

Memorandum 2000-39

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

At the April meeting the Commission directed the staff to prepare a draft of a tentative recommendation on early disclosure of valuation data and resolution of issues in eminent domain. The staff draft is attached to this memorandum.

The draft includes features agreed upon by the Commission at the April meeting, including modifications responsive to points made in a letter submitted by Norm Matteoni representing the views of a number of property owners' attorneys. See Second Supplement to Memorandum 2000-24. These include:

- **More Detailed Summary of Prelitigation Appraisal.** Under the draft, appraisal summaries would include, among other matters, a statement of the highest and best use on which the appraisal is based and calculations and an explanation supporting any compensation for injury to the remainder and offsetting benefits. The Comment notes that this would also cover a situation where the compensation for injury to the remainder is zero due to a total offset of benefits. The draft does not address increase in the amount of a prejudgment deposit or admissibility of an appraisal or summary against the condemnor in the eminent domain proceeding.
- **Early Exchange of Valuation Data.** The proposal for an exchange of valuation data 90 days before trial provides that in no event could the exchange occur earlier than 9 months after the commencement of the proceeding. This is combined with a provision that would allow the court to extend time on motion and a showing of good cause.
- **Pretrial settlement offers.** The proposed revision of Code of Civil Procedure Section 1250.410 requires that the final offer and demand include "all compensation required pursuant to this title".
- **Early Resolution of Legal Issues.** The procedure for early resolution of legal issues now provides for a motion within 30 days after the exchange of valuation data. The motion is determined by the judge assigned for trial of the case. The judge may extend the time for final offers and demands and the time for commencement

of trial if necessary to allow a sufficient opportunity for the parties to prepare in light of the court's resolution of the legal issues.

- **Encourage Alternative Dispute Resolution.** The materials emphasize the voluntary nature of ADR under the draft provisions. ADR would be used in eminent domain only on mutual agreement of the parties. If the parties elect binding arbitration, the arbitration is subject to the arbitration law in the Code of Civil Procedure (Section 1280 et seq.). Nonbinding arbitration would be governed by the existing Eminent Domain Law arbitration statute (Section 1273.010 et seq.).

If the draft appears satisfactory, either as submitted or as further revised by the Commission, we will circulate it for comment as a tentative recommendation.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

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

4 BACKGROUND

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

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

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

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

32 The various incentives for the parties to resolve the eminent domain dispute
33 without the need for a lengthy and expensive trial have been reasonably

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

2. Code Civ. Proc. § 1250.410.

3. Ibid.

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

1 successful. During the three year period from July 1, 1996, to June 30, 1999, for
2 example, there were 3,783 eminent domain cases filed statewide.⁵ Of the 3,477
3 pending eminent domain cases disposed of statewide during that period, 3200
4 (92%) were either disposed of before trial or after trial as uncontested matters.
5 Only 277 (8%) were disposed of after trial as contested matters.

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

12 MORE DETAILED SUMMARY OF PRELITIGATION APPRAISAL

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

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

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

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

30 To enable the property owner to evaluate the condemnor’s offer, each summary
31 of the appraisal should contain basic information — the highest and best use of the
32 property on which the appraisal is based, the key comparable sales on which the
33 appraisal is based, and if there are damages to the remainder, an explanation and

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

6. Gov’t Code §§ 7267.1–7267.2.

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

1 calculations illustrating how the compensation for damages and offsetting benefits
2 to the remainder were determined.⁸

3 EXCHANGE OF VALUATION DATA

4 The valuation exchange statute was first enacted in 1967 on recommendation of
5 the Law Revision Commission.⁹ The Commission pointed out the unique problems
6 of eminent domain discovery, the effective use of exchange procedures in Los
7 Angeles, and the need for uniformity throughout the state. An early exchange of
8 valuation data would provide a relatively inexpensive means of eminent domain
9 discovery, reduce the necessity for interrogatories and depositions, and provide a
10 number of other advantages:¹⁰

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

19 **Timing of Data Exchange**

20 Since enactment of the valuation data exchange statute, there has been a
21 consistent trend to push the data exchange ever earlier in the proceedings. As
22 enacted, the statute provided for an exchange 20 days before trial¹¹ — too close to
23 the time of trial to be of practical use to the parties. The defect was corrected in
24 1975, providing for a mutual exchange 40, rather than 20, days before trial.¹²

25 Legislation enacted at the 1999 legislative session pushes the exchange back to
26 60 days before trial.¹³ The time period was extended to give both parties an
27 adequate opportunity to examine each other's valuation data and depose expert
28 witnesses before making a final pretrial offer or demand. The intent was to
29 facilitate reasonable offers and demands, resulting in a greater number of
30 settlements; it could also yield reduced court costs.¹⁴

31 The purpose of the pretrial exchange of valuation data — to provide each party
32 with the relevant facts on which the opposition will base its valuation opinion — is
33 not always accomplished. Critics have noted a number of obstacles to effective

8. In the case of the Relocation Assistance Act, this requirement would apply primarily to acquisition of commercial properties. The Act already requires disclosure of the appraisal itself (as opposed to a summary) for an owner-occupied residence. Gov't Code § 7267.2(a).

9. 1967 Cal. Stat. ch. 1104.

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

11. Code of Civil Procedure Sections 1272.01-1272.09.

12. Code Civ. Proc. § 1258.220.

13. 1999 Cal. Stat. ch. 102 § 2.

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

1 exchange of data, including that further discovery following an exchange is
2 ordinarily necessary. However, because the exchange does not occur until late in
3 the pretrial process, discovery may be needed very close to the commencement of
4 trial.¹⁵

5 **Proposed Revision**

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

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

16 In some cases, the 90-day exchange could occur so early in the proceedings that
17 the parties will not have had sufficient time to retain appraisal experts, complete
18 initial discovery, and obtain appraisals from their expert witnesses. To guard
19 against that possibility, all parties should be provided a minimum of nine months
20 after the case is filed before they may be required to exchange valuation data. The
21 court should retain authority to provide further relief from the 90-day limit if the
22 facts in the case so warrant.

23 BUSINESS GOODWILL ISSUES

24 The following discussion duplicates the Commission's pending recommendation
25 relating to claimed losses of business goodwill.¹⁶

26 **Exchange of Valuation Data**

27 The Eminent Domain Law provides for a pretrial exchange of valuation data on
28 demand of a party.¹⁷ The parties must provide a statement of valuation data for
29 each witness who will testify on (1) the value of the property taken, (2) any dam-
30 age or benefit to the remainder, or (3) the amount of "any other compensation
31 required to be paid" by specified statutes, including Chapter 9 (commencing with

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

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

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

1 Section 1263.010).¹⁸ Chapter 9 includes provisions that require compensation to
2 be paid for loss of business goodwill.¹⁹

3 Thus the statutes on their face require goodwill valuation data to be included in
4 the data exchanged. However, a Court of Appeal opinion suggests that the statutes
5 might be made more clear on this point. In *City of Fresno v. Harrison*,²⁰ the city
6 argued that its failure to provide goodwill valuation data did not violate the statute,
7 “since it is ambiguous whether the special eminent domain discovery statutes
8 applied to cases for recovery of goodwill under section 1263.510”.²¹ This interpre-
9 tation derives from the city’s observation that the specific types of information
10 required to be exchanged (which are listed in Code of Civil Procedure Section
11 1258.260) include factors more relevant to valuing tangible than intangible prop-
12 erty and damage.

13 Code of Civil Procedure Section 1258.260 provides:

14 1258.260. (a) The statement of valuation data shall give the name and
15 business or residence address of the witness and shall include a statement
16 whether the witness will testify to an opinion as to any of the matters listed
17 in Section 1258.250 and, as to each such matter upon which he will give
18 an opinion, what that opinion is and the following items to the extent that
19 the opinion on such matter is based thereon:

20 (1) The interest being valued.

21 (2) The date of valuation used by the witness.

22 (3) The highest and best use of the property.

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

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

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

31 (7) The gross income from the property, the deductions from gross
32 income, and the resulting net income; the reasonable net rental value
33 attributable to the land and existing improvements thereon, and the esti-
34 mated gross rental income and deductions therefrom upon which such
35 reasonable net rental value is computed; the rate of capitalization used;
36 and the value indicated by such capitalization.

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

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

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

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

18. Code Civ. Proc. § 1258.250(d).

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

20. 154 Cal. App. 3d 296, 201 Cal. Rptr. 219 (1984).

21. 154 Cal. App. 3d at 302.

1 (3) The date of the transaction.

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

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

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

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

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

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

23 The Court of Appeal notes that, of the factors listed in this section, those which
24 may apply to goodwill are (1) the interest being valued, (2) the date of valuation,
25 (3) the gross income, deductions and net income, and (4) the rate of capitalization
26 and resulting value. The court states, “It is likely that section 1258.260 was written
27 without contemplation of business goodwill valuation problems. If it is not explicit
28 on the subject, as the trial court thought, it should be amended. However ill-fitting
29 the words may be, the intent is clearly to expose fully the expert’s opinion on the
30 subject concerned.”²²

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

33 **Calculation of Loss of Goodwill**

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

- 36 • Market analysis.²³
- 37 • “Excess income” method.²⁴
- 38 • Capitalized value of net income or profits of business, or some simi-
39 lar method of calculating present value of anticipated profits.²⁵

22. *Id.* at 302-03.

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

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

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

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

4 **Offer and Demand**

5 The Eminent Domain Law requires that at least 30 days before trial, the parties
6 file and serve on each other their final offers and demands of compensation in the
7 proceeding.²⁶ The statute does not define what is included in the meaning of the
8 term “compensation”. If the plaintiff’s offer is unreasonable and the defendant’s
9 demand reasonable in light of the evidence admitted and the compensation
10 awarded in the proceeding, the defendant is entitled to litigation expenses.²⁷

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

18 Notwithstanding the language in the cases, the law intends that the offer and
19 demand include compensation for loss of goodwill. The statute should be revised
20 to make clear that the final offer and demand should include all statutorily or
21 constitutionally required compensation, including compensation for loss of
22 goodwill. For purposes of clarity, each offer and demand should also indicate
23 whether or not interest and costs are included.

24 EARLY RESOLUTION OF LEGAL ISSUES

25 **Existing Law**

26 It should become apparent at the pretrial conference whether there are questions
27 of law on which the parties disagree that affect valuation of the property.
28 Resolution of matters such as contentions over what constitutes the larger parcel,
29 whether or not there is an impairment of access, or the probability of a zoning
30 change, must be resolved before the jury trial on valuation. The pretrial conference
31 can isolate many of these questions and provide for their determination before trial
32 and, ideally, before valuation data are exchanged and final offers and demands
33 filed.³⁰

26. Code Civ. Proc. § 1250.410(a).

27. Code Civ. Proc. § 1250.410(b).

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

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

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

1 Early resolution of legal issues can be accommodated because legal issues are
2 for court rather than jury determination. Under existing law, bifurcation of legal
3 issues may be achieved through use of various procedural devices.³¹ The Eminent
4 Domain Law provides structurally for early resolution of right to take issues.³²
5 However, there is nothing in the statute providing for early resolution of legal
6 disputes affecting valuation.

7 It is common for courts to establish local rules to require that in limine motions
8 to exclude evidence be filed and served in advance of the trial date. To expedite
9 testimony before a jury, courts routinely conduct hearings in limine to determine
10 the admissibility of evidence.³³ However, some courts resist in limine motions and
11 bifurcation, preferring to hear the matter only once and sort things out at trial.³⁴
12 While this may be efficient for the judge hearing the case, it does not save the jury
13 time, and does not foster early resolution of disputes and settlement of cases.

14 **Statutory Procedure**

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

17 There is one model for this already in the Eminent Domain Law, although its
18 application is narrow. An “improvement pertaining to the realty” is an
19 improvement installed for use on property taken by eminent domain that cannot be
20 removed without a substantial economic loss; improvements pertaining to the
21 realty must be taken into account in determining compensation.³⁵ The Eminent
22 Domain Law provides for early resolution of a dispute over whether a particular
23 improvement should be characterized as an improvement pertaining to the realty
24 for compensation and other purposes.³⁶

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

27 **Timing Issues**

28 There must be sufficient time for the parties to examine any valuation data
29 exchanged, focus on the nature of their dispute, and obtain judicial resolution of
30 any irreconcilable disagreements over legal issues. Resolution of legal issues in a

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

32. Code Civ. Proc. § 1260.110.

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

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

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

36. Code Civ. Proc. § 1260.030.

1 timely fashion will help pave the way for a resolution of the proceeding without
2 the need for a trial.

3 Assuming an exchange of valuation data 90 days before trial, a motion for
4 resolution of legal issues should be permitted 30 days thereafter, or 60 days before
5 trial. This will allow enough time following the exchange for the parties to
6 complete expert witness depositions and other necessary discovery, before the
7 motion to resolve legal issues is made.

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

12 However, where the issues are complex, this schedule may not be possible to
13 meet. The proposed statute would allow the court to extend time for trial, and for
14 submission of final offers and demands, to the extent warranted by the court's
15 resolution of legal issues.

16 **Trial Judge**

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

22 **ENCOURAGE ALTERNATIVE DISPUTE RESOLUTION**

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

31 **Condemnor Reluctance To Use ADR**

32 Historically, some public agencies have resisted alternative dispute resolution.³⁷
33 This may be in part due to agency uncertainty whether it is permissible to
34 relinquish control of public decision-making authority to a nonjudicial process.

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

1 Existing law explicitly establishes the authority of a public entity to engage in
2 binding arbitration.³⁸ However, the law is silent as to mediation and nonbinding
3 arbitration.

4 The proposed law makes clear that public agency condemnors may, but are not
5 required to, agree to an alternative dispute resolution process, including mediation,
6 binding arbitration, and nonbinding arbitration. This is analogous to the rule
7 applicable in administrative adjudication involving state agencies.³⁹

8 **Limited Time Available For ADR**

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

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

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

39. Gov't Code § 11420.10.

PROPOSED LEGISLATION

1 **Code Civ. Proc. §§ 1250.410 (amended). Article heading**

2 Article 6. Settlement Offers and Alternative Dispute Resolution

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

4 1250.410. (a) At least 20 days prior to the date of the trial on issues relating to
5 compensation, the plaintiff shall file with the court and serve on the defendant its
6 final offer of compensation in the proceeding and the defendant shall file and serve
7 on the plaintiff its final demand for compensation in the proceeding. The offer and
8 the demand shall include all compensation required pursuant to this title, including
9 compensation for loss of goodwill if any, and shall state whether interest and costs
10 are included. Such offers and demands shall be the only offers and demands
11 considered by the court in determining the entitlement, if any, to litigation
12 expenses. Service shall be in the manner prescribed by Chapter 5 (commencing
13 with Section 1010) of Title 14 of Part 2.

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

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

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

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

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

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

36 1250.420. The parties may by agreement refer a dispute that is the subject of an
37 eminent domain proceeding for resolution by any of the following means:

38 (a) Mediation by a neutral mediator.

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

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

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

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

15 Subdivision (c) parallels the procedure applicable in judicial arbitration. See Code Civ. Proc. §§
16 1141.20-1141.21.

17 Standard protections of confidentiality of communications made in alternative dispute
18 resolution apply to alternative dispute resolution pursuant to this section. See, e.g., Evid. Code §§
19 1115-1128 (mediation); Evid. Code § 703.5 (testimony by arbitrator or mediator).

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

21 1250.430. Notwithstanding any other statute or rule of court governing the date
22 of trial of an eminent domain proceeding, on motion of a party the court may
23 postpone the date of trial for a period that appears adequate to enable resolution of
24 a dispute pursuant to alternative resolution procedures, if it is demonstrated to the
25 satisfaction of the court that all of the following conditions are satisfied:

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

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

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

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

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

37 1255.010. (a) At any time before entry of judgment, the plaintiff may deposit
38 with the State Treasury the probable amount of compensation, based on an
39 appraisal, that will be awarded in the proceeding. The appraisal upon which the
40 deposit is based shall be one that satisfies the requirements of subdivision (b). The
41 deposit may be made whether or not the plaintiff applies for an order for
42 possession or intends to do so.

43 (b) Before making a deposit under this section, the plaintiff shall have an expert
44 qualified to express an opinion as to the value of the property (1) make an

1 appraisal of the property and (2) prepare a written statement of, or summary of the
2 basis for, the appraisal. The statement or summary shall contain detail sufficient to
3 indicate clearly the basis for the appraisal, including but not limited to all of the
4 following information:

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

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

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

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

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

17 1258.220. (a) For the purposes of this article, the “date of exchange” is the date
18 agreed to for the exchange of their lists of expert witnesses and statements of
19 valuation data by the party who served a demand and the party on whom the
20 demand was served or, failing such agreement, a date ~~60~~ 90 days prior to
21 commencement of the trial on the issue of compensation or the date set by the
22 court on noticed motion of either party establishing good cause therefor.

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

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

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

32 ☞ **Staff Note.** A more precise timing designation than “months” would be preferred drafting
33 technique in subdivision (b), but a figure like “275 days” is not particularly user-friendly.
34 “Months” actually works reasonably well in the Code of Civil Procedure, and there is a surprising
35 number of procedural statutes that state time periods in months.

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

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

43 (1) The interest being valued.

44 (2) The date of valuation used by the witness.

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

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

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

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

7 1260.040. (a) If there is a dispute between plaintiff and defendant over an
8 evidentiary or other legal issue affecting the determination of compensation, either
9 party may move the court for a ruling on the issue. The motion shall be made not
10 later than 60 days before commencement of the trial. The motion shall be heard by
11 the judge assigned for trial of the case.

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

17 **Comment.** Section 12160.040 is intended to provide a mechanism by which a party may obtain
18 early resolution of an *in limine* motion or other dispute affecting valuation. Nothing in this section
19 precludes the use of other procedures for the same purpose, including, without limitation,
20 bifurcation of issues and control of the order of proof pursuant to statute, or other pretrial
21 procedure pursuant to court rule.

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

23 7267.2. (a) Prior to adopting a resolution of necessity pursuant to Section
24 1245.230 and initiating negotiations for the acquisition of real property, the public
25 entity shall establish an amount which it believes to be just compensation therefor,
26 and shall make an offer to the owner or owners of record to acquire the property
27 for the full amount so established, unless the owner cannot be located with
28 reasonable diligence. The offer may be conditioned upon the legislative body's
29 ratification of the offer by execution of a contract of acquisition or adoption of a
30 resolution of necessity or both. In no event shall the amount be less than the public
31 entity's approved appraisal of the fair market value of the property. Any decrease
32 or increase in the fair market value of real property to be acquired prior to the date
33 of valuation caused by the public improvement for which the property is acquired,
34 or by the likelihood that the property would be acquired for the improvement,
35 other than that due to physical deterioration within the reasonable control of the
36 owner or occupant, shall be disregarded in determining the compensation for the
37 property. The public entity shall provide the owner of real property to be acquired
38 with a written statement of, and summary of the basis for, the amount it
39 established as just compensation. Where the property involved is owner occupied
40 residential property and contains no more than four residential units, the
41 homeowner shall, upon request, be allowed to review a copy of the appraisal upon
42 which the offer is based. Where appropriate, the just compensation for the real
43 property acquired and for damages to remaining real property shall be separately

1 stated. The summary shall contain detail sufficient to indicate clearly the basis for
2 the amount established as just compensation, including but not limited to all of the
3 following information:

4 (1) The highest and best use on which the appraisal of the fair market value of
5 the property is based.

6 (2) If the amount established as just compensation is based on market data, the
7 principal transactions supporting that amount.

8 (3) If the amount established as just compensation includes compensation for
9 damages to remaining real property, the calculations and a narrative explanation
10 supporting the compensation,, including any offsetting benefits.

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

19 (c) As used in subdivision (b), “offered for sale” means any of the following:

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

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

26 **Comment.** Subdivision (a) of Section 7267.2 is amended to prescribe the contents of the
27 summary of the amount established as just compensation. The requirement in subdivision (a)(3)
28 that the summary include detail relating to damages to the remainder applies as well in a situation
29 where no compensation for damages to the remainder is provided due to a complete offset by
30 benefits to the remainder.

31 It should be noted that the appraisal referred to in subdivision (a) is a written statement
32 independently and impartially prepared by a qualified appraiser setting forth an opinion of
33 defined value of an adequately described property as of a specific date, supported by the
34 presentation and analysis of relevant market information. Section 7260.