

*Meeting*

10/12/61

Memorandum No. 49(1961)

Subject: Study No. 36(L) - Condemnation (Pretrial Conferences and Discovery)

Attached is the revised tentative recommendation on Pretrial Conferences and Discovery in Eminent Domain Proceedings. We are not planning to distribute this recommendation until after the October meeting of the Commission.

We have placed this memorandum on the agenda for the October meeting. We do not, however, plan to consider it unless some member of the Commission so indicates at the meeting.

A few minor revisions are made in the text of the recommendation. The major changes in the statute are the addition of new Sections 1246.4, 1246.7 and 1246.8 and the addition of the words "such party has made a good faith effort to comply with Sections 1246.1 to 1246.3, inclusive, that he has complied with Section 1246.4, and that" in what is now Section 1246.6. Other minor changes have been made in the statute.

Respectfully submitted,

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Executive Secretary

October 11, 1961

CALIFORNIA LAW REVISION COMMISSION  
School of Law  
Stanford, California

T E N T A T I V E

RECOMMENDATION AND PROPOSED LEGISLATION

relating to

Pretrial Conferences and Discovery in Eminent Domain Proceedings

NOTE: This is a tentative recommendation and proposed statute prepared by the California Law Revision Commission. It is not a final recommendation and the Commission should not be considered as having made a recommendation on a particular subject until the final recommendation of the Commission on that subject has been submitted to the Legislature. This material is being distributed at this time for the purpose of obtaining suggestions and comments from the recipients and is not to be used for any other purpose.

TENTATIVE RECOMMENDATION OF THE CALIFORNIA

LAW REVISION COMMISSION

relating to

Pretrial Conferences and 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.

The use of discovery in eminent domain proceedings has not kept pace with its use generally in other civil proceedings. Prior to the August 1961 decision of the California Supreme Court in Greyhound Corp. v. Superior Court,<sup>1</sup> this was in part attributable to such decisions as Rust v. Roberts.<sup>2</sup> These decisions severely limited the extent to which the opinion of an expert could be discovered in an eminent domain case. They 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

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1. 56 A.C. 353.

2. 171 Cal. App.2d 772, 341 P.2d 36 (1959)

matter of expert opinion. The extent to which the Greyhound case has made the opinion of the expert in an eminent domain case discoverable is not clear, although in that case the Supreme Court cited Grand Lake Drive-In v. Superior Court<sup>3</sup> (holding that an expert's opinion may be discovered) with approval<sup>4</sup> and criticized Rust v. Roberts.<sup>5</sup>

Even if the courts construe the Greyhound case to permit broad discovery in eminent domain litigation, two major obstacles to the use of discovery in these cases will still exist. The first is the problem of the compensation of the expert for his time in preparing for and giving his deposition. It seems unfair for one party to impose this expense upon the adverse party against his will. Even if the problem of the allocation of 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 to discovery in eminent domain proceedings 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

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3. Grand Lake Drive-In v. Superior Court, 179 Cal. App.2d 122, 3 Cal. Rptr. 621 (1960).

4. See 56 A.C. 353, 394-396.

5. See 56 A.C. 353, 378-380.

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 these 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>7</sup>

The procedure recommended above for the pretrial exchange of valuation data is supplemental to other discovery procedures. Never-

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7. 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 is hopeful that if the proposed statute is enacted the Judicial Council will amend the pretrial rules to permit the holding of the pretrial conference in eminent domain cases after the completion of the procedures required in the proposed statute, i.e., within 20 days of the time set for trial. If the Judicial Council believes a different time schedule for the pretrial conference in eminent domain cases is necessary, the Commission will reconsider its recommendation to determine whether the procedures here required can be completed before the pretrial conference.

theless, 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 40 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 the witnesses who will testify as to the value of the property, the opinions of these witnesses and certain of the data upon which the opinions are based. In lieu of reporting the contents of documentary material, a party should be able to list the documents and indicate where and when they are available for inspection.

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 parties.

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 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 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, and that he diligently gave notice to the adverse parties of his intention to call such witness or to introduce such evidence. 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. This will enable the condemnee to prepare his statement of valuation data with an accurate idea of the amount of property to be taken by the condemner.

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The Commission's recommendation would be effectuated by the 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, 1246.7 and 1246.8 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 40 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) The 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 1246.6 of the Code of Civil Procedure, your failure to do so will constitute a waiver of the right to introduce on direct examination in your case in chief any of the evidence required to be set forth in your statement of valuation data."

(c) Not later than 20 days prior to the day set for trial, the party who served the demand and each party upon whom the demand was served shall serve and file a statement of valuation data. The party who served the demand shall serve his statement of valuation data upon each party on whom the demand was served. Each party on whom a demand was served shall serve his statement of valuation data upon the party who served the 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 a witness by the party to testify to his opinion of the value of the property described in the demand or as to the amount of the damage or benefit, if any, to the larger parcel from which such property is taken.

(b) The opinion of each witness listed as required in subdivision (a) of this section as to the value of the property described in the 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 any information indicating a 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) A list of the maps, plans, documents, photographs, motion pictures, books, accounts, models, objects and other tangible things upon which the opinion is based, the place where each is located and, if known, the times when it is available for inspection by the adverse party.

(7) The name and business or residence address of each person upon whose statements or opinion the opinion is based in whole or in part.

(c) With respect to each offer, contract, sale, lease or other transaction listed under subdivision (b) 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.

(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 and circumstances 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. If a party required to serve a statement of valuation data has in his possession, custody or control any property or tangible thing required to be listed in his statement of valuation data, he shall make it available at reasonable times for inspection and copying or photographing by or on behalf of the party on whom the statement is served.

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

1246.4 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:

(a) 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;

(b) 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

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

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

1246.5. Except as provided in Section 1246.4, 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 a witness to 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 unless the name and address of such witness are listed on the statement of the party who calls the witness.

(b) 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. 7. Section 1246.6 is added to the Code of Civil Procedure, to read:

1246.6. The court may, upon such terms as may be just, permit a party to call a witness or introduce on direct examination in his case in chief evidence required to be but 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 to 1246.3, inclusive, that he has complied with Section 1246.4, 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. 8. Section 1246.7 is added to the Code of Civil Procedure, to read:

1246.7 The procedure provided in Sections 1246.1 to 1246.6, inclusive, does not prevent the use of other discovery procedures in eminent domain proceedings.

SEC. 9. Section 1246.8 is added to the Code of Civil Procedure, to read:

1246.8. Nothing in Sections 1246.1 to 1246.7, inclusive, makes admissible any matter that is not otherwise admissible as evidence in eminent domain proceedings.

SEC. 10. 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]~~.