agent. To open up "Pandora's Box" in this way, upon the argument that it would be "equitable," would create havoc in a multitude of cases where a governmental agency is one of the parties. It would be difficult to treat a governmental agency involved in litigation less favorably than a private party.

Although we believe it necessary to reject the suggestion that the condemnor should disclose its appraisal reports, we believe that the condemnor should be required to make an offer to the condemnee based upon what it believes to be fair market value. However, to protect the condemnor in this situation, particularly since these offers are often in the nature of compromises, no such offer should be introduced in evidence for any purpose. The condemnee should rightfully be put on notice as to the fair market value of his property, as judged by the condemnor, before he is required to decide whether or not to "fight" the taking. Legislation to this effect was introduced in the Legislature in 1959, and other authorities have rightfully called for such a provision.<sup>113</sup>

Returning now to the argument of unfairness, the usual argument advanced is that compulsory disclosure of appraisal data, especially comparable sales, would be unfair to one party or the other, usually the condemnor who has already obtained at least a staff appraisal of the subject property. This position has been more clearly spelled out in *Lewis v. United Air Lines Transport Corp.*,<sup>114</sup> where the court said:

To permit a party by deposition to examine an expert of the opposite party before trial, to whom the latter has obligated himself to pay a considerable sum of money, would be equivalent to taking another's property without making any compensation therefor. To permit parties to examine the expert witnesses of the other party in land condemnation and patent actions, where the evidence nearly all comes from expert witnesses, would cause con-

<sup>113</sup> See Cal. Senate Bill No. 1320, introduced April 27, 1959, and referred to the appropriate interim committee, May 27, 1959.

<sup>114</sup> 32 F. Supp. 21 (W.D. Pa. 1940).



fusion and probably would violate that provision of Rule 1 which provides that the rules "shall be construed to secure the just, speedy, and inexpensive determination of every action."<sup>115</sup>

Professor Moore has concurred with the view that discovery of an expert's observation and conclusions may be unfair in the ordinary case. He has stated that:

The fact that a party's expert might be compelled to testify at the trial, however, does not mean that the opposing party has a right to compel his testimony at the pre-trial stage of the case. It is an oversimplification to say that discovery simply advances the stage at which disclosure can be compelled.

\* \* \*

Our analysis of the *Hickman* case has also shown that the mere fact that one party may have gone to expense to obtain statements of witnesses and other information does not immunize such data from discovery. Examination of an expert witness, however, is not the same as inspection of statements of ordinary lay witnesses to an accident. We have shown that inspection of such statements, or disclosure of their tenor, ought to be ordered because of their peculiar character. But this argument is not relevant to examination of an expert witness on matters of his expert opinion. Litigants commonly pay experts substantial fees for obtaining their advice, and it is oppressive and unjust to permit a party to take advantage of his opponent by obtaining his expert witness' opinion, before trial, without paying any part of the cost thereof.<sup>116</sup>

There is little question but that the authorities and courts are correct in holding that a unilateral disclosure of an expert's findings would often be unfair and detrimental to the discovery purpose. Though the statement that this sales information is a matter of public record and is available to both sides is not entirely true and really avoids the question of fairness, we must conclude that in the ordinary case a policy of compulsory unilateral disclosure would be improper and would not be conducive either to a settlement of the proceedings nor a facilitation of the trial.

This conclusion, nonetheless, does not negate the possibility of permitting disclosure of sales data. Rather it opens up an alternative approach. We shall now direct our attention to what we consider a feasible resolution of the conflict.

#### *The Faus Case and the Fair Exchange of Sales Data*

As indicated at the beginning of this study, the implications of *County of Los Angeles v. Faus*<sup>117</sup> necessitate a preliminary determination by the court, preferably prior to the introduction of evidence

<sup>115</sup> *Id.* at 23. The argument that an expert has a "property right" in his knowledge and opinions was rejected by the California Supreme Court in *City & County of San Francisco v. Superior Court*, 37 Cal.2d 227, 231 P.2d 26 (1951).

<sup>116</sup> 4 MOORE § 26.24, at 1157.

<sup>117</sup> 48 Cal.2d 672, 312 P.2d 680 (1957).

before the jury, on the questions of whether or not other sales are comparable to the subject property. It is for this reason that Judge McCoy of the Los Angeles Superior Court has written:

As I read it, the *Faus* case requires a determination of the trial judge with respect to these "safeguards" before the evidence of price can be admitted, and that the questions involved in making that determination are questions of fact. This being so, I have held that the defendant is entitled in discovery proceedings to "information only relating to sales of similar properties which will be considered by or will serve as a basis for, in part, the opinion of any or all expert witnesses as to the value to be called by plaintiff," including the description of such properties sufficient to enable defendant to locate them, and the dates of such sales. *County of Los Angeles v. Faus*, Super. Ct. No. 637303. A petition for a writ to review my order was denied by the District Court of Appeal in Civ. No. 23512. (Shinn, Vallee and Patrosso, JJ.) The interrogatory approved by me in the *Faus* case is substantially broader than the interrogatory approved by the court in *Rust v. Roberts*.<sup>118</sup>

We are in general accord with Judge McCoy's position; however, we would add an additional "safeguard" to protect one side or the other (generally the condemnor) from being a victim of a policy of "unfairness." We believe that appraisal data—particularly comparable sales data—should be subject to mutual and concurrent disclosure by the parties. As indicated below, such a policy would better effectuate the "safeguards" called for by the *Faus* case.

Before discussing the strong authority and precedent that exists for such a position, it is well to note that this policy is hardly novel, even in California.

Almost 30 years ago, in January 1931, a bill was introduced in the Assembly which stands as a harbinger of modern discovery rules and, at least in general terms, foreshadowed the type of legislation herein recommended. While not directly concerned with eminent domain proceedings, that bill (Assembly Bill No. 344) is set forth for the purposes of introducing the subsequent proposals to be made:

Three new sections are hereby added to the Code of Civil Procedure, to be known as chapter 3a of title eight, part two of said Code, to be numbered 597, 598 and 599, respectively, and to read as follows:

#### CHAPTER 3A

##### Preparation for Trial, Settlement of Controversy and Trial.

597. Preparation for trial: In every civil action, within ten days after issues of fact are joined, plaintiff shall file with the clerk of the court, without service, a statement of issues and witnesses, with affidavits of all witnesses to be used by plaintiff at the trial with as many copies of each as there are defendants. Said statement shall recite in brief numbered paragraphs what plaintiff considers to be the principal issues of fact, with the names

<sup>118</sup> Memorandum written by Judge Philbrick McCoy, November 1959, a copy on file in author's office.

under each issue of the witnesses by whom plaintiff expects to prove such issue. Within thirty days after issues of fact are joined, each defendant shall file a like statement of issues and witnesses, and affidavits of all witnesses to be used by defendants at the trial, with as many copies of each as there are plaintiffs.

Said affidavits shall state in brief numbered paragraphs the principal facts known to such witness relevant to the said issues, including the date and parties to all documents and writings relevant thereto known to the witness.

The clerk shall treat all such statements and affidavits as confidential and not permit examination of any of them until all are filed; after which time he shall, as soon as convenient, furnish to each party a copy of the statements and affidavits filed by his opponent.

Persons having knowledge of facts, documents and/or writings relevant to the said issues, shall, upon request of and upon reasonable notice by a party or his attorney, make affidavit thereto. A party or his attorney may, in case of need, compel the attendance of such a witness before such party or attorney or a notary public, by subpoena at a time and place appointed, to then and there make said affidavit.

598. Settlement. Upon receipt of such copies of statement and affidavit, or affidavits, it shall be the duty of each party to the action to earnestly and actively seek a satisfactory settlement with the other party or parties thereto, to the end that a trial may be avoided. If it is not possible after diligent effort to settle the controversy in whole or in part, the questions of fact remaining in controversy may be tried, and any party to the action may move to set the action for trial. No motion to set for trial may be made until after all such statements and affidavits have been exchanged by the clerk, and said efforts to settle have been made and proven unsuccessful, and said facts are shown to the court.

Thereafter, the court shall compare statements and affidavits in reference to the issues remaining in controversy, and designate the portions thereof considered by the court to be important in determining said issues.

599. Trial. At the trial, the court shall require the testimony of witnesses to be directed especially to the designated important facts relating to the issues upon which the witnesses appear by their affidavits or testimony to disagree. Unless for good cause shown, a witness shall not be permitted to testify unless the said affidavit of said witness as described in section 597 has been previously filed and copy furnished, nor shall a witness be permitted to testify to important facts not contained in said affidavit. Upon good cause appearing however, any such witness may be permitted to testify, upon such terms and conditions, and under such circumstances as the court may determine to be just.<sup>119</sup>

<sup>119</sup> Quoted from Harkelroad, *The Law of Discovery in the Courts of California*, 4 So. CAL. L. REV. 169, 193-94 n.142 (1931).

Not only does the above proposed bill reflect the policy behind modern discovery statutes but it suggests a procedure for compelling mutual disclosure of the comparable sales and similar data which lie at the basis of most condemnation actions.

In 1932, as pointed out in the Law Revision Commission's Recommendation and Study relating to *Evidence in Eminent Domain Proceedings*, New York City adopted the majority rule permitting comparable sales prices to be introduced in evidence on direct examination which was later adopted in this State in the *Faus* case.<sup>120</sup> However, at the same time, New York City adopted safeguarding legislation. This legislation is still part of the law of New York and, as has been indicated before, is strikingly similar to that advocated by the Los Angeles Bar Association's Committee on Condemnation (though at the time the Committee adopted its position it did not appear to be aware of the New York statute). Specifically, the New York statute requires each party, prior to the time of trial, to exchange the comparable sales data that it intends to rely upon at the time of trial; and no sale can be used at the trial unless it has been so exchanged. Either party thereafter may, prior to trial, object to the introduction into evidence of any particular sale. The statute reads as follows:

No such evidence, however, shall be admissible as to any sale or lease, which shall not have been the subject of an examination before trial either at the instance of the city or of an owner, unless at least twenty days before the trial the attorney for the party proposing to offer such evidence shall have served a written notice in respect of such sale or lease, which notice shall specify the names and addresses of the parties to the sale or lease, the date of making the same, the location of the premises, the office, liber and page of the record of the same, if recorded, and the purchase price or rent reserved and other material terms, or unless such sale or lease shall have occurred within twenty days before the trial. Such notice by the corporation counsel shall be served upon all owners or their attorneys who have appeared in the proceeding; or if served on behalf of an owner, shall be served upon the corporation counsel and upon all other owners or their attorneys who have appeared in the proceeding. The testimony of a witness as to his opinion or estimate of value or damage shall be incompetent, if it shall appear that such opinion or estimate is based upon a sale or lease of any of the property taken or to be taken or of any of the property in the vicinity thereof, which shall not have been the subject of an examination before trial, unless it shall have been specified in a notice served as aforesaid or shall have occurred within twenty days before the trial.<sup>121</sup>

An additional provision included within the New York statute also deserves consideration. This provision calls for the exchange of maps, plans and drawings indicating the nature of the improvement, the effect that the construction of such improvement would have on the property, as well as the cost or expense of constructing streets, drains,

<sup>120</sup> See *Recommendation and Study Relating to Evidence in Eminent Domain Proceedings*, 3 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, Recommendation and Study at A-1, A-34 (1960).

<sup>121</sup> NEW YORK CITY ADMIN. CODE § 15-16.0, N.Y. Laws 1937, ch. 929, at 159-60.

sewers and the like.<sup>122</sup> As in the case of comparable sales, no evidence can be introduced regarding the effect of the improvements on the remaining property unless prior to the trial this information had been exchanged between the parties.

It is difficult, and at times impossible, to arrive at a determination of damages without this information. Though it is true that condemners generally provide the condemnee with this information, there is no assurance that such data will be forthcoming prior to the trial. In an effort to provide this safeguard, the Legislature in 1959 enacted Section 1247b of the Code of Civil Procedure,<sup>123</sup> which allows the condemnee, upon request, to secure from the condemnor a map showing the boundaries of the property to be taken and indicating that part of the property that will remain after the taking. Unfortunately, the statute appears too limited inasmuch as it does not take into consideration Code of Civil Procedure Section 1248(2), which provides for damages as a result of the "construction of the improvement in the manner proposed by the plaintiff." To effectuate the purpose of pretrial discovery, the condemnor should make information regarding the effect of the construction known to the condemnee 40 days prior to the pre-trial conference in order to permit the condemnee to prepare his case properly.

In recommending legislation similar to that mentioned above, we recognize that, despite the fact that much comparable sales data is a matter of public record and available to both parties, quite often some of the facts surrounding particular sales are known to one party and not the other. In absence of some such statutory provision, one party might ignore a sale or consider a sale because of certain knowledge or because of a lack thereof, while the other party might act in a contrary fashion because of the extent of the information available to him in regard to such sale. As the court stated in *United States v. Certain Parcels of Land etc.*,<sup>124</sup> an appraiser

might reasonably expect to find information as to facts not disclosed by public record, relevant to transactions involving property comparable to that sought to be condemned. And discovery of such information "appears reasonably calculated to lead to the discovery" of evidence which would be admissible at the trial.<sup>125</sup>

There appears to be at least one provision absent in the New York statute that we would add. At times, despite diligence and good faith, an expert employed by one party or the other, through oversight fails to list a particular sale which could be quite instrumental in proving market value. Subsequently, the party may become informed of this particular sale. It would seem proper that if the party so affected can show that he acted in good faith and that there is good cause for

<sup>122</sup> NEW YORK CITY ADMIN. CODE § 15-16.0(b), N.Y. Laws 1937, ch. 929, at 160.

<sup>123</sup> Section 1247b reads as follows:

Whenever in a condemnation proceeding only a portion of a parcel of property is sought to be taken and upon a request of a defendant to the plaintiff made at least 30 days prior to the time of trial, the plaintiff shall prepare a map showing the boundaries of the entire parcel, indicating thereon the part to be taken, the part remaining, and shall serve an exact copy of such map on the defendant or his attorney at least fifteen (15) days prior to the time of trial.

<sup>124</sup> 15 F.R.D. 224 (S.D. Cal. 1954).

<sup>125</sup> *Id.* at 236.

allowing this sale in evidence, the court should permit the evidence to be introduced.

Indeed in a recent case, *Singer v. Superior Court*,<sup>126</sup> the Supreme Court of California was faced with a similar question. In that case the plaintiff served an interrogatory upon the defendant with which the latter refused to comply. The defendant claimed, among other things, that if he were made to answer "fully and in detail" all facts upon which he based his defense, he would be unfairly prevented from relying upon other facts or evidence which might subsequently come to his knowledge. The court, in rejecting this argument, recognized that an interrogatory which seeks to "tie a party down in such a way that he may be deprived of his substantive rights" is improper.<sup>127</sup> It would seem, therefore, that a party, who acts in good faith and who for good cause at the time of trial seeks to introduce a sale previously unknown to it despite diligent research, should be accorded the right to introduce such evidence.<sup>128</sup>

We would add one further provision that is not contained in the New York statute but is included within the general policy recommendation of the Los Angeles Bar Association's Committee on Condemnation. In addition to the exchange of comparable data at a date some 20 days prior to trial, provision should be made that such sales must be objected to by the other party or else they will be automatically admitted into evidence. Should a party object to the admissibility of any particular sale that has been exchanged, the court could decide the question of comparability and the admissibility of such a sale on direct examination prior to the jury trial. Such a provision would better provide the safeguards called for in the *Faus* case, and decisions on these matters could be made out of the presence of the jury where such matters should properly be determined.

<sup>126</sup> 54 Cal.2d 318, 353 P.2d 305, 5 Cal. Rptr. 697 (1960).

<sup>127</sup> *Id.* at 324, 353 P.2d at 309, 5 Cal. Rptr. at 701, quoting from James, *The Revival of Bills of Particulars Under the Federal Rules*, 71 HARV. L. REV. 1473, 1481 (1958).

<sup>128</sup> This proposal was defeated (7-3) by the Los Angeles Bar Association, Committee on Condemnation at its August 5, 1959 meeting.

## SUMMARY

As indicated before, it is the general consensus of those in the field that in eminent domain cases the pretrial conference has not fulfilled the goals envisioned by its proponents. Furthermore, aside from those noncontroversial matters that are presently resolved at the time of the pretrial conference, there is little purpose that the conference can serve, save promoting a settlement where possible. The chief obstacle to strengthening the role of the pretrial conference in condemnation cases is that the same judge is unable in most instances to conduct both the pretrial conference and the trial. An additional factor that retards the effectiveness of the pretrial conference is that parties are not usually able to commit themselves to binding stipulations at a date considerably in advance of the trial date. The practice of having the parties reveal their opinions of value to the pretrial conference judge *in camera* should be encouraged, but there seems to be little justification for making such a procedure compulsory. In the final analysis, whatever improvements can be made in pretrial conference procedure should be undertaken by the Judicial Council and the court administrators; it is essentially not a problem for legislative action.

Our examination of the discovery rules and practice as they affect the trial leads us to conclude and recommend as follows: It is doubtful that a liberal discovery rule simplifies or narrows the issues in most condemnation cases. Nor does it decrease the element of "surprise" to any meaningful extent. We believe that the spirit and the scope of modern discovery statutes require that as great a leeway be given as possible for the uncovering of the "facts" involved in the action.

This does not lead us to conclude, however, that appraisers' opinions should be subject to discovery. But it does lead us to the conclusion that the expert's knowledge, as distinguished from the opinion he has formed as to market value, should be the subject for disclosure. We do not believe that the disclosure of these facts will interfere with the attorney's "work product." Nor do we believe that such a rule would be unfair to one party or the other, provided that the exchange of comparable sales and similar data be incumbent upon both parties. Finally, we believe that the compulsory exchange of comparable sales data, as provided in the New York statute on this point and as recommended by the Los Angeles Bar Association's Committee on Condemnation, would facilitate the operation of the *Faus* rule.

Moreover, not only is it proper and just to require the condemnor to disclose, upon request, maps, drawings and plans as to the construction of the improvement in the manner proposed by the condemnor, but the condemnor should be required to offer the property owner, at the commencement of the action, just compensation, based upon fair market value, provided that such an offer would be inadmissible into evidence.

Such a policy should have the effect of expediting condemnation trials and better insuring just compensation.

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