NATIONAL COOPERATIVE HIGHWAY RESEARCH PROGRAM
REPORT 87

RULES OF DISCOVERY AND DISCLOSURE IN HIGHWAY CONDEMNATION PROCEEDINGS

HIGHWAY RESEARCH BOARD
NATIONAL RESEARCH COUNCIL
NATIONAL ACADEMY OF SCIENCES—NATIONAL ACADEMY OF ENGINEERING

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RULES OF DISCOVERY AND DISCLOSURE IN HIGHWAY CONDEMNATION PROCEEDINGS

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RESEARCH SPONSORED BY THE AMERICAN ASSOCIATION
OF STATE HIGHWAY OFFICIALS IN COOPERATION
WITH THE BUREAU OF PUBLIC ROADS

SUBJECT CLASSIFICATIONS:
LAND ACQUISITION
LEGAL STUDIES

HIGHWAY RESEARCH BOARD
DIVISION OF ENGINEERING NATIONAL RESEARCH COUNCIL
NATIONAL ACADEMY OF SCIENCES—NATIONAL ACADEMY OF ENGINEERING 1970

NATIONAL COOPERATIVE HIGHWAY RESEARCH PROGRAM

Systematic, well-designed research provides the most effective approach to the solution of many problems facing highway administrators and engineers. Often, highway problems are of local interest and can best be studied by highway departments individually or in cooperation with their state universities and others. However, the accelerating growth of highway transportation develops increasingly complex problems of wide interest to highway authorities. These problems are best studied through a coordinated program of cooperative research.

In recognition of these needs, the highway administrators of the American Association of State Highway Officials initiated in 1962 an objective national highway research program employing modern scientific techniques. This program is supported on a continuing basis by Highway Planning and Research funds from participating member states of the Association and it receives the full cooperation and support of the Bureau of Public Roads, United States Department of Transportation.

The Highway Research Board of the National Academy of Sciences-National Research Council was requested by the Association to administer the research program because of the Board's recognized objectivity and understanding of modern research practices. The Board is uniquely suited for this purpose as: it maintains an extensive committee structure from which authorities on any highway transportation subject may be drawn; it possesses avenues of communications and cooperation with federal, state, and local governmental agencies, universities, and industry; its relationship to its parent organization, the National Academy of Sciences, a private, non-profit institution, is an insurance of objectivity; it maintains a full-time research correlation staff of specialists in highway transportation matters to bring the findings of research directly to those who are in a position to use them.

The program is developed on the basis of research needs identified by chief administrators of the highway departments and by committees of AASHO. Each year, specific areas of research needs to be included in the program are proposed to the Academy and the Board by the American Association of State Highway Officials. Research projects to fulfill these needs are defined by the Board, and qualified research agencies are selected from those that have submitted proposals. Administration and surveillance of research contracts are responsibilities of the Academy and its Highway Research Board.

The needs for highway research are many, and the National Cooperative Highway Research Program can make significant contributions to the solution of highway transportation problems of mutual concern to many responsible groups. The program, however, is intended to complement rather than to substitute for or duplicate other highway research programs.

This report is one of a series of reports issued from a continuing research program conducted under a three-way agreement entered into in June 1962 by and among the National Academy of Sciences-National Research Council, the American Association of State Highway Officials, and the U. S. Bureau of Public Roads. Individual fiscal agreements are executed annually by the Academy-Research Council, the Bureau of Public Roads, and participating state highway departments, members of the American Association of State Highway Officials.

This report was prepared by the contracting research agency. It has been reviewed by the appropriate Advisory Panel for clarity, documentation, and fulfillment of the contract. It has been accepted by the Highway Research Board and published in the interest of an effectual dissemination of findings and their application in the formulation of policies, procedures, and practices in the subject problem area.

NCHRP Project 11-1(5) FY '68
SBN 309-01785-8
Library of Congress Catalog Card Number: 77-606082

FOREWORD

By Staff
Highway Research Board

The field of eminent domain has produced the most activity, and the greatest diversity of legal opinion, in the area of pretrial discovery of the opinions and conclusions of experts retained for negotiation and in anticipation of litigation. This report reviews all of the reported decisions, rules and legislation, State and Federal, treating the subject of the discoverability before trial of the appraisal opinions held by expert appraisers retained by an opposing party in condemnation. The report will be of primary interest to highway lawyers, right-of-way engineers, appraisers, and other highway personnel engaged in the acquisition of property for highway purposes.

Until recently, expert opinion has generally been deemed nondiscoverable; however, some unique circumstances attending the use of expert testimony in condemnation actions have caused some courts and legislatures to revise the discovery rules to permit such discovery. A large body of statute and case law is developing concerning the applicability of state and federal rules of discovery to eminent domain actions and the rights of the parties to compel disclosure of the opposition's valuation testimony. Depending on the manner in which such disclosure is permitted, advance possession of the other party's valuation evidence, and the reasons therefor, may materially affect trial preparation and cross examination. All of those decisions, rules and statutes are cited and discussed in this report.

Testimony by opposing experts on the issue of value may be widely divergent. Divergent testimony arises out of the differences in the opinions and conclusions of the opposing experts as to such variable factors as highest and best use, comparable sales, zoning changes, analysis of income data, and many others. Without pre-trial discovery, opposing counsel will have no means of preparing to meet the valuation evidence presented because the opinions of appraisal experts, and the facts upon which they are based, are not otherwise available to counsel. In researching this problem, the agency of Long, Mikkelborg, Wells and Fryer has concluded, however, that a definite trend has developed in favor of appraisal discovery and suggests that it will have a salutary effect on the preparation for and trial of the condemnation action.

The legal practitioner in the field of highway condemnation will find this document of practical use on a day-to-day basis. References and citations are given to all legal literature, published and known unpublished material on the subject.

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RULES OF DISCOVERY AND DISCLOSURE IN HIGHWAY CONDEMNATION PROCEEDINGS

CHAPTER ONE

INTRODUCTION

From a trial standpoint, the condemnation case presents many unique problems for the attorney. With the exception of the owner, it is quite likely that the witnesses for both parties will be engineering and appraisal experts skilled both in their professions and in their effective presentations of value testimony. The trier of the fact will usually be a jury, uninitiated in the technical evidence of value which they are called upon to weigh.

In many cases the trial will be short, not permitting time for thorough preparation for cross-examination and rebuttal evidence during its course; in fact, skilled opposing counsel will make every effort to time the appearance and length of direct examination of his expert witnesses so as to prevent even overnight preparation for cross-examination by opposing counsel. For various reasons, including cost and court restriction, each party may have only one or possibly two experts upon whom his entire case is based, further shortening the trial and greatly increasing the importance of the cross-examination of the experts presented and the preparation of rebuttal evidence.

Testimony by opposing experts on the issue of value and damages may be widely divergent even though all testimony is based upon identical facts, such as the location of the property, the areas before and after the taking, the engineering of the condemnor's project *vis-à-vis* the subject property, the number and location of existing improvements on the property, the present use of the property and the facts relating to that use, the existing zoning and other governmental regulations applicable to the property, and the utilities and other services serving or available to the property.

The divergent testimony will arise out of differences in the opinions and conclusions of the opposing experts concerning such variable factors as highest and best use; comparable sales; probability of zoning changes; analysis of income data to project future income; analysis of construction cost and depreciation figures for improvements; damages to remaining property from changes in size, shape, access, loss of improvements, or proximity to the condemnor's project; and the myriad other aspects of value that form the basis for the expert's opinion—including the degree of importance placed upon each of such factors by each expert.

It is apparent, therefore, that the divergent conclusions and opinions relating to value are not based upon the existence of differing facts, but are based upon differing opinions and conclusions as to the effect of the facts upon the expert's opinion of the value of the property before and after the acquisition; these conclusions are entirely in the mind of the expert testifying. No amount of independent pretrial effort on the part of the opposing counsel or his client will reveal the expert's conclusions and opinions regarding value. Counsel, client, and their experts can only guess the probable conclusions and opinions in the testimony of the opposing experts. Equipped with these conjectures only, each party finds it burdensome to prepare for effective cross-examination and rebuttal evidence.

When one adds to these uncertainties the primary importance of expert testimony in condemnation actions and the wide divergence of such opinions, it is not surprising that the field of eminent domain has produced the most activity—and the greatest diversity of legal opinion—in the area of pretrial discovery of the opinions and conclusions of value experts retained for negotiation and in anticipation of litigation.

This report discusses the existing federal and state cases on the subject as well as the statutes and rules adopted in various jurisdictions to resolve the uncertainties attending the discovery of expert opinion.

CHAPTER TWO

THE PROBLEM RAISED

With some exceptions [1] the problem described in the foregoing is raised by one of three methods:

1. Interrogatories to the condemnor, pursuant to *Federal Rules of Civil Procedure* (FRCP) 33 or its equivalent, asking the names of all persons who have given the condemor an opinion of value of the property; the information submitted by each such person, including highest and best use, before value, after value, comparable sales considered in reaching before and after value, all income figures and capitalization rates used, reproduction cost less depreciation figures used; and a request or demand that a copy of each expert's report be attached to the condemnor's answers to the interrogatories.[2] Issue is joined on the condemnor's objection to the interrogatories.

2. A motion for production of any and all reports of experts in the files of the condemnor under FRCP 34 or its equivalent.[3] Issue is joined by the motion and the good cause showing required by that rule.

3. A subpoena *duces tecum* to the expert involved requiring his attendance for deposition and further requiring the expert to bring all papers pertaining to his appraisal of the subject property. Issue is joined when a protective order is sought by the condemnor pursuant to FRCP 45 or its equivalent, or the expert is directed by condemnor's counsel not to answer opposing counsel's questions.[4]

Although any of the three methods may be available to the party seeking discovery of expert opinions, the courts have usually overlooked any procedural or substantive differences in them, preferring instead to go directly to the issues raised by such discovery, irrespective of the form adopted.[5]

CHAPTER THREE

FEDERAL CASES

All federal cases treating the subject of pretrial discovery of expert appraisal opinion have been decided after the oft-cited Supreme Court case of *Hickman* v. *Taylor* [6] and have been greatly affected by the holding, or what was thought to be the holding, therein. All reported cases were district court decisions until 1968 when the Ninth Circuit decided the case of *United States* v. *Meyer*.[7] Prior to the *Meyer* case, the district court box score was 4 permitting discovery and 13 not permitting discovery of expert opinion in eminent domain. It remains to be seen what effect the *Meyer* decision will have on the other circuits; however, the decision is expected to be a considerable impetus in the liberalizing of prior federal decisions barring such discovery.[8]

The Ninth Circuit was a likely prospect for liberalization of the rule of discovery of expert opinion in eminent domain, because of California's case and statutory authority favoring such discovery in eminent domain [9] and the existence of local rules in several districts in the circuit requiring varying degrees of pretrial discovery of such information.[10]

The district court decision leading to *Meyer* denied a protective order sought by the United States following the condemnee's service of a subpoena *duces tecum* on three of the government's appraisers.[11] The government's attorney attended the deposition and instructed the appraisers neither to answer questions pertaining to the opinions and conclusion reached by the appraisers nor to produce their notes, reports, or other information collected in the course of their appraisal.

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[1] With few exceptions, cases discussed have concerned discovery of the condemnor's witnesses The exceptions include, State ex rel Wiley v. Whitman, 370 P 2d 273 (Ariz 1962) and Illinois Building Authority v. Dembinsky, 233 N.E 2d 38 (Ill.App. 1967).

[2] An example of this method is found in Stanley Works v. New Britain Redevelopment Agency, 230 A 2d 9 (Conn. 1967)

[3] As in United States v. Certain Parcels, 15 F.R.D. 244 (S.D. Cal. 1953).

[4] As in United States v. 364 82 Acres, 38 F R D 411 (N.D. Cal. 1965) *aff'd*, United States v Meyer, 398 F 2d 66 (9th Cir. 1968).

[5] This is in the spirit of the landmark case of Hickman v Taylor, 329 U S 495, 91 L.Ed. 451. In 67 Sup.Ct 385 (1947), the court refused to view the various discovery methods technically, saying, "The deposition-discovery rules created integrated procedural devices." (329 U S. at 505).

[6] *Id.*

[7] 398 F.2d 66 (9th Cir. 1968).

[8] No review has been sought of the Ninth Circuit decision in *Meyer*

[9] *See* text accompanying notes 52-70; *infra*.

[10] *See* App. A, "Federal District Court Rules (Calif., Idaho, Nev.)," *infra*.

[11] United States v. 364.82 Acres, 38 F.R.D. 411 (M.D. Cal. 1965).

The government argued on appeal that the appraisers called to testify had not yet had their reports "approved and accepted" and therefore were not at that time definitely intended to be witnesses at trial; further, that the reports were uncompleted by reason of the lack of review by the governmental review appraisers and attorneys. Relying on the work-product doctrine of *Hickman* v. *Taylor*, it was argued that

1. Good cause was not shown to require such discovery.
2. FRCP 71(a) makes no provision for binding pretrial exchanges of value information.
3. Such discovery could not lead to admissible evidence and was not itself admissible evidence, the sole issue being just compensation.
4. The appraisers are not yet competent witnesses by reason of the incomplete status of their reports.
5. Some of the information sought was wholly inadmissible at trial, such as facts pertaining to other acquisitions in the area by government.
6. Since condemnee has the burden of proof, such discovery will not serve to avoid surprise, particularly with respect to those appraisers the government does not call as witnesses to value.
7. Such discovery of unapproved and incomplete appraisals is unfair to the public and the public treasury.
8. Since the appraiser has not completed his report, discovery at that time would be annoying to him and his work.
9. Production of the appraiser's written report would be unfair and misleading since the appraiser is unable to fully and accurately express himself in it.
10. If such discovery is allowed, the condemnee should pay all of the expert's fees in making the report and testifying thereto.
11. The work-product doctrine should include expert appraisers who should be permitted to work unfettered, at least until completion of his report.
12. Such discovery will not serve to narrow the issues since the sole issue, just compensation, will remain after discovery.[12]

At the outset then, the Ninth Circuit was faced with the argument that there had been no commitment by the government as to which of the experts subpoenaed to testify would be used as witnesses on value at the time of trial. In addition, it was uncontroverted that the appraisal review process by the government had not been completed with regard to any of the appraisers subpoenaed; therefore, the United States had not adopted or chosen to be bound by any of the opinions or conclusions of the appraisers.[13]

Noting the unique situation enhancing the desirability of discovery of expert appraisal opinion, the court rejected the government's contentions and found, "It would be a curious anomaly if expert opinion, though admissible in evidence at trial, were nevertheless shielded from pretrial discovery." [14]

The court noted the proposed amendments to the Rules of Civil Procedure,[15] specifically permitting discovery of expert opinions previously given by an expert whom the opposing party expects to call as a witness and discovery of other expert opinions upon a showing of good cause. It was also held that if the timing of discovery was unduly burdensome to the government or its experts, the trial court had the power to condition discovery in order to reduce or eliminate those burdens. The court further noted "it may well be" that the trial court could have concluded that discovery be deferred until the appraisers had completed their work and the government had determined whether or not to use them as witnesses.[16]

Going beyond most cases that have permitted discovery, the court held that the expert need not be a witness or even a potential witness to permit pretrial discovery and stated that "it would be intolerable to allow a party to suppress unfavorable evidence by deciding not to use a retained expert at trial." [17] Here the court went beyond the recommended revisions to the federal rules.[18]

The federal district court decisions preceding *Meyer*, dealing with discovery of expert valuation opinion,[19] began with *United States* v. *50.34 Acres*,[20] in which a condemnee sought to depose the Chief of the Real Estate Division, Corps of Engineers, "concerning opinions which he expressed during negotiations for resolution of damages question arising out of prior government lease of property to be acquired." The officer had apparently expressed an opinion concerning the value of the property at that time, and the government objected to the discovery on the basis of the asserted nondiscoverability of opinions as to value.

The court held such expressions of value discoverable,

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[12] Brief of Appellant, *Meyer*, 398 F.2d 66 (9th Cir.1968). The government specifically disclaimed the attorney-client privilege as applying to protect the expert appraiser choosing to place its heaviest reliance upon the work-product rules engendered by *Hickman*.

[13] That review, as disclosed in the briefs, included consultations with the attorneys after preparation and submission of the report.

[14] 398 F.2d at 72-3. The court outlined the circumstances creating the need, as follows: "The appraiser's opinions and their factual and theoretical foundation are peculiarly within the knowledge of each appraiser and, to a degree, that of the party who obtained him. The opposing party can obtain this information in advance of trial only by discovery. Since this material will constitute the substance of the trial, pretrial disclosure is necessary if the parties are to fairly evaluate their respective claims for settlement purposes, determine the real issues, avoid surprise, and prepare adequately for cross-examination and rebuttal." (*Id.* at 69).

[15] 43 F R D. 211 (1967); *see* App A, "Proposed Amendments to Federal Discovery Rules," *infra*.

[16] 398 F.2d at 76.

[17] *Id.*

[18] *See* App. A, "Proposed Amendments . . ." *infra*. In a recent opinion, the Ninth Circuit Court of Appeals, in General Services Administration v. Benson, filed August 26, 1969 (Appeal No. 22862), affirmed a lower court decision (Benson v General Services Administration, 289 F.Supp. 590 [W.D. Wn., 1968]) requiring disclosure under 5 U.S.C A. § 522(a)(3) of appraisal reports submitted to the GSA for purposes of determining the value of property to be disposed by that agency. That statute is the so-called "Freedom of Information Act" enacted as Public Law 90-23; 81 Stat. 54. The Circuit Court held, *inter alia*, that since the appraisal reports would have been discoverable under Federal Rule FRCP 26(b), there was no basis for a claim on the part of the GSA that the materials sought came within subsection (b)(5) of that statute barring disclosure of "interagency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency; . . ." The opinion appears to be one of first impression, and the extent to which it will bear upon discovery in condemnation proceedings prior to the institution of suit remains to be seen.

[19] There have been a few cases in which discovery has been implemented to disclose facts pertaining to the condemnor's determination of necessity, *e.g.* United States v. 1278.83 Acres, 12 F.R.D. 320 (E.D. Va. 1952); State v. Vandenburgh Circuit Court, 211 N.E.2d 181 (Ind. 1965). These cases fall outside the valuation field, although the *Vandenburgh* case ordered production of appraisals pertaining to the finding of blight in a proposed urban renewal project, and are therefore noted only in passing.

[20] 12 F.R.D. 440 (E.D. N.Y. 1952).

even if not admissible, under FRCP 26(b). The court did refuse to permit discovery of the recommendation of value the officer submitted to his employer and the weight given to that recommendation on review.[21]

In the same action, another judge of the same court permitted the discovery of the government's appraisal reports in response to the condemnee's motion to produce.[22] The court held that since the government's appraisers may not testify, the reports were not otherwise available to the condemnee. These reports were obtained by the government to assist in the determination of just compensation, and the court found nothing to indicate that the reports were privileged matter. Admissibility in evidence was held not to be a necessary requisite for discovery under FRCP 26(b). Barron and Holtzhoff found this decision to be "difficult to reconcile with the general principle that the findings of an expert are not subject to discovery save in unusual cases." [23]

In *United States ex rel TVA* v. *Bennett*,[24] interrogatories served upon the condemnee were objected to because they called for opinion and work product. The interrogatories did not ask for values placed upon the property by the government's experts, but sought the government's opinion of the effect of the taking on the remainder's ability to continue using an existing sewer system. The court said the attorneys for the condemnee "should not be required to express opinion or make statements that might later be urged against TVA by way of estoppel or as evidence." [25]

The court denominated such information as "work product" and found that no showing of necessity had been made to warrant such discovery; it further held that the question of the extent of damages to the remainder is solely for the trier of the fact to decide. There was no indication from the opinion that the government had hired expert opinion on remainder values: it appeared that the condemnee was seeking admissions by the government that he would be unable to use the system after the taking.

In *United States* v. *Certain Panels*,[26] condemnees sought, under FRCP 34, the production of all appraisal reports and other documents containing written communications relating to the value of the subject property. In addition, they sought all relevant letters, memoranda, reports, work sheets, notes, descriptions, maps, and photographs in the government's file.

Rejecting any claim of executive privilege, the court noted that appraisal reports contain two distinct types of information, (1) the factual bases upon which (2) the appraiser's opinions on value are based. Exchange of the entire report would likely shorten cross-examination and otherwise expedite the trial; however, the language of FRCP 26(b) did not seem to permit discovery of expert opinion for the reason that the production of opinion is wholly immaterial as evidence unless and until the expert is called as a witness. Further, the court found that opinion discovery would not lead to the discovery of admissible evidence.

With regard to the factual [27] portions of the appraiser's report, the work-product protection was denied, since the court found little or no involvement of the attorney in the gathering of the facts.[28]

Following an *in camera* review of the government's reports, the court withheld them from discovery for the reason that their contents tended to be more opinion than facts. This case has been overruled in the deciding district by the *Meyer* decision.

Volume 18 of FEDERAL RULES DECISIONS contains four reported decisions on the subject of discovery of expert opinion in eminent domain. The first, *Hickey* v. *United States*,[29] concerned interrogatories submitted to the condemnor seeking the names, addresses, and positions of persons from whom appraisals were obtained. Stating that the discovery of observed facts is not the same as the discovery of expert witnesses, the court denied discovery since no fact was the subject of the discovery, but rather the opinions of the government's experts.[30]

In *United States* v. *Certain Acres*,[31] production of the condemnor's appraisal reports was sought under FRCP 34. Discovery was denied since the court found that good cause for such discovery was not shown. The condemnee then submitted 34 interrogatories "seeking detailed information as to the appraisals of these properties by (the government's) expert appraisers." Upon objection, the condemnee then sought to depose the appraisal experts, at which time the attorney for the government instructed the deponents not to answer value questions and not to disclose comparable sales and soil classifications. Citing *Lewis* v. *U.A.L.*,[32] the three forms of discovery attempted were denied to the condemnee; the court noted the lack of unanimity in prior decisions and found that the majority denied such discovery of expert opinion.

United States v. *7534.04 Acres*,[33] also cites *Lewis* v. *U.A.L.* as authority for the denial of the condemnee's right to discover by interrogatory the names of opposing appraisers, copies of their appraisals, disclosure of their methods of appraisal, and a breakdown of their values. The decision relied upon the questionable proposition that the facts were equally available to all and that the opinions

[21] A similar result with respect to discovery of "approved values" through condemnor's employees was reached in Hodges v. State, 403 S.W. 2d 207 (Tex.Civ.App. 1966) and United States v. 6.82 Acres, 18 F R D. 195 (N.M. 1955).

[22] United States v. 50.34 Acres, 13 F.R.D. 19 (E.D. N.Y. 1952).

[23] BARRON AND HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE, § 1515 N.21 (Pocket Part). The *Meyer* decision may be sufficient to place all condemnation actions in the category of "unusual cases" within the Barron and Holtzoff rule.

[24] 14 F.R.D. 166 (E.D. Tenn. 1953).

[25] *Id.* at 167.

[26] 15 F.R.D. 166 (S.D. Cal. 1963).

[27] The courts have seemed to consider comparable sales to fall within the factual ambit of an appraisal report, although the appellation "comparable" would seem to call for the opposite result. In the instant case they were deemed factual, as they were in United States v. 3595.98 Acres, 212 F Supp 617 (N D. Cal. 1962).

[28] This result is particularly appropriate in the field of real estate appraisal where the expert appraiser for the most part is solely responsible for the ascertainment of those facts not related to the condemnor's project.

[29] 18 F.R.D. 88 (E D Pa. 1952).

[30] The decision of Lewis v. United Air Lines, 32 F.Supp. 21 (W.D. Pa. 1940) is cited in support of this proposition. The case dealt with discovery of an expert engineer and held that it would not be permitted, provided the subject matter of the expert's report still existed. The decision further commented upon the confusion which would result from permitting expert discovery in land condemnation and patent cases.

[31] 18 F.R.D. 98 (M.D Ga. 1955).

[32] *Supra*, note 30.

[33] 18 F.R.D. 146 (N.D. Ga. 1954).

based thereon were part of the condemnee's trial preparation and hence undiscoverable. As in many of these cases, the *Hickman* decision is not discussed and it is doubtful if support for such a holding can be found in it.[34]

In *United States* v. *6.82 Acres*,[35] condemnees sought to depose the government's "Chief of Real Estate Division" and the "Chief Appraiser" in that division. There was also issued a subpoena *duces tecum* of all their books, records, and papers pertaining to the property in question. The government objected that these records were investigative material which should not be available on discovery; that its discovery would be prejudicial to the experts' testimony; that the facts were equally available to condemnee; and that good cause had not been shown for such discovery. In denying the sought-for discovery, the court stated that "such expert opinions are subject to protection from cross-examination, impeachment and contradiction until, upon the trial on the merits, the trier of fact can alone evaluate the qualification and credibility of such expert witnesses." [36]

The most that can be said about the decisions discussed heretofore is that there was little depth in their reasoning, and they did not recognize that one of the purposes of the discovery rules is to assist in the effective cross-examination of witnesses and preparation of rebuttal evidence. The discovery rules were treated restrictively rather than liberally, as the *Hickman* decision requires. The die had been cast, however; the later cases were affected by these early decisions denying discovery, to the point that it became the burden of the condemnee to show why discovery should be permitted rather than that of the condemnor to show why it should be prevented.

An enlightened decision, in which a complex acquisition was made the subject of a pretrial requirement of disclosure of certain valuation aspects (without disclosure of the appraisal reports themselves), is found in *United States* v. *70.39 Acres*.[37]

A decision effectively overruled by the *Meyer* opinion is that of *United States* v. *Certain Parcels*,[38] in which production under FRCP 34 was sought of the government's appraisals. The government objected, reasoning that the opinions and conclusions of the experts were privileged. The court allowed the discovery of the "actual facts" upon which the opinions were based, but refused to permit discovery of the opinions, stating, "Generally, the courts have denied pre-trial discovery of expert reports and opinions. . . ."

In *United States* v. *19,897 Acres*,[39] the court in the one district which had previously permitted discovery of appraisal opinion specifically refused to follow the case on that point.[40] It prohibited interrogatories that sought names of appraisers, lists of comparable sales, appraisal values, and information pertaining to the qualifications of the condemnor's experts. The court did, however, order the exchange of comparable sales intended to be used at trial. A similar result was again reached by the same court where a subpoena of condemnor's agents having custody of its appraisal reports was quashed.[41]

Similar interrogatories and a motion for production of appraisal reports were rejected in *United States* v. *900.57 Acres*,[42] in which the court stated, "In the instant case the landowners are seeking to obtain in most instances information which is available to them and they are not entitled to obtain in advance of a trial the opinion of the condemnor's expert appraisers, nor are they entitled to see and copy the appraisal reports." [43] The court did not find "good cause" warranting production of the reports, because the amount deposited by the government was less than what the condemnee understood its appraisal values to be.

In a case in which one of condemnor's appraisers had died prior to trial, rendering the production of the report unnecessary to prepare for cross-examination, the court denied discovery of the appraisal report and followed what it stated to be the general rule of nondiscoverability.[44] The discovery of the report of the other appraiser, a potential witness, was similarly denied. In this case, the government voluntarily disclosed its comparable sales and other "factual data."

In *United States* v. *3,595.98 Acres*,[45] the court noted that the "growing trend" in the area of eminent domain pretrial discovery supports the idea of an exchange of comparable sales. The exchange of such sales intended to be used at trial was therefore ordered, the court finding that such discovery did not extend into the area of opinion discovery.

Another case, which has been effectively overruled by *Meyer*, is *United States* v. *48.49 Acres*.[46] The condemnee sought production under Rule 34 of the report of the government's mineral appraiser. In the manner of a prior decision of that district,[47] the court reviewed each party's reports *in camera* and thereafter held them to be undiscoverable because of their opinion content, choosing to follow its prior decision on the subject.

As with the *Meyer* decision, the court, in *United States* v. *23.76 Acres*,[48] was heavily influenced in favor of discovery of appraisal opinion by the existence of a

[31] There is absolutely nothing in Hickman v. Taylor, *supra*, note 5, that would protect the opinions or conclusions of an expert The *Hickman* opinion dealt with a single narrow issue, the discoverability of oral and written statements made or taken by an attorney from witnesses presently available for subpoena by opposing counsel. Until recently, *Hickman's* language of "work product" has been used to shield expert opinion when, in fact, the decision would seem to require the opposite result since it was premised upon the availability to opposing counsel of the witnesses whose statements were sought for the information contained. The opinion states that "where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had." (329 U. S. at 511). Nowhere, however, is opinion other than that of counsel held to be privileged, rather it must be supposed that, in line with its policy of not deciding beyond the issues presented, the court limited its opinion to facts, since nonexpert witnesses were involved whose only contribution therefore would be factual.

[35] 18 F R D. 195 (N M. 1955).

[36] *Id.* at 197

[37] 164 F.Supp. 451 (S.D. Cal. 1958). Judge Carter, who rendered this decision, describes and evaluates his approach in an interesting article in 39 J.AM.JUD.SOC'Y. 78.

[38] 25 F R D. 192 (N D. Cal. 1959).

[39] 25 F R D. 420 (E.D. N.Y. 1961).

[40] The prior case was United States v. 50.34 Acres, *supra*, note 22.

[41] United States v. 284.392 Square Feet, 203 F Supp. 75 (E.D. N.Y. 1962).

[42] 30 F.R.D. 512 (W.D. Ark. 1962).

[43] *Id.* at 519.

[44] United States v 4.724 Acres, 31 F.R.D. 290 (E.D. La. 1962).

[45] 212 F.Supp. 617 (N.D. Cal. 1962)

[46] 32 F.R.D. 462 (S.D. Cal. 1963).

[47] *See* text accompanying note 26, *supra*.

[48] 32 F.R.D. 593 (Md. 1963).

statute, providing for such discovery,[49] in the state in which the district is located. The condemnee sought to depose the condemnor's appraiser because of his methods, the comparable sales and factors considered in the determination of remainder value, highest and best use, and what facts were furnished to the expert by the government. The value figures of the appraiser were not sought.

Noting the existence of the Maryland statute permitting such discovery and reviewing the bases upon which discovery has been denied in the federal cases, the court rejected all grounds for possible denial of such discovery, except unfairness. Noting the "slipperiness" of many expert witnesses, the court specifically recognized the value to cross-examination of pretrial discovery of expert opinion. Finding that remainder values are particularly critical to the determination of just compensation, and particularly susceptible to a diversity of expert opinion, the court stated, ". . . I believe that where the issue to be litigated is value and where value is to be litigated through expert witnesses, the best way to avoid unfairness and secure just, speedy, and inexpensive determination of every action, (FRCP I) is to make expert data, opinion, and material sought here discoverable." [50]

CHAPTER FOUR

STATE CASES

There are numerous state appellate court decisions pertaining to the discoverability of expert opinion in eminent domain. The cases have reflected the same inconsistency of rationale and result as have the federal cases and are further complicated by the differences in language of the state rules of discovery.[51]

California and New York have the greatest exposure to eminent domain discovery and have recently adopted statutes regulating such discovery; therefore, these states are discussed separately. Citation and analysis of other state court decisions follow.

CALIFORNIA

California recently adopted a discovery statute applicable only to eminent domain.[52] Decided cases on that subject prior to the adoption of the statute indicate clearly the need for a special rule or statute to ensure uniformity of application of discovery procedure to appraisal experts.

In *Rust* v. *Roberts*,[53] the District Court of Appeals for the Third District rejected the condemnee's interrogatories seeking value figures as well as the basis upon which they were reached; the court found that the interrogatories were "not relevant to the issue of value" because they were only theories and arguments upon which the state through its experts sought to establish value.[54] The *Rust* decision was "questioned" by the California Supreme Court, concerning the pretrial discovery of expert opinion supplied to the condemnor.[55] The *Rust* decision was "distinguished" by the California Supreme Court in another case; [56] and it was finally "disapproved," insofar as it held that the report of an appraiser is privileged.[57] This process indicates the tortuous course that appraisal discovery has followed in California.

In the *Donovan* case,[58] the California Supreme Court rejected the attorney-client argument for protection of appraisal opinions and conclusions, citing the *Greyhound* case [59] as authority for the proposition that the attorney-client privilege should be strictly applied to further the disclosing of all relevant facts.

The court assumed *arguendo* that the appraiser did have attorney-client protection for his communications with the condemnor or its attorney, but stated that no breach of confidence is involved in disclosure of information obtained that is solely within the appraiser's own knowledge, such as the factors pertaining to fair market value. Even if the appraiser's conclusions were based in part upon advice of counsel, that advice is too remote from the

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[49] *See* App. A, "New York Court of Claims Rule 16 and 25a," *infra*

[50] 32 F.R.D at 598

[51] *E.g.*, Idaho Rule 26(b) has added to the basic Federal Rule 26(b) the following language: ". . nor shall the deponent be required to produce or submit for inspection any part of a writing which reflects an attorney's mental impression, conclusions, opinions, or legal theories, or, except as provided by Rule 35 the conclusions of an expert." This is the so-called "Hickman amendment" adopted in varying forms in several states, which was originally proposed for addition to the federal rules just prior to the *Hickman* decision. *See* ADVISORY COMMISSION ON RULES FOR CIVIL PROCEDURE, REPORT OF PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES (1946).

[52] California, CODE CIVIL PROCEDURE § 1272.01–.09 (Laws 1967, ch. 1104); *See* App. A, "California Code of Civil Procedure," *infra*.

[53] 314 P 2d 46 (Cal. App. 1959).

[54] The use of interrogatories to a party to seek expert opinion information would seem to be inappropriate for the reason that the opinion is not that of the party, but rather a third person, and the rules do not seem to contemplate the use of interrogatories to a party to discover information known only to a third person; *cf.* Mowry v. Superior Court of El Dorado County, 20 Cal.Rptr. 698 (Dist.Ct App. 1962).

[55] Greyhound Corp. v. Sup'r Court, 364 P.2d 266 (Sup.Ct.Cal. 1961).

[56] People v Donovan, 369 P.2d 1 (Sup.Ct.Cal. 1962).

[57] San Diego Prof Assn. v. Sup'r Court, 377 P.2d 448 (Sup Ct.Cal. 1962).

[58] *Supra*, note 56.

[59] *Supra*, note 55.

appraisal conclusions to be protected by the attorney-client privilege.

Another California District Court of Appeals decision, *Mowry* v. *Superior Court, El Dorado County,*[60] involved the condemnee's submission of interrogatories to the condemnor's appraiser, a discovery tactic that has no sanction in the California rules. The court ruled that the condemnor could be required to answer only those interrogatories that pertain to facts it knows; the value information was deemed to be answerable only by the appraiser. The court did approve the application of non-party discovery techniques to the appraiser, noting that in that case the answers would not bind the condemnor.[61]

In an extensive decision, the court in *Mowry* analyzed the work-product and attorney-client rules as they relate to appraisal discovery. Finding that the attorney-client privilege is inapplicable to the discovery of witnesses, the court said the problem becomes strictly one of unfairness.[62]

The court said it would apply the attorney-client rule to the production of appraiser's reports made to the condemnor's attorney.[63] The court, however, found good cause for the discovery of appraiser's opinions and conclusions in the testing of the appraiser's affidavit of value when it is furnished to comply with a quick-take statute. The court further stated that it would not be unfair to permit the discovery of appraisal opinion in such a case, without ordering production of the written report.

The Supreme Court of California, in *Oceanside Union School* v. *Superior Court, San Diego Co.,*[64] required the condemnor to answer interrogatories on value and specifically rejected the attorney-client privilege because, even if the appraiser is the agent of the attorney, he does not base his opinions upon the "confidences" of the client, but rather upon his own investigation. Holding that the work-product exception to discovery did not constitute an absolute privilege, but was designed to prevent undue harrassment to the attorney and his agents, and finding no reason to prevent the discovery of the appraiser's opinions, the court compelled the disclosure of both facts and opinions contained in the written appraisal reports submitted to the condemnee.[65]

In the same year in which the *Oceanside* case was decided, the California Supreme Court held that the written reports of potential expert witnesses were discoverable and specifically disapproved prior cases to the contrary.[66] The court held that, even if the report of the expert is work product (which it was found to be in the instant case), the trial court may, in its discretion, order its production upon a showing of good cause.

These two cases are the high-water mark in California case law dealing with expert opinion discovery. Later lower court decisions have specifically approved the policy of the Los Angeles County Superior Courts requiring the pretrial exchange of appraisal reports; [67] upheld the assertion of the attorney-client privilege where the condemnee attempted to call as a trial witness a former employee of the condemnor—an employee who had prepared an appraisal for the condemnor's use; [68] and, in a noncondemnation case, held that an expert's report may contain opinion and information given to the attorney by an expert in his capacity as an advisor to the attorney, and not as a potential witness. This report content, to that extent, would be protected by the work-product exception.[69]

In 1967 California added a provision to its Code of Civil Procedure—Sections 1272.01 to 1272.09. These sections specifically auhorize the pretrial discovery and exchange of appraisal information and are discussed in a later portion of this report.[70]

NEW YORK

The State of New York has produced at least 18 reported decisions pertaining to the subject of appraisal discovery. In 1967 a statute was enacted, adding Section 3140 to the CODE OF CIVIL PRACTICE LAW and RULES (CPLR). The statute requires the adoption of court rules in each Appellate Division "governing the exchange of appraisal reports." [71] A review of the decisions prior to and following the enactment of CPLR 3140 follows.

As in many states, the early reported decisions on expert appraisal discovery actually involved the right of the opposing party to call an appraiser hired, but not called to testify, by the other party. In *People ex rel Kranshaar Bros.* v. *Thorpe,*[72] the Court of Appeals held that a court could not compel an expert appraisal witness to testify as a witness for the opposing party.

As early as 1948, it was held that "there appears to be no valid objection to the exchange of written appraisals, including the supporting and underlying information and factors at the opening or even in advance of trial." [73] The court was dealing with a very complex series of acquisitions in the City of New York and, of necessity, ruled in advance of all the trials therein that comparable sales should be exchanged prior to trial.

In *Power Authority* v. *Kochan,*[74] the condemnor benefited. The condemnor sought to depose the condemnee regarding highest and best use and fair market value. Overruling the condemnee's refusal to testify, the court held that it is the policy of the law to permit full disclosure of "data and information." The owner was not an expert and was not asked to give opinions; however, the case illustrates the possible value of discovery to the condemnor as well as the condemnee.

Production of the condemnor's appraisals of the subject property was ordered in *In re Park and Park Addition;* [75]

[60] 20 Cal.Rptr. 698 (Dist.Ct.App. 1962).
[61] *See* text accompanying note 54, *supra.*
[62] The court also noted that the work product exception is not recognized in California. This has not been consistently held in the state, however. *See,* Scotsman Mfg. Co. v. Sup'r Court, 51 Cal.Rptr. 511 (Dist.Ct. Cal. 1966); Oceanside Union School v. Sup'r Court, San Diego Co., 373 P.2d 439 (Sup.Ct.Cal. 1962).
[63] This aspect of the *Mowry* decision was disapproved in San Diego Prof. Assn. v. Sup'r Court, 373 P.2d 448 (Sup.Ct.Cal. 1962)
[64] 373 P.2d 439 (Sup.Ct.Cal. 1962).
[65] The written report of the appraiser was not sought.
[66] San Diego Prof. Assn., *supra,* note 57.
[67] Swartzman v. Sup'r Court, 41 Cal. Rptr. 721 (Cal.App. 1964).
[68] People v. Glen Arms Estate, Inc., 41 Cal Rptr. 303 (Cal.App. 1964).
[69] Scotsman Mfg. v. Sup'r Court, 51 Cal.Rptr. 511 (Dist.Ct.Cal. 1966).
[70] *See* app. A, "California Codes," *infra.*
[71] CPLR 3140 (Law 1967, ch. 640); *See* App. A, "New York Civil Practice Law and Rules, *infra.*
[72] 72 N.E.2d 165 (Ct.App.N.Y. 1947).
[73] In re Cross-Bronx Expressway, 82 N.Y.S.2d (Sup.Ct. 1948).
[74] 216 N.Y.S.2d 8 (Sup.Ct. 1961).
[75] 250 N.Y.S.2d 664 (Sup.Ct. 1964).

the court found that the appraisal had not been prepared in anticipation of litigation, but rather to aid the condemning agency in performing its functions in acquiring the land, thereby constituting an adoptive admission of sorts. The work-product argument was rejected by the court because the appraisals were not prepared by the condemnor's attorney. Production of all appraisals of the condemnor was ordered, regardless of whether or not they were to be used at trial. This decision is an example of a judicious effort to encourage appraisal discovery in condemnation in the face of procedural rules apparently barring such discovery rules adopted for civil practice in general.[76]

Another rule, CPLR 3101(d)(1), codifying the work-product exemption to pretrial discovery, was cited by the court in *In Re Brooklyn Bridge S.W. Urban Renewal Project*[77] as preventing the discovery of appraisal reports in the possession of the condemnor's attorneys. The court noted that all the appraisals were ordered by counsel for the condemnor, and the experts had submitted their appraisal reports some two years prior to the date of vesting of title.

The court found, however, that the condemnor had used the value figures in the report for the purpose of obtaining federal grants and, therefore, the appraisals should be discoverable as potential admissions against interest of the condemnor insofar as the values therein were concerned.

Discovery of the condemnor's engineer concerning the cost of curing damages to a remainder and the basis for his determination was barred in *In Re Newbridge Avenue*,[78] according to CPLR 3101(d)(1). For the same reason, deposition discovery concerning values of the appraisers for the condemnor was barred.

Cases decided following the 1967 legislation permitting the establishment of appraisal discovery rules in the Appellate Courts have shown a tendency to liberally apply discovery procedure to expert appraisal information. The only Appellate Division case reported since the enactment of Section 3140 is *City of Binghamton* v. *Arlington Hotel*,[79] which concerned trial court proceedings instituted prior to the effective date of the statute and the adoption of the applicable rules. The condemnor had three appraisals, two obtained for the purpose of acquiring federal funds, and a third, lower than the others, that the condemnor intended to use at the trial for just compensation.

The court held that the two higher appraisals should be produced, using the rationale of earlier cases permitting production as an admission against interest.[80] The third appraisal, intended to be used at trial, was held to be discoverable in spite of the limitations of CPLR 3101(d)(1), since recently enacted Section 3140 showed the "intent of the Legislature to permit wider disclosure of all matters material to the litigation of these matters. . . ."[81]

The New York Supreme Courts have held the rules adopted pursuant to Section 3140 to be exclusive method by which appraisal information may be discovered.[82] It has been held that the rule of the Appellate Division, Fourth Department, requires pretrial disclosure of all appraisal reports intended to be used at trial.[83] In the *Ives* case, the condemnor had rejected one of its appraisals and disclaimed any intention of presenting it at the trial; the court held, however, that the condemnor cannot select its lowest appraisal and withhold others, finding that it would be unfair to permit such selection to bar discovery. Apparently the court decided that the hiring of an appraiser indicates the intention to use him at trial, which intention cannot later be disclaimed to defeat discovery.

The New York Court of Claims has had its Rule 25(a) requiring appraisal discovery since 1965.[84] It was held in *Valley Stream Lawns* v. *State*,[85] a decision before the adoption of Rule 25(a), that appraisals made by the state's employees were not discoverable by reason of their being the opinions and conclusions of expert witnesses.

After the adoption of Rule 25(a) the court noted in *Valcour Builders* v. *State*,[86] that while the state's appraisers have generally been in compliance with the appraisal report content requirements of 25(a), the claimants have not. The court observed that 25(a) "has had a most salutory effect upon the disposition of claims on the Court of Claims calendars." Stating that all data upon which valuations are based is required, and that such data contained in full appraisal report materially assists the court in reaching its decisions, the court held that the use of the sanctions contained in 25(a) was indicated for subsequent cases of noncompliance.

In *Sullivan* v. *State*,[87] the Court of Claims ruled that, unless there are special circumstances such as were present in the New York admission against interest cases, the preparation or filing of an appraisal does not make it admissible unless the appraiser testifies. The court found that other discovery devices were available to determine whether an appraisal qualifies as an admission against interest.

With the adoption of the Court of Claims and Appellate Division Rules for pretrial discovery of appraisal information through a filing and exchange of appraisal reports, many of the uncertainties and strained legal analyses arising out of the efforts of the courts to circumvent CPLR 3101(d)(1), prohibiting such discovery, were eliminated in the State of New York.

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[76] CPLR 3101(d)(1) and (2) bar the discovery of "opinions of experts" and writings created in preparation for litigation by a party or his agent.

[77] 270 N Y S 2d 703 (Sup Ct. 1966).

[78] 269 N.Y.S 2d 874 (Sup.Ct. 1966)

[79] 290 N Y S 2d 330 (App Div 1968).

[80] *See* text accompanying notes 75 and 77, *supra.*

[81] Lessen v Stevens, 291 N.Y.S.2d 202 (App Div. 1968), is also a decision under the new statute; it upheld the right of a taxpayer challenging his assessment to depose the assessor and his appraisal consultant. Tax contest proceedings are specifically included in CPLR 3140.

[82] In re Inwood v. Town of Hempstead, 286 N.Y.S.2d 360 (Sup.Ct. 1968).

[83] City of Buffalo v Ives, 286 N.Y S 2d 517 (Sup.Ct. 1968); the Appellate Division, 4th Dep't, rule is not clear on this point; however, it appears to require the production only of those reports actually intended to be used at trial, in accordance with CPLR 3140.

[84] *See* "New York Court of Claims Rule 25a," *infra.* Prior to that rule, the Court of Claims Rule 16 required pretrial exchange of sales, leases, etc., which were of value in condemnation.

[85] 164 N.Y.S.2d 482 (Ct.Cl. 1957).

[86] 277 N.Y.S.2d 30 (Ct Cl 1967).

[87] 292 N.Y.S.2d 244 (Ct.Cl. 1968).

OTHER STATE CASES

The following is a brief discussion of the reported state appellate decisions relating to the subject of pretrial discovery of appraisal information.

Arizona

Discovery rules in Arizona, patterned on the federal rules, contain no specific restriction on expert discovery. In *State ex rel Wiley* v. *Whitman*,[88] the court held that the trial court's rejection of the condemnor's interrogatories to the condemnee was in error, although harmless in this instance. These interrogatories were pursuant to Arizona Rule 33 (identical to FRCP 33) and concerned the names of the condemnee's appraisers to be used at trial, the values reached, information on any demonstrative evidence anticipated to be used at trial, names of all witnesses to be called at trial, and information about offers received to purchase the subject property. The trial court had quashed the interrogatories on the basis of their being the work product of the condemnee's attorney.

Reviewing the federal cases on the subject, the appellate court held that, while work product is not discoverable in Arizona, this doctrine is not available to prevent discovery of the expert opinion of a potential witness. The language of Rule 26(b) does not distinguish between fact and opinion, and therefore the court permitted the discovery of expert opinion under the same circumstances as that of any other potential witness.

The *Whitman* decision has been cited frequently in other state decisions allowing discovery; its conclusion that, without a specific prohibition in the discovery rules, discovery of expert opinion is no different from other witness discovery, cannot be gainsaid.[89]

Arkansas

Arkansas has not been faced squarely with the problem of expert discovery, but has two reported eminent domain decisions which may place it in the category of allowing such discovery. It has discovery rules similar to federal rules in that there is no specific limitation on expert discovery. The Arkansas court rejected a condemnee's demand for a new trial on the basis of newly discovered evidence regarding the construction features of condemnor's project; the court held that the condemnee's failure to avail itself of the regular civil deposition and interrogatory discovery procedures was sufficient lack of due diligence to warrant denial of a new trial.[90] This, of course, does not necessarily involve expert opinion discovery.

With four dissenting, the Arkansas court has held that the state, under a rule equivalent to FRCP 34, should be permitted to go on the subject property for the purpose of drilling tests on the remainder.[91]

Connecticut

Connecticut has recently provided for the exchange of appraisal reports by court rule.[92] Prior to that rule, the Superior Court had denied the condemnee's motion to produce the appraisal reports on the ground that they were the work product of the condemnor.[93] In *Stanley Works* v. *New Britan Redevelopment Agency*,[94] the Connecticut Supreme Court upheld a lower court order requiring answers by the condemnor to interrogatories requiring the condemnor to disclose the names of appraisers and the values assigned by them as well as production and exchange of appraisal reports with the condemnee. Neither the attorney-client nor work-product defenses to such discovery were held to be available to the condemnor. The court noted that the condemnor did not raise the objection in the lower court that the court rules specify only the discovery of facts; the court therefore refrained from deciding the case on that basis.[95]

Delaware

Delaware has no specific limitation upon expert discovery in its rules; however, in *American Insurance* v. *Synvar Corp.*,[96] not an eminent domain action, the court expressed "considerable doubt" as to the right to discovery of opposing party's experts. In an eminent domain action, a lower court held that the attorney-client privilege would prohibit the condemnee's calling as a witness an appraiser who had "counselled" the condemnor's attorneys on that project.[97]

Florida

In *State* v. *Shell*,[98] the Florida court denied the condemnee's motion to produce made pursuant to a rule similar to FRCP 34. The court reasoned that the "surveys, drawings, maps, plats, road construction statistics, specifications, appraisals, appraisal work sheets, and all other documentary evidence affecting or purporting to affect or reflect valuation of defendant's land" sought by the condemnee, were work product and equally available to the condemnee and the condemnor and were therefore not discoverable.

On appeal, the Florida Supreme Court reversed the decision, noting that it was adopting a rule diametrically opposed to the rule in private litigation.[99] Considering the

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[88] 370 P 2d 273 (Ariz. 1962).

[89] *See, e g.*, the following articles for the same proposition: Friedenthal, *Discovery and Use of an Adverse Party's Expert Information*, 14 STAN. L. REV. 455 (1961); Long, *Discovery and Experts*, 39 WASH. L. REV. 665 (1964), reprinted 38 F.R.D. 111 (1965); Note, *Pretrial Discovery in Condemnation Proceedings, An Evaluation*, 42 ST. JOHN'S L. REV. 52 (1967); Note, *Opinion of Adverse Party's Prospective Appraiser-Witness Discoverable as of Right*, 111 U.PA.L.REV. 509 (1962); Note, *Use of Opponent's Expert Information*, 50 IOWA L. REV. 218 (1964); Comment, *Discovery of Expert Opinion in Land Condemnation Proceedings*, 41 IND. L. J. 506 (1965); Comment, *Discovery of Expert Witnesses*, 41 TUL. L. REV. 678 (1966).

[90] Arkansas St. Hwy. Comm. v. Owen, 411 S.W.2d 304 (Ark. 1967).

[91] *Arkansas St. Hwy. Comm. v. Stanley*, 353 S.W.2d 173 (Ark. 1962).

[92] Connecticut, PRACTICE BOOK 352; *see* App. A, "N.Y. Sup. Ct. App. Div., 3d Dept, Albany, Standard Form for Appraisal Reports," *infra*.

[93] Arrow-Hart and Hegerman Elec. v. Greater Hartford Flood Comm., 209 A.2d 681 (Conn Super.Ct. 1965).

[94] 230 A.2d 9 (Conn 1967).

[95] In a later case, Town of Thomaston v. Ives, 239 A.2d 515 (Conn. 1968), the court clearly indicates that, at least in condemnation, discovery of expert opinion will be permitted. This is *dictum*, however, inasmuch as the case dealt only with the right to call at trial an expert retained by the condemnor, for the purpose of testifying to facts only.

[96] 199 A.2d 755 (Del. 1964).

[97] State v. 62 96247 Acres, 193 A.2d 799 (Del.Super.Ct. 1963).

[98] 122 So.2d 215 (2d Cir.Fla. 1960); *reversed* 135 So.2d 857.

[99] Shell v. State Rd. Dept., 135 So.2d 857 (Fla. 1962) reversing 122 So.2d 215. The Shell decision also, in effect, reversed the holding in State v. Cline, 122 So.2d 827 (3d Cir.Fla. 1960).

involuntary nature of the condemnation action and the fact that records of a public agency were sought, the court found no unfairness in requiring their disclosure.[100]

Georgia

Relying on the federal cases denying discovery, the Georgia Court of Appeals barred the condemnee's interrogatories seeking the names of the condemnor's appraisers, the dates of their appraisals, and their opinion of before and after value.[101]

Idaho

Idaho has adopted an amendment to its discovery rules specifically barring the discovery of the conclusions of an expert. The other states discussed have held, or given strong indication, that the specific prohibition prevents the discovery of the opinions of the condemnation appraiser.[102]

In *State ex rel Rich* v. *Bair*,[103] interrogatories to the condemnor on value and on production of appraisal reports were prohibited on the basis of the expert-discovery limitation in the rules. The interrogatories were not directed to the appraiser; but finding that the information sought was the conclusions of an expert and was contained in his report to the condemnor, the court held that this fact was sufficient to bar discovery.

Illinois

Illinois has had a troubled history with expert discovery. The case of *City of Chicago* v. *Harrison-Halstad Bldg. Corp.*[104] has been frequently relied upon as authority sustaining the nondiscovery of expert opinion in eminent domain cases. In fact, what was sought was the supporting information upon which an offer of the condemnor prior to trial was based. Without citing a rule, the court denied such discovery, saying that the information was the product of expert witnesses for the use of the condemnor's attorney at trial.[105]

Monier v. *Chamberlin*,[106] a personal injury action, clarified Illinois work-product theory by limiting the exception to "only those memoranda reports or documents which reflect the employment of the attorney's legal expertise. . . ." All other opinion discovery is permitted. Subsequent condemnation decisions by the appellate courts have indicated that the *Monier* rationale will be carried into the field of appraisal discovery.[107]

Indiana

One reported decision in Indiana pertains to appraisal discovery.[108] In it the appellate court reversed a trial court decision prohibiting the production by the condemnor of all "appraisals, books, documents, papers" pertaining to the declaration of blight in an urban renewal action. Valuation was not at issue in this action at this time; the decision, however, should be applicable to the valuation portion of the action as well.

Iowa

A series of decisions in Iowa apply its discovery rules to valuation experts. The earliest[109] failed to reach the merits of the condemnor's objection to the production of all "original papers, and notes incidental thereto" prepared by the condemnor's appraisers. The court stated that Iowa Rule 141(a), prohibiting the production of a writing containing the conclusions of an expert, applied to bar discovery, but that since it was not cited to the trial court, it could not be relied upon on appeal.

In *Crist* v. *Iowa State Highway Commission*,[110] the court was called upon to decide whether condemnee's interrogatories were proper. They had asked for the condemnor's appraisal values and the deposition of the condemnor's appraiser concerning value. The court did not meet the interrogatory issue squarely, but found that the error in ordering their answer, if any, was harmless.

With regard to the deposition of the appraiser, the court held that, in the eminent domain situation, expert testimony should be available to both sides. As did the Florida court,[111] the court noted the duty of the public agency to be fair to the condemnee and that the appraiser was paid with public funds.

The limitations in Rule 141(a) on discovery of the conclusions of expert witnesses were asserted by the condemnor in *Jones* v. *St. Highway Comm.*,[112] in response to the motion for production of the work of condemnor's appraisers. The necessity for appraisal figures was held objectionable by virtue of Iowa Rule 141(a) prohibiting

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[100] In Bainbridge v State Rd Dep't., 139 So.2d 714 (1st Cir. 1962), the court refused to order a new trial on the basis of the state's testimony being below the state's previous offer, because the *Shell* decision gave the condemnee the power to discover the state's trial testimony in advance, thereby eliminating the surprise element.

[101] Thornton v State Hwy. Comm., 148 S E 2d 66 (Ga.Ct App. 1966).

[102] "Rule 26(b). Scope of examination —Unless otherwise ordered by the court as provided by rule 30(b) or (d), 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. Nor is it ground for objection that the examining party has knowledge of all the matters as to which testimony is sought. The deponent shall not be required to produce or submit for inspection any writing obtained or prepared by the adverse party, his attorney, surety, indemnitor, or agent in anticipation of litigation and in preparation for trial unless the court otherwise order on the ground that a denial of production or inspection will result in an injustice or undue hardship; nor shall the deponent be required to produce or submit for inspection any part of a writing which reflects an attorney's mental impression, conclusions, opinions, or legal theories, or, except as provided by rule 35 the conclusions of an expert." Utah has a similar prohibition in its discovery rules, but has permitted the discovery of an expert's opinion concerning value in a condemnation action. *See* text accompanying note 143, *infra*

[103] 365 P.2d 216 (Idaho 1961).

[104] 143 N.E.2d 40 (Ill. 1957).

[105] A later lower court decision went to great lengths to distinguish *Harrison-Halsted* by limiting its holding only to condemnation discovery, Kemeny v. Skorch, 159 N E 2d 489 (Ill.App. 1959); the same court applied *Harrison-Halsted* in a condemnation setting, City of Chicago v. Shayne, 196 N E.2d 521 (Ill.App 1964).

In Illinois Bldg. Auth. v. Dembinsky, 233 N.E.2d (Ill.App. 1967), discovery of the condemnee's value opinion was denied largely because no compelling reason for such discovery was seen

[106] 221 N E 2d 410 (Ill. 1966).

[107] City of Chicago v. Schorsch, 238 N.E.2d 426 (Ill.App. 1968); Dept. of Public Works v. Oberlaender, 235 N.E.2d 3 (Ill.App. 1968).

[108] State v. Vandenburgh Cir.Ct., 211 N.E.2d 181 (Ind. 1965).

[109] Bryan v. St. Hwy. Comm , 104 N.W.2d 562 (Iowa 1960).

[110] 123 N.W.2d 424 (Iowa 1963).

[111] *See* text accompanying note 99, *supra*

[112] 157 N.W 2d 86 (Iowa 1968)

the discovery of the conclusions of experts. Discovery seeking the factual background to the appraisal values was held proper, as was discovery seeking the names of expert witnesses and their qualifications. The motion seeking the contents of the condemnor's files pertaining to the acquisition was given qualified approval to the extent it was relevant, not privileged, and did not contain work product which should be immunized from discovery. The *Jones* decision was given further elaboration in a later decision.[113]

Kentucky

Kentucky has a court rule prohibiting the discovery of expert conclusions.[114]

Louisiana

Louisiana also has a court rule prohibiting the discovery of expert opinion or "theories." In addition, it has a rule prohibiting the production of an expert's report unless its denial would be unfair.[115] In *State* v. *Spruell,*[116] the condemnor's appraiser was served with a subpoena *duces tecum* requiring his attendance for a deposition together with his appraisal reports and memoranda. The appraiser had previously signed the Certificate of Just Compensation pursuant to the Louisiana quick-take statute. At the deposition, the appraiser testified that he was unable to recall the figures contained in his report and that the condemnor's attorney had instructed him not to prepare for the deposition. The lower court ordered the appraiser to answer all questions concerning facts and to refresh himself from his report if necessary to do so; the order was upheld on appeal. Opinion discovery was not sought in this case, the court observing that Louisiana Rule 1452 bars such discovery.[117]

Maine

Maine has a statute providing for the service of a statement containing considerable valuation information.[118] This statement is to be served at the same time notice of condemnation is served. Also, Maine Rules of Procedure 26(b) prohibits the discovery of the conclusions of an expert. *Rancourt* v. *Waterville Urban Renewal Auth.*[119] provides an exception to the rule. The Maine Supreme Court held that because the condemnee called one of the condemnor's appraisers at trial, he neither contravened the Maine discovery rules nor violated the attorney-client privilege. In short, the decision held that the appraisal opinion was not entitled to secrecy from the opposing party at trial.

Maryland

Maryland has a general discovery rule providing for the discovery of expert opinion. This rule should apply to appraisal opinion in eminent domain as well.[120]

Massachusetts

A court rule in Massachusetts prohibits the discovery of expert conclusions.[121] The court has held that the condemnee was not entitled to call an appraiser hired by the condemnor, but not called to testify. The court deemed it unfair since the condemnee had no difficulty getting appraisals of his own.[122]

Minnesota

Minnesota Rule 26.02 forbids the discovery of conclusions of experts. In *State* v. *Boening,*[123] the court permitted discovery by interrogatory of the facts, methods, and data used by the condemnor's appraisers. The work-product exclusion was held not to protect the condemnor's appraisals *in toto* but only barred discovery of expert conclusions; the court noted that eminent domain cases are in a special category.[124]

Missouri

In Missouri, a court rule prohibits the production of the conclusions of experts.[125] *State* v. *Jensen*[126] held that the trial court erred in ordering the condemnor to produce all appraisal records pertaining to the subject property. Applying Missouri 57.01, pertaining to the nondiscoverability of writings of a party or agent prepared in anticipation of litigation, the court ruled that the condemnor anticipates litigation when it begins the acquisition process, regardless of when the suit is filed. Therefore, appraisals prepared for the condemnor would be protected by the Missouri work-product rule. The *Jensen* decision did not cite Missouri Rule 57(b) in support of its decision.

Montana

Montana has allowed the highway crews to enter private property for purposes of test boring, under its equivalent of FRCP 34.[127]

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[113] Robbins v. Iowa-Illinois Gas and Elec. Co., 160 N W.2d 847 (Iowa 1968). Interrogatories to the condemnor were summarized as follows: "Interrogatory 1 asks the number of appraisers employed by defendant to appraise plaintiff's property; 2, names and addresses of those appraisers; and 3, for appraisal figures on property being condemned as made by defendant's appraisers. Interrogatories 4 and 5 seek to determine whether a report was obtained from an appraiser and if so, who signed it. Six was the name and address of the individual connected with defendant who has possession of any written report of appraisals. Interrogatories 7 and 8 inquire whether other experts were employed and if so, their names; 9, whether experts other than appraisers have submitted written reports; 10, who signed such reports; and 11, who has possession of such reports; Twelve seeks to learn whether defendant had a file relating to the action; and 13, in whose possession the file is kept and the file's contents." All but no. three were given at least qualified approval. This interrogatory ran afoul of Rule 141(a).

[114] CR 37.02; *cf.* Bender v. Eaton, 343 S W 2d 799 (Ky. 1961). There is a condemnation discovery case on appeal to the Kentucky Supreme Court, at the time of writing it had not been decided. Goetz v. St. Hwy. Comm., Appeal No. W-86-68.

[115] Louisiana, Code Civil Procedure, § 1452.

[116] 142 So.2d 396 (La. 1962), *on remand* 165 So 2d 597; *writ denied* 167 So.2d 664. *See also,* State v. Buchman, 120 So.2d 461 (La. 1965), where discovery was denied of the condemnor's instructions to its appraiser.

[117] In State v. Riverside Realty, 152 So.2d 345 (La.App. 1963) the court held that what sales were deemed comparable by the expert was a fact and could therefore be discovered, in spite of rule 1452. *Accord,* State v. Kronlage, 195 So.2d 295 (La.App. 1967). In State v. Johnson, 168 So.2d 389 (La.App. 1964), Rule 1452 was held to bar examination of the written report of the expert at trial.

In Barnett v. Barnett Enterprises, 182 So.2d 728 (La App. 1966), it was held that the discovery of expert conclusions and opinions was prohibited whether or not contained in a written report, although Rule 1452 specifically applies to writings only The court refused to permit the obtaining by deposition that which could not be obtained in writing.

[118] *See* App. A, "Maine State Highway Law Title 23 § 154," *infra*

[119] 223 A 2d 303 (Me. 1966).

[120] *See* App. A, "Maryland Rule 410," *infra.*

[121] Massachusetts, Rule 15 § 1(b).

[122] Ramacorti v. Boston Redev. Auth., 170 N.E.2d 323 (Sup.Jud.Ct.Mass. 1960).

[123] 149 N.W.2d 87 (Minn. 1967).

[124] *Accord,* Sanchez v. Waldrup, 136 N.W.2d 61 (Minn. 1965).

[125] Missouri, Rule 57(b).

[126] 362 S.W.2d 568 (Mo. 1962); *See also* State v. Scott, 407 S.W.2d 79 (Mo. 1966).

New Hampshire

In *Riddle Spring Realty* v. *State*,[128] the New Hampshire Supreme Court, noting that other court decisions on the subject of condemnation discovery "are far from being in agreement," rejected the attorney-client and work-product claims of the condemnor with regard to the condemnee's interrogatories seeking the names of all appraisers, highest and best use, size of property, methods of appraisal, values, and copies of the appraisal reports. Simplification of the issues, shorter and more effective cross-examination, and the superior ability of the state to prepare for trial were reasons given by the court for favoring such discovery.

The appellate court did not require answers to interrogatories seeking appraisal information, and the court found no abuse of discretion in the trial court's refusal to order the disclosure of "appraisal details." The court limited the permissible purpose of such discovery to ferreting out the condemnor's case rather than enabling the condemnee to prove his case; it further gave notice that discovery of appraisal reports was not to be freely required.[129]

New Mexico

New Mexico followed *Crist* v. *State Highway Commission* [130] in ruling that the condemnee may call as a witness an appraiser retained by the condemnor, and rejected the assertion of the attorney-client privilege by the condemnor, holding that the facts and opinions contained in the report were evidence, not privileged communications.[131] In another case a possible relaxation of expert-opinion-discovery bars was indicated.[132]

Ohio

The Ohio Court of Appeals, in *Neff* v. *Hall*,[133] upheld a lower court decision approving the refusal of the condemnor's appraiser to divulge his findings in deposition testimony. The court stated that the facts in the report were equally available to each party, the report itself was a part of the condemnor's trial preparation, and therefore the conclusions therein were nondiscoverable.

Oregon

In *Brink* v. *Multnomah County*,[134] the Oregon Supreme Court upheld the trial court's exclusion of an appraiser for the condemnor from testifying on behalf of the condemnee, on the basis of the attorney-client privilege existing between the appraiser and the condemnor's attorney. The court noted it is possible that the work-product rule would also exclude the testimony, but held that it need not rule on that basis in the case.

Pennsylvania

The EMINENT DOMAIN CODE in Pennsylvania provides for the service of a statement of appraisal testimony prior to trial where the witness did not testify before the viewers.[135]

Rhode Island

Rhode Island has reached a similar conclusion upon facts nearly identical to the *Brink* case.[136]

South Dakota

South Dakota has reached the opposite conclusion upon facts identical to the *Brink* case.[137]

Tennessee

Tennessee has reviewed a number of other state decisions on the right of the condemnee to discover appraisals in the possession of the condemnor and the right of the condemnee to depose the condemnor's appraisers on their opinion of value; it was concluded, ". . . we believe the majority of courts not restricted by statute or court rules favor discovery of expert witnesses on value in condemnation cases. . . ." [138] The court deemed the discretion vested in the trial court with regard to the timing and scope of discovery sufficient protection for the condemnor from unfair and unreasonable discovery attempts.

The court took a compromise position on such discovery in the instant case and ruled that there was not sufficient justification for the production of appraisal reports "gathered in preparation for trial," although it stated that the depositions of the condemnor's appraisers could be taken and their opinions on value disclosed. The basis for the decision was said to be the tenuous nature of valuation evidence and the need for effective cross-examination concerning such evidence. This decision appears to be the soundest state decision on the subject in its reasoning and result; it may be expected to be the harbinger of decisions in other jurisdictions not restricted by statute or rule from permitting discovery of expert opinion in eminent domain actions.[139]

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[127] State v District Court, 412 P.2d 832 (Mont. 1966).

[128] 220 A 2d 751 (N.H. 1966).

[129] "It seems to us, however, that in the absence of unusual circumstances it would rarely be found in the interest of the orderly dispatch of judicial business to order the State to produce the reports of all appraisals which were made by its experts" (*Id.* at 758).

[130] *See* text accompanying note 110, *supra*

[131] State v Steinkraus, 417 P.2d 431 (N.M. 1966).

[132] State v. Taira, 430 P.2d 773 (N.M. 1967).

[133] 170 N E 2d 77 (Ohio Ct App. 1959).

[134] 356 P.2d 536 (Ore. 1960)

[135] Purdon's Penna. Stat. Title 26 § 1-703 *See* App. A, "Pennsylvania Eminent Domain," *infra*. Rule 4011(f) of the Pennsylvania Rules of Civil Procedure bars expert opinion discovery in civil actions, however The cases have so held, *e.g.* Commonwealth v. Pierson, 35 D &C.2d 649 (Pa. 1965), *Construction of Vine St. Extension*, 18 D &C.2d 115 (Pa. 1959).

[136] L'Etoile v. Director Pub Wks, 153 A.2d 173 (R.I 1959).

[137] State Hwy. Comm. v Earl, 143 N W 2d 88 (S D. 1966).

[138] State ex rel Pack v West Tenn Distr. Co., 430 S.W.2d 355, 358 (Tenn Ct App 1968)

[139] "In condemnation cases the opinion of expert appraisers is necessarily based to a great extent upon information regarding sales of comparable property gathered *ex parte* from hearsay or written records which may or may not reflect the true sale price. If the parties can not explore in advance of trial the predicate of opposing expert witnesses' opinions as to value cross examination is likely to be severely hampered and largely ineffective and if the parties must wait until the trial is underway the information may come too late to permit the introduction of rebuttal evidence Also of prime importance is the opinion of the witnesses as to the portion of the award representing incidental damages. We conclude that both parties in condemnation cases, in the discretion of the trial judge reasonably exercised in the light of the circumstances of the case under consideration, may properly be allowed to take the discovery deposition of opposing expert witnesses as to incidental damages and the value of the land taken. To this end a party may be compelled under the direction of the court to disclose the names of such witnesses. We are of opinion, however, no sufficient reason appears in this case for requiring the production of written appraisal reports, gathered in preparation for trial, from the files of the State's legal counsel. To this extent the order is superseded." *Id.* at 358-9.

Texas

In *Shirley* v. *Dalby*,[110] the Texas court refused to permit discovery of the condemnor's appraisal information through interrogatories to the condemnor and a subpoena *duces tecum* to the condemnor's appraiser. The basis of the decision was a Texas rule barring the discovery of work product, attorney-client material, and the conclusions of experts.[111]

In a later decision,[112] the court cited *Shirley* v. *Dalby* as authority for the refusal to permit the condemnee to call the condemnor's right-of-way employee to testify on the condemnor's "appraisal value" of just compensation. The court said this value was based upon the conclusions of experts retained by the condemnor; and, since those conclusions are immune from discovery, the condemnee should not be permitted to obtain by indirection what he is legally unable to obtain directly.

Utah

Utah has a rule barring the production of a writing containing the conclusions of an expert.[113] In *State Road Commission* v. *Petty*,[114] the court considered interrogatories to the condemnor seeking the names of witnesses intended to be called for trial; the fair market value of the condemnee's property, segregated between land, improvements, and the damages to the remainder; and the highest and best use of the property.

In opposing discovery, the condemnor relied upon the prohibition of Rule 30(b), and the court ruled that the interrogatories seeking the names of witnesses and the total fair market value (unsegregated) were proper; the balance of the interrogatories were held to be opinion discovery beyond the permissible scope of discovery.

The *Petty* decision is explained by the court as arising from the unique circumstances attending a condemnation action; i.e., not only the respective situations of the condemnee and the condemnor *vis-à-vis* the availability of information and financial resources, but also the fact that it is the public suing a private individual, to whom duties of fairness and protection are owed.[115]

Virginia

Virginia discovery rules contain no specific limitations upon the discovery of expert opinion; the Virginia court has ruled, however, that interrogatories to the condemnor seeking the names of condemnor's appraisers and the amounts of each appraisal are not discoverable.[116] The court specifically refused to follow *State ex rel Wiley* v. *Whitman*[117] and instead held that only facts that assist in establishing the condemnee's case may be discovered; and all facts were found to be equally available to each party. Production of condemnor's appraisal reports was denied for the same reasons.

Washington

Rules of the State of Washington prohibit the production of any writing reflecting the written conclusions of an expert.[118] In *State* v. *Corvalis Sand and Gravel*,[119] the condemnee was denied the right to examine the written report of the condemnor's appraiser during the course of trial cross-examination. The condemnor claimed the benefit of the expert opinion exclusion of Washington Rule 26(b). On appeal, the court barred the production of the report on the basis of that rule; it stated that unless something occurs during the trial to warrant its production, such material is immune from discovery at and before the trial.[150]

Wisconsin

Wisconsin has adopted a statute providing for pretrial disclosure in eminent domain actions.[151] Holding that the special condemnation discovery statue was not exclusive of the civil discovery rules in Wisconsin, the court, in *State ex rel Reynolds* v. *Circuit Court*,[152] held proper under the civil discovery rules the deposition of the condemnor's appraisers. The court thoroughly analyzed the condemnor's contentions that the appraisal reports constituted a privileged communication prepared in anticipation of trial, violated the attorney-client relationship, were work product entitled to protection, and violated the rights of the expert witness in compelling his testimony. Assuming, *arguendo*, that conversations and communications between the attorney and the appraiser were privileged communications and also came within the strictures of the attorney-client relationship, the court found no reason to extend those privileges to the results (fact and opinion) of the appraiser's independent investigation into value. The court did indicate, however, that the written report of the appraiser possibly would be protected from discovery by these privileges and refused to order its production in this case.

Work product was limited to efforts by the attorney, or on his behalf, and was found to be inapplicable in the case of the deposition of the expert appraiser into facts and opinions independently reached by him within the confines of his profession.

In *State Highway Commission* v. *Laird*,[153] the Wyoming

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[110] 384 S.W.2d 362 (Tex.Civ.App. 1964).

[111] Texas Civil Rule 167.

[112] Hodges v. State, 403 S W.2d 207 (Tex.Civ.App. 1966), *accord*, Lapsley v. Texas, 405 S.W.2d 406 (Tex.Civ.App. 1966). In State v Biggers, 360 S.W.2d 516 (Tex. 1962), the calling by the condemnee at trial of an appraiser hired, but not called to testify, by the state, was approved; provided there was no mention of the relationship to the condemnor.

[113] Utah, Rule 30(b). This rule is similar in effect to the Idaho rule quoted at note 102, *supra*.

[114] 412 P.2d 914 (Utah 1966).

[115] This result, permitting the discovery of the total appraisal figure, may be as far as it is possible to go in jurisdictions with a specific limitation of expert discovery; for a more restrictive application of the same rule in a noncondemnation setting, *see* Mower v. McCarthy, 245 P.2d 224 (Utah 1952).

[116] Hornback v. State Hwy. Comm., 135 S.E.2d 136 (Va. 1964); *see also*, Edwards v. State Hwy. Comm., 139 S.E.2d 845 (Va. 1965).

[117] *See* text accompanying note 88, *supra*.

[118] Washington, Civil Rule 26(b). The 1969 Washington Legislature adoped a limited discovery provision, applicable only to eminent domain. *See* App. A, "Washington State," *infra*.

[119] 416 P.2d 675 (Wn. 1966).

[150] In State v Washington Horsebreeder's Assn., 394 P.2d 218 (Wn. 1964), the condemnee's calling of appraisers hired by the state, but not called to testify at trial, was approved, provided no mention was made of their relationship to the condemnor.

[151] *See* App. A, "Wisconsin Eminent Domain Code § 32.09," *infra*.

[152] 112 N.W 2d 686 (Wis. 1961), *reh. den.* 113 N.W.2d 537; *see* State ex rel Dudek v. Circuit Ct., 150 N.W.2d 387 (Wis. 1967).

Under a prior discovery statute, it was held in City of Milwaukee v. Schumberg, 63 N.W.2d 50 (Wis. 1954), that discovery of the condemning agency's employees could be had with respect to the determination of public necessity.

court noted that under the rules, there was no justification for a claim by the condemnor of surprise at the nature of the condemnee's case on compensation, since ample discovery methods under the civil rules are available for the prevention of surprise. The court did not deal with the extent of such discovery or whether expert opinion was discoverable in the eminent domain setting.

CONCLUSION

If a trend can be found in the cases discussed, it must be that the resolution of the problems of pretrial discovery in eminent domain has been in favor of requiring greater disclosure of appraisal information, either through judicial opinions giving broad import to the regular civil discovery rules, or, where the discovery rules are too restrictive in language or interpretation, by the adoption of statute or court rule requiring such increased disclosure.[154]

The reasons given for the expansion of discovery have not varied greatly. The favorable position of the condemnor from an economic and timing standpoint has been mentioned together with the constitutional obligations upon the condemnor to be fair and just in protecting both the public treasury and condemnee. Additionally, an important consideration has been the encouragement of thorough preparation for cross-examination of appraisal experts. The courts have often noted the divergencies in such opinion, its subjective nature, and its importance to the outcome of the trial.[155]

Those courts permitting broad discovery of appraisal information have found little merit in the contention that discovery will encourage opposing counsel to defer preparation of his case until the details of the condemnor's case have been learned. Reciprocity of discovery has been deemed sufficient protection from that danger, with the trial courts having the power to order discovery only at such time as each party has fully prepared his case. The same feeling has prevailed when it is argued that pretrial disclosure will impede and harrass the appraiser in his work; the courts have held that the trial court's discretion in discovery is sufficient protection from such problems.

The researchers believe that the trial of a condemnation case benefits greatly from the effective cross-examination which results from advance knowledge of the methods, theories, and opinions of the appraisal and engineering expert witness called by the opposing party, whether he be the condemnor or the condemnee. How it may best be accomplished probably depends upon the particular case. In one, interrogatories may suffice; in another, oral depositions of the experts; in another, the exchange of experts' reports; in still another, oral depositions of the experts after interrogatories and/or exchange of reports. Exchange of experts' reports undoubtedly would be the least expensive and the least time-consuming method of accomplishing discovery in this field. Knowing that the report will be exchanged, however, may well inhibit an expert in writing his report. Perhaps the exchange of detailed statements of position on all aspects of valuation, such as is presently required by statute in California, may be the best solution to the problem. Time and experience with this practice will tell.

If adopted, the proposed amendments to the *Federal Rules of Civil Procedure* concerning discovery of expert information will undoubtedly have a salutary effect on federal practice; the amendments will eliminate the uncertainty of trying to anticipate the approach taken by each district court and even among judges in the same district. In addition, the amendments will introduce uniformity and a degree of certainty to discovery practice in an area where uniformity and certainty have been lacking. If past experience with the *Federal Rules of Civil Procedure* is followed, it will be but a question of time before many of the state courts adopt similar changes.

With a reciprocal disclosure of substantially all facets of expert information prior to trial, eminent domain litigation will more adequately fulfill its function as the means of determining just compensation.

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[153] 426 P.2d 439 (Wyo. 1967).

[154] NICHOLS, EMINENT DOMAIN § 703(2) finds this to be the trend

[155] "Although as a general rule a party will not be allowed to obtain discovery from the adverse party's experts, a guarded relaxation of this doctrine in favor of the condemnee may, at times, be proper, at least in condemnation actions by the government. The condemnee is in the position of an innocent bystander who suddenly finds himself about to be dispossessed merely because it has been determined by the government that his property is necessary for some governmental function. He may not recover his costs from the government. And the funds at his disposal in many (although not all) cases will be no match for those of the government. A desirable rule should be sufficiently flexible so that the district court may, on a showing of good cause and in the exercise of a sound discretion, permit discovery of expert appraisals and related materials that are non-privileged." 7 MOORE, FEDERAL PRACTICE 71A.20(3) (2d ed.).

APPENDIX A

STATUTES AND COURT RULES RELATING TO EMINENT DOMAIN DISCOVERY

Statutes and court rules have reflected, to a certain extent, the variety in approach that has been found in judicial decisions upon the subject of eminent domain discovery. There are two basic approaches which have been taken in the statutes and court rules; the first is the requirement that a statement be filed a certain time before trial and that it set out in varying degrees of detail the valuation conclusions of each party's experts who are to testify at trial; the second requires the filing or exchange of the written appraisal reports of each party's experts a certain time before trial.

STATEMENT FILING

In the statement-filing category fall the following statutes and court rules:

1. Los Angeles County Superior Court, "Policy Memorandum for Setting Cases for Pretrial and Trial, Including Eminent Domain Cases," effective July 1, 1966, Section VII. These rules adopt both statement filing and appraisal report exchange in that at an early stage of pretrial both parties are to file statements of position on valuation, damages, and benefits for *in camera* review by the court; they must then file appraisal reports "upon which they intend to rely at the time of trial" 5 days prior to a final pretrial conference held not more than 30 days before trial. (Section VII, and Exhibit E thereto, are included in this appendix.)

2. Sections 1272.01 through .09 of the California CODE OF CIVIL PROCEDURE (Stats. 1967, ch. 1104, p. 2742, § 2) require the exchange of "a statement of valuation data . . . for each person intended to be called as a witness" on valuation. (CCCP § 1272.02). The statement requirements are exhaustive, and it is provided in the statute that appraisal reports containing all of the required information may be exchanged in lieu of a statement. The Los Angeles County Superior Courts are specifically excluded from this statute by reason of having adopted their own rules (§ 1272.07). (This statute is included in this appendix.)

3. Pennsylvania statutes (ch. 26, § 1–703) require the service of an expert valuation summary upon the opposing party, for any valuation experts who have not testified before the viewers. (This statute is included in this appendix.)

4. Maine, STATE HIGHWAY LAW, ch. 23, § 154, requires the condemnor to serve a statement at the time the Notice of Condemnation is served, setting forth general valuation figures with respect to the parcel. (This statute is included in this appendix.)

5. Wisconsin EMINENT DOMAIN CODE § 32.09(8) provides that the valuation commission or the court may, "in their discretion," require both parties to submit or exchange statements of valuation data and the methods of each appraiser. (This statute is included in this appendix.)

6. Nassau County Supreme Court of the State of New York, in its ADMINISTRATIVE CODE (§ 11–35.0) provides for service upon the opposing party of a notice of intention to use a particular comparable sale together with certain background information relating to that sale. (This provision is not included in this appendix.)

7. Only a few of the federal district courts have adopted pretrial rules for eminent domain discovery. In all cases where rules have been adopted, statement filing has been required.

The following districts have adopted special rules for eminent domain pretrial disclosure:

A. Central District of California—"Statement of Comparable Transactions" and "Statement of Just Compensation."

B. Idaho—"Statement of Comparable Transactions," and "Schedule of Witnesses to Value."

C. Nevada—"Memorandum of Contentions of Fact and Law," including valuation and information; "Statement of Comparable Transactions"; "Schedule of Witnesses as to Value," for *in camera* review only; and "Statement as to Just Compensation."

D. Oregon and Western District of Washington—Pretrial Order requires statements of the claims of each party on various aspects of valuation.

EXCHANGE OF APPRAISAL REPORTS

The following statutes and court rules require the exchange of appraisal reports.

1. Los Angeles County Superior Court "Policy Memorandum on Setting Cases for Pretrial and Trial including Eminent Domain Cases," Section VII and Exhibit E thereto. It was noted in the prior section on statement filing that the Los Angeles County requires both statement filing and an exchange of appraisals thereafter.

2. The New York Supreme Courts and the Court of Claims each have rules providing for the exchange of appraisal reports.

The Court of Claims Rule 25(a) requires that appraisals be filed with the Clerk within six months from the date of filing the claim.

All New York Supreme Court Appellate Divisions have adopted rules implementing the provisions of CPLR 3140, requiring the adoption by each Appellate Division of rules requiring the exchange of appraisals in eminent domain. With minor exceptions the rules are identical. New York and Bronx County Supreme Courts have also adopted dis-

closure rules identical to the Appellate Division Rules. In Appellate Divisions One and Two, appraisal reports are required to be filed and exchanged not less than 10 days prior to trial; in Appellate Divisions Three and Four the reports must be submitted not less than 30 days prior to trial. (The rule of the Third Department, Appellate Division regarding the exchange of appraisal reports is included in this appendix; in addition, the Standard Form for Appraisal Reports referred to in subsection (c) of the Third and Fourth Department Rules is included in this appendix.)

3. Connecticut in 1967 amended Section 352 of its PRACTICE BOOK to require the filing and exchange of appraisals. (This rule is included in this appendix.)

4. Maryland Discovery Rule 410 § c provides for the discovery of the written reports of experts "whom the opposing party proposes to call as a witness. . . ." This rule is general in application. (This rule is included in this Appendix.)

REVISIONS OF FEDERAL DISCOVERY RULES

The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States has recently proposed substantial revisions to the discovery portions of the FEDERAL RULES OF CIVIL PROCEDURE. *Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for the United States District Courts Relating to Deposition and Discovery*, 43 F.R.D. 211 (1967). With respect to the topic of this report, Rule 26(b) would be revised specifically to permit the discovery of "facts known or opinions held by the (opposing party's) expert which are relevant to the stated subject matter." [Proposed Rule 26(b)(4)(B)]. This discovery would be permitted only upon the disclosure through interrogatory; also specifically permitted would be the opposing party's intention to call the expert at trial upon the subject of his expertise.

Discovery of experts under other circumstances may be made only upon a showing of good cause. [Proposed Rule 26(b)(4)(A)]. The protective order provisions contained in the present Rule 30 are placed in a proposed Rule 26(c), and are made more detailed in the application and scope.

The Committee's Note to the proposed revisions states that in cases where expert opinion is "likely to be determinative, such as condemnation cases . . . a prohibition against discovery of information held by expert witnesses produces in the acute form the very evils that discovery has been created to prevent." This was repeatedly emphasized in the *United States* v. *Meyer* decision, *supra*, note 7.

Relevant portions of the proposed rule are .ncluded in this appendix.

FEDERAL DISTRICT COURT RULES

California (Central Division)

4. In eminent domain proceedings, additional pretrial disclosure shall be made as follows:

(A) Not later than 30 days in advance of pretrial conference, each party appearing shall serve and file 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 therefore; 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;

(B) At least 20 days prior to trial each party appearing shall serve and file a "STATEMENT AS TO JUST COMPENSATION" setting forth a brief schedule of contentions as to the following: (1) the fair market value in cash, at the time of taking, of the estate or interest taken; (2) the maximum amount of any benefit proximately resulting from the taking; and (3) the amount of any claimed damage proximately resulting from severance.

Idaho

(f) Additional Disclosure in Eminent Domain Proceedings. In eminent domain proceedings, additional pretrial disclosure shall be made as follows:

(1) Not later than 10 days in advance of pretrial 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 therefore; 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 copies of each party's statement by United States mail on the attorney 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 each party shall lodge with the clerk, under seal, for examination by the judge in camera, the original and one copy of "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 appraisers and owners and former owners, intended to be called to give opinion evidence as to value; and, (c) the opinion to be given by each.

Nevada

Federal Local Court Rules

(f) 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.

(i) Additional Disclosure in Eminent Domain Proceedings: In eminent domain proceedings, additional pretrial disclosure shall be made as follows:

(1) Not later than 10 days in advance of pretrial 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 copies 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 five 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 two 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.

(j) Conduct of Conference: At pretrial conference the Court will consider:

(1) the pleadings, papers, and exhibits then on file, including the stipulations, statements, and memorandums filed pursuant to this order;
(2) all matters referred to in FRCP Rule 16 that may be applicable;
(3) all motions and other proceedings then pending, including a motion to dismiss pursuant to FRCP Rule 41(b), "for failure . . . to comply with these rules or any order of court"; or to impose attorney's fees and costs or other penalties pursuant to FRCP 37, for failure of a party to comply with the rules as to discovery; or to impose a personal liability upon counsel for excessive costs pursuant to 28 USC 1927 or Local Civil Rule 7(f);
(4) any other matters which may be presented relative to parties, process, pleading or proof, with a view to simplifying the issues and bringing about a just, speedy and inexpensive determination of the case; and
(5) upon conclusion of pretrial conference, the Court will set the case for trial and enter such further orders as the status of the case may require.

Proposed Amendments to Federal Discovery Rules

(a) DISCOVERY METHODS. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission. Unless the court orders otherwise, the frequency of use of these methods is not limited.
(b) SCOPE OF DISCOVERY. Unless otherwise ordered by the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery 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 party seeking discovery 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 any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.
(2) Insurance Agreements. A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial.
(3) Trial Preparation: Materials. Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing of good cause therefor, except that a statement concerning the action or its subject matter previously given by the party seeking the statement may be obtained without such a showing. A statement of a party is (a) a written statement signed or otherwise adopted or approved by the party, or (B) a stenographic, mechanical, electrical or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement which was made by the party and contemporaneously recorded.
(4) Trial Preparation: Experts.
(A) Subject to the provisions of subdivision (b)(4)(B) of this rule and Rule 35(b), a party may discover facts known or opinions held by an expert retained or specially employed by another party in anticipation of litigation or preparation for trial only upon a showing that the party seeking discovery is unable without undue hardship to obtain facts and opinions on the same subject by other means or upon a showing of other exceptional circumstances indicating that denial of discovery would cause manifest injustice.
(B) As an alternative or in addition to obtaining discovery under subdivision (b)(4)(A) of this rule, a party by means of interrogatories may require any other party (i) to identify each person whom the other party expects to call

as an expert witness at trial, and (ii) to state the subject matter on which the expert is expected to testify. Thereafter, any party may discover from the expert or the other party facts known or opinions held by the expert which are relevant to the stated subject matter. Discovery of the expert's opinions and the grounds therefor is restricted to those previously given or those to be given on direct examination at trial.

(C) The court may require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery, and, with respect to discovery permitted under subdivision (b)(4)(A) of this rule, require a party to pay another party a fair portion of the fees and expenses incurred by the latter party in obtaining facts and opinions from the expert.

(c) PROTECTIVE ORDERS. Upon motion by any party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is being taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(d) SEQUENCE AND TIMING OF DISCOVERY. Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(c) SUPPLEMENTATION OF RESPONSES. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at trial and the subject matter on which he is expected to testify.

(2) A party who knows or later learns that his response is incorrect is under a duty seasonably to correct the response.

(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through requests for supplementation of prior responses.

STATE STATUTES AND RULES

California Code of Civil Procedure

Chapter 2. Exchange of Information in Eminent Domain Proceedings (New) (Stats. 1967, C. 1104, P 27425.2)

§ 1272.01 Exchange of lists of expert witnesses and statements of valuation data.

(a) Service and filing of demand.

(a) Not later than 50 days prior to the day set for the trial, any party to an eminent domain proceeding may serve upon any adverse party and file a demand to exchange lists of expert witnesses and statements of valuation data.

(b) Cross-demand.

(b) A party on whom a demand is served may, not later than 40 days prior to the day set for the trial, serve upon any adverse party and file a cross-demand to exchange lists of expert witnesses and statements of valuation data relating to the parcel of property described in the demand.

(c) Contents of demand or cross-demand.

(c) The demand or cross-demand shall:

(1) Describe the parcel of property to which the demand or cross-demand relates, 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 deposit with the clerk of court a list of expert witnesses and statements of valuation data in compliance with Chapter 2 (commencing with Section 1272.01) of Title 7 of Part 3 of the Code of Civil Procedure not later than 20 days prior to the day set for trial. Except as otherwise provided in that chapter, your failure to do so will constitute a waiver of your right to call unlisted expert witnesses during your case in chief and of your right to introduce on direct examination during your case in chief any matter that is required to be, but is not, set forth in your statements of valuation data."

(d) Service and deposit of list and statements.

(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 deposit with the clerk of the court a list of expert witnesses and statements of valuation data. A party who served a demand or cross-demand shall serve his list and statements 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 list and statements upon the party who served the demand or cross-demand.

(e) Duties of clerk of court.

(e) The clerk of the court shall make an entry in the register of actions for each list of expert witnesses and statement of valuation data deposited with him pursuant to this chapter. The lists and statements shall not be filed in the proceeding, but the clerk shall make them available to the court at the commencement of the trial for the limited purpose of enabling the court to apply the provisions of this chapter. Unless the court otherwise orders, the clerk shall, at the conclusion of the trial, return all lists and statements to the attorneys for the parties who deposited them.

§ 1272.02 Statement of valuation data; persons from whom exchanged: contents

(a) A statement of valuation data shall be exchanged for each person intended to be called as a witness by the party to testify to his opinion as to any of the following matters:

(1) The value of the property or property interest being valued.

(2) The amount of the damage, if any, to the remainder of the larger parcel from which such property is taken.

(3) The amount of the special benefit, if any, to the remainder of the larger parcel from which such property is taken.

(b) The statement of valuation data shall give the name and business or residence address of the witness and shall include a statement whether the witness will testify to an opinion as to any of the matters listed in subdivision (a) and, as to each such matter upon which he will give an opinion, what that opinion is and the following items to the extent that the opinion on such matter is based thereon:

(1) The estate or interest being valued.

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

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

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

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

(6) The cost of reproduction or replacement of the existing improvements on the property, the depreciation or obsolesence the improvements have suffered, and the method of calculation used to determine depreciation.

(7) The gross income from the property, the deductions from gross income, and the resulting net income; the reasonable net rental value attributable to the land and existing improvements thereon, and the estimated gross rental income and deductions therefrom upon which such reasonable net rental value is computed; the rate of capitalization used; and the value indicated by such capitalization.

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

(c) With respect to each sale, contract, or lease listed under paragraph (5) of subdivision (b):

(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 or other identification of the record of the transaction.

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

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

(e) Except when an appraisal report is used as a statement of valuation data as permitted by subdivision (f), the statement of valuation data shall include a statement, signed by the witness, that the witness has read the statement of valuation data and that it fairly and correctly states his opinions and knowledge as to the matters therein stated.

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

§ 1272.03 List of expert witnesses; contents

The list of expert witnesses shall include the name, business or residence address, and business occupation, or profession of each person intended to be called as an expert witness by the party and a statement as to the subject matter to which his testimony relates.

§ 1272.04 Notice to persons upon whom list and statements served of additional witnesses or data; form

(a) A party who is required to exchange lists of expert witnesses and statements of valuation data shall diligently give notice to the parties upon whom his list and statements were served if, after service of his list and statements, he:

(1) Determines to call an expert witness not included in his list of expert witnesses to testify on direct examination during his case in chief;

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

(3) Discovers any data required to be listed in a statement of valuation data but which was not so listed.

(b) The notice required by subdivision (a) shall include the information specified in Sections 1272.02 and 1272.03, 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.

§ 1272.05 Limitations upon calling witnesses and testimony by witnesses

Except as provided in Section 1272.06, upon objection of any party who has served his list of expert witnesses and statements of valuation data in compliance with Section 1272.01:

(a) No party required to serve a list of expert witnesses may call an expert witness to testify on direct examination during the case in chief of the party calling him unless the information required by Section 1272.03 for such witness is included in the list served by the party who calls the witness.

(b) No party required to serve statements 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 remainder of the larger parcel from which such property is taken unless a statement of valuation data for the witness was served by the party who calls the witness.

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

§ 1272.06 Grounds for court authority to call witness or permit testimony by witness

(a) The court may, upon such terms as may be just, permit a party to call a witness, or permit a witness called by a party to testify to an opinion or data on direct examination, during the party's case in chief where such witness, opinion, or data statements of valuation data if the court finds that such party has made a good faith effort to comply with Sections 1272.01 to 1272.03, inclusive, that he has complied with Section 1272.04, and that, by the date of the service of his list and statements, he:

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

(2) Failed to determine to call such witness or to discover or list such opinion or data through mistake, inadvertence, surprise, or excusable neglect.

(b) In making a determination under this section, the court shall take into account the extent to which the opposing party has relied upon the list of expert witnesses and statements of valuation data and will be prejudiced if the witness is called or the testimony concerning such opinion or data is given.

§ 1272.07 Applicability of chapter

This chapter does not apply in any eminent domain proceeding in any county having a population in excess of 4,000,000 in which a pretrial conference is held.

§ 1272.08 Use of discovery procedures

The procedure provided in this chapter does not prevent the use of discovery procedures or limit the matters that are discoverable in eminent domain proceedings. Neither the existence of the procedure provided by this chapter, nor the fact that it has or has not been invoked by a party to the proceeding, affects the time for completion of discovery in the proceeding.

§ 1272.09 Admissibility of evidence

Nothing in this chapter makes admissible any evidence that is not otherwise admissible or permits a witness to base an opinion on any matter that is not a proper basis for such an opinion.

Los Angeles County Policy Memorandum for Setting Cases for Pretrial and Trial

VII. EMINENT DOMAIN (Including Inverse Condemnation)

A. Policy Memorandum

1. Contested eminent domain cases are governed by California Rules of Court, Rules 206 to 222, inclusive, with respect to setting for pretrial and trial and with respect to pretrial and settlement conferences.

2. Experience has shown that in order to make discovery and pretrial procedures effective and to properly control the calendaring of eminent domain cases for pretrial conferences and for trial, the court must insist on compliance with the California Rules of Court and with the provisions of this Policy Memorandum, provided that in the exercise of the court's discretion and for good cause, compliance with the provisions of this Policy Memorandum may be waived in any particular case.

3. It is the policy of the court in setting such cases for pretrial and trial to give them the priority to which they are entitled by law. (C.C.P., Sec. 1264) All such cases should be brought to trial if possible within twelve months after the filing of the complaint.

   Counsel are expected to assist the court in carrying out this policy by compliance with the Rules and with the following procedures with respect to calendaring, pretrial, and discovery.

4. This Policy Memorandum shall apply to eminent domain cases in the Central District, and to all such cases in any other Districts when so ordered by the judge presiding in the Master Calendar Department in any such District.

5. In order to assure uniformity in eminent domain cases (including inverse condemnation cases), all pretrial conferences, together with all law and motion matters, (except motions to transfer to another district, which are heard in the master calendar department), all discovery procedures, all ex parte orders and judgments, all stipulated and other uncontested matters, all contested matters for trial and determination of issues when such issues are for determination of the court rather than a jury and such issues are submitted for trial and determination by the court, will be handled in Department 64 of the Court. Department 64 has been designated by the Presiding Judge as a special department for all of the stated purposes.

6. All eminent domain cases are set for a first pretrial conference within sixty days after the filing of the memorandum to set. At that conference the Court, with the help of counsel, will settle the issues to be tried and set a date for the trial of the case, as well as the date for a final pretrial conference about thirty days before the date set for trial. Since the date then set for the trial will usually be six months after the first pretrial conference, counsel will be expected to keep that date available, thus eliminating the necessity for continuances because of conflicting engagements. Counsel will also be expected to complete all their discovery between the first and final pretrial conferences. Continuances of the final pretrial conference for that purpose will only be granted on an affirmative showing of good cause.

B. Pretrial, Discovery, Other Proceedings Before Trial and Calendaring.

1. "No eminent domain case shall be set for a pretrial conference or for trial until it is at issue and unless a party thereto has served and filed a memorandum to set." (Rule 206) (Exhibit B)

2. In order to expedite the setting of a contested eminent domain case for pretrial and trial, the summons should be served promptly on all defendants, and answers should be filed promptly after the service of summons. While reasonable extensions of time to answer may properly be agreed to by counsel, the court considers that in the ordinary case an extension of time for more than sixty days is not reasonable where the sole reason for such delay is to give to a defendant's counsel time to secure professional appraisals of the property taken or damaged.

   In most cases an answer can and should be filed within sixty days based on the information as to the value of the property taken or damaged then available, having in mind the owner's right to file an amended answer on stipulation or by order of the court on motion after he has obtained an adequate appraisal. The early filing of an answer will enable the court, upon the filing of a memorandum to set, to set the case for pretrial and for trial within twelve months after the commencement of the action, on dates which are agreeable to all counsel.

3. In preparing answers to complaints in eminent domain cases, counsel are expected to comply with the requirements of section 1246, Code of Civil Procedure, that "[e]ach defendant must, by answer, set forth his estate or interest in each parcel of property described in the complaint and the amount, if any, which he claims for each of the several items of damage specified in section 1248."

C. First Pretrial Conference

1. When the memorandum to set a contested eminent domain case (Exhibit B) has been filed, the clerk in Department 64 will set a date for a first pretrial conference not later than sixty days after the filing of the memorandum.

2. Where all parties appearing in the action agree in writing, by letter or stipulation filed with the Pretrial Setting Clerk in Department 64 concurrently with the memorandum to set, the first pretrial conference will be set on any one of three dates within said period of sixty days as requested by the parties. If the parties do not agree, counsel for the party filing the memorandum to set, by letter to the Pretrial Setting Clerk in Department 64 with copy to each other party appearing in the action in propria persona or by counsel, filed

with the memorandum to set, may request that the case be set for the first pretrial conference on any one of three dates, in which event the case will be set for such conference on one of those dates unless within five days from the date of such request, any party appearing in the action, by letter to the Pretrial Setting Clerk in Department 64 with copy to all other parties appearing in the action, objects to all such dates and requests that such conference be set on any one of three other dates. If within five days thereafter the parties do not advise the said Pretrial Setting Clerk in writing that they have agreed on a mutually convenient date, the case will be set for a first pretrial conference by direction of the judge assigned for that purpose by the Presiding Judge on a date within said period of sixty days convenient to the court, which date will be changed only on motion on an affirmative showing of good cause. Notice of the date for the pretrial conference (Exhibit C) will be sent by the said Pretrial Setting Clerk to all parties appearing in the action as required by Rule 209.

3. The first pretrial conference will be held for the purpose of discussing and securing agreement on all matters set forth in the joint statement to be filed as provided in paragraph 15 of this Policy Memorandum, and such other matters as may be suggested by the judge presiding at such conference or by the parties then present. When necessary, a reasonable continuance will be allowed on all such matters before securing their appraisals and engaging in discovery proceedings. At such conference the court will also discuss the possibility of settlement.

4. At the first pretrial conference the court will also fix the date for the trial and a date for the final pretrial conference not more than thirty days before the date so fixed for the trial, having in mind the calendars of counsel and the calendar of the court. When such dates are fixed, counsel will be expected to avoid conflicting engagements.

5. Unless the first pretrial conference is waived as hereinafter provided, each party appearing in the case shall attend the first pretrial conference by counsel, or if none, in person, and shall have a thorough knowledge of the case and be prepared to discuss it and make stipulations or admissions where appropriate, and be prepared to agree on a date for the final pretrial conference and for the trial.

6. It is the policy of the court to require the filing of a joint statement at or before the time set for the first pretrial conference evidencing the extent to which counsel are agreed on matters which should be agreed on at the first pretrial conference, including a date for the final pretrial conference and for the trial. The court has prepared a check list of all such matters, which should be used by counsel as a guide in preparing the required joint statement. Copies of the check list are available at the main or any branch office of the County Clerk. (See Section VII E)

7. It is the policy of the court to waive the first pretrial conference when the joint statement evidences the agreement of counsel on all matters set forth in the check list which are applicable to the particular case, on condition that the joint statement, together with a request for such waiver, is filed not less than ten days before the time set for the first pretrial conference. In that event, counsel may call the pretrial clerk in Department 64 on the second court-day before the day set for such conference, to determine whether appearance at the conference is necessary.

8. At the conclusion of the first pretrial conference, or upon the waiver of such conference if the joint statement is approved, the court will prepare a first pretrial conference order setting forth all matters agreed on except the several parties' estimates of value [see Rule 211, subd. (d)], including the date set for the final pretrial conference and for the trial, and serve the file such order as provided in Rule 215.

D. Interim Proceedings

1. During the period between the conclusion of the first pretrial conference and the time then set for the final pretrial conference, the parties are expected to complete any law and motion matters and any deposition and discovery proceedings as may be provided in the first pretrial order, including the exchange of all valuation data as may be agreed on by the parties. During such period the parties are also expected to confer in person or by correspondence to reach agreement upon as many additional matters as possible.

2. Counsel are reminded that at the first pretrial conference or at any time before or at the final pretrial conference, the parties may by stipulation also submit to the judge assigned for that purpose, and such judge may determine, any other matter which will aid in the disposition of the case. [See Rule 212, subdivision (b)]

E. Final Pretrial Conference

1. At or before the final pretrial conference, when ordered by the court, the parties will submit to the pretrial conference judge a joint written statement of all matters agreed on subsequent to the first pretrial conference and a joint written statement or separate written statements of the factual and legal contentions to be made as to the issues remaining in dispute, to the extent that such matters have not previously been incorporated in any partial pretrial conference order or amendment thereto. (See Rule 210)

2. At such conference, when so ordered by the court, the parties will submit to the court a descriptive list of all maps, photographs and other documentary exhibits which either party then intends to offer in evidence, except documents either party may intend to use for impeachment, with a statement indicating which ones may be marked in evidence at the beginning of the trial and which ones are to be marked for identification. In the discretion of the court said list may be included, in whole or in part, as a part of the joint written statement required to be filed at or before such conference. To the extent that such exhibits are then available, they should be produced at the time of the final pretrial conference and marked by the clerk as exhibits in evidence or for identification. The provisions of this paragraph do not preclude the production of other exhibits at the time of trial.

3. Prior to the final pretrial conference each party will submit *in camera* to the court in writing a memorandum setting forth in summary form a statement of the opinions of each of their respective appraisers and other valuation witnesses as to (1) the value of each parcel to be taken, (2) severance damages, if any, and (3) the value of the benefits resulting from the construction of the proposed public work, and other information and data as may be requested by the court. Such memoranda shall not be filed and at time of final pretrial conference may be returned to the respective parties or ordered exchanged if deemed comparable and in compliance with the first pretrial order. The requirements with reference to appraisal reports or other valuation data as generally required are set forth in Exhibit E.

4. At the conclusion of the final pretrial conference the judge as required by Rule 214 will prepare a final pretrial conference order, which shall incorporate by ref-

erence any partial pretrial conference order and a statement of any amendments thereto and of the matters then agreed on, the list of proposed exhibits if submitted by the parties with their stipulation with respect thereto, a statement of any factual and legal contentions made by each party as to the issues remaining in dispute, which have not been set forth in any partial pretrial order or amendment thereto, and a concise and descriptive statement of every ruling and order of the judge at the final pretrial conference on any matter which has theretofore been determined or will aid the court in the disposition of the case.

5. The final pretrial conference order will be served and filed as provided in Rule 215.

F. Check List for Completion of Joint Statements for First Pretrial Conference in Eminent Domain Proceedings.

1. A joint written statement setting forth the position of the parties as to all matters listed in paragraph 2 of this checklist must be filed at or before the time set for the first pretrial conference in contested eminent domain cases.

Each such statement should indicate in the caption the number of the parcel or parcels to which it refers. Paragraph numbers and headings herein should be used by counsel in preparing such statements.

2. As to each of the items referred to in this paragraph, state one of the following: (1) the facts agreed to, (2) that the item is "disputed", or (3) that the particular item is not applicable. When the parties cannot agree on any matter, each party shall state his contentions with respect thereto.

All of the following items are to be included as to each parcel in preparing the joint statement:

(a) Date of Filing Complaint and of Issuance of Summons. (See C.C.P. Sec. 1249)
(b) Names and capacities of all parties served and of parties not served.
(c) Immediate Possession: Effective date of order for immediate possession.
(d) Description of Property: Address, legal description of land or property to be taken and of remaining property, if any; area of property; existing structures and improvements, if any; existing encumbrances; existing leases; and existing zoning.
(e) Nature, Extent or Character and Ownership of the several estates or interests to be taken.
(f) Purpose of Acquisition and a brief general description of the proposed public work.
(g) Condemnor's Estimated Valuation. Plaintiff may include here a statement as to its source, such as a staff or other preliminary appraisal.
(h) Condemnee's Estimated Valuation. The party may include here a statement as to its source, such as the owner's opinion of value or a preliminary appraisal.
(i) Whether severance damages are claimed, and if so, by whom?
(j) Whether benefits are claimed by the construction of the proposed public work, and if so, what benefits?
(k) Dates for Valuation Data Exchange.
(l) Issues. Whether there are any other issues to be determined in addition to the issue of value.
(m) Available Trial Dates—fill in not less than two dates at least 30 days prior to expiration of one year from the date the action was commenced.
(n) Available Final Pretrial Conference Dates—fill in at least two dates not less than 60 days prior to expiration of one year after the date the summons was issued.
(o) Other matters agreed on or admitted.
(p) Whether any party contemplates making a motion to transfer the trial to another Superior Court District for trial and, if so, which party. Note: The information required by the foregoing checklist should be based on all information available as of the date of the required joint statement. If the parties so desire, the information required by items (g) and (h) may be furnished in a separate supplemental statement. When the parties cannot agree on the dates required under items (l) and (m), the statement should include two dates in each instance which are available to counsel for each of the parties.

3. If the parties so desire, the statement may conclude with a joint request for a waiver of the first pretrial conference. In that event, the statement must be filed not less than ten days before the date set for such conference.

This Policy Memorandum shall be effective on and after July 1, 1966.

DATED: June 15, 1966.

LLOYD S. NIX, Presiding Judge

EXHIBIT E

REQUIREMENTS FOR VALUATION DATA

The parties are ordered to file appraisal reports upon which they intend to rely at the time of trial, if any, with the clerk in Department 64, on or before five days before the final pretrial. If any party intends to have an owner or any witness, other than the appraisers whose appraisal reports are to be submitted, testify in this case with respect to valuation, such party shall also file with the court on the same date the name of such person, his opinion as to valuation, and all factual data, not otherwise submitted, upon which such opinion is based, including market data, reproduction studies, and capitalization studies, in as much detail as practicable. If the court determines said reports to be comparable, and if it appears just and proper to do so, an exchange will be ordered. If the court does not order an exchange, the court will initial the documents for identification at the time of trial. Except as set forth herein, and except for the purpose of rebuttal, the parties will not be permitted to call any witness to testify on direct examination to an opinion of value, a sale, a reproduction study or capitalization study, unless submitted to the court as set forth above.

In the event a party subsequently discovers any information which should have been submitted as set forth in the preceding paragraph, and desires in good faith to use the information at time of trial, he must immediately notify the other party to this effect, and provide the other party with the said information, and show good cause to the court, either in Department 64 or the trial department, that he should be permitted to use such information at the trial.

In the event a party intends to use an expert other than those who will testify with respect to valuation as set forth above, said party shall disclose, prior to the final pretrial in this case, if possible, or as soon thereafter as such information is available, the name and address of the said person, if known, and the nature of the testimony of said witness to be used at the trial of this case.

The appraisal report shall bear the title and number of the case, the parcel numbers involved, the names of the defendant owners of the parcels involved, and the date of final pretrial, on the outside cover of the appraisal report, and shall include, as a minimum, clear and concise statements of the following:

1. A description of the property including, as a minimum, a

plot plan (not necessarily to scale) showing the size, shape, dimensions of the property being acquired and its location to street accesses. Additional information relating to terrain, utilities, principal street accesses, location of improvements upon the property, and the relationship of the property to and description of a larger parcel of which it is a part, when appropriate, if necessary for understanding of the appraisal problem.

2. Present zoning of property, and if the existing use is inconsistent with the present zoning, the authority for which such use is permitted.

3. A statement of the appraiser's opinion of the highest and best use of the property. If such use is inconsistent with the present zoning, a concise statement of factual matter upon which the opinion of probable zone change was predicted. The appraiser's opinion of the market value of the property being acquired and if the property is part of a larger parcel, his opinion of severance damage, if any, and special benefits, if any. If the appraiser is of the opinion that there is no severance damage or special benefit, a statement to this effect should be included.

4. The valuation approaches or methods utilized in the formation of the appraiser's opinion should be set forth in a brief statement. If any approach or method is not specified, it shall be presumed that the appraiser did not consider it in arriving at his opinion.

5. Where market data or sales are utilized the following information as to each sale: legal description and address, if available, or other sufficient designation for identification; size and shape of property; zoning; date of sale or transaction; names of buyer and seller; nature and brief description of improvements, if any; price paid and terms of sale; with whom and when the sale was verified. Which sales are considered indicative of the value of the property. Gross multiplier used, if any.

6. If reproduction cost studies are made, the following information must be submitted; description of improvements; size and area of building; type of construction; age of building; condition of buildings indicating obsoletion and depreciation; remaining economic life of improvements; cost factor or other computation used to establish cost to replace improvements; depreciation allowance used and the basis therefor.

7. If a capitalization or other income study is made, the following minimum information should be included, where relevant: gross income utilized in computations and whether actual income being produced or assumed income is used and the basis therefor; enumeration of expense items expected, the respective amounts thereof and whether said amounts are based upon actual or assumed expenses; method of processing or treating income; capitalization rate or rates or multiplier used; if the recapture of improvements is provided for (land residual method), a statement of the remaining economic life of improvements used and rate of capitalization applied to residual land, if annuity methods used, a statement of the anticipated economic period in which payments are expected and the discount rate used, and the residual value of the land adopted in the study. The valuation indicated by said method or methods.

8. Lease information, if applicable, including terms of existing leases and names and addresses of lessors, lessees, and other persons who verified the information.

Connecticut Practice Book § 352

. . . In making a reference in any eminent domain proceeding the court shall fix a date not more than sixty days thereafter, unless for good cause shown a longer period is required, on which the parties shall exchange copies of their appraisal reports and file copies thereof with the clerk. Such reports shall set forth the valuation placed upon the property in issue and the details of the items of, or the basis for, such valuation. . . .

Maine State Highway Law Title 23 § 154

A copy of the notice of condemnation shall be served on the owner or owners of record. With said copy there shall be served on each individual owner of record a copy of so much of the plan as relates to the particular parcel or parcels of land taken from him and a statement by the commission with respect to the particular parcel or parcels of land taken from him which shall state:

1. Date of proposed possession. The proposed date of taking possession.

2. Compensation involving severance damage. Where the commission appraisals disclose severance damages, state the amount of compensation itemized in accordance with the commission's determination of the following elements of damage:

A. The highest and best use of the property at the date of taking;
B. The highest and best use of the property remaining after the taking;
C. The fair market value of the property before the taking;
D. The fair market value of the property after the taking;
E. The gross damage, showing separately:

(1) The fair market value of the real property taken,
(2) Severance damages including the impairment or destruction of facilities and structures;

F. Special benefits, accruing to the remaining property by reason of the public improvement for which part of the property is taken, to be set off against the gross damage;
G. Net damage and offering price.

3. Compensation not involving severance damage. Where the commission appraisals disclose no severance damages, state the amount of compensation itemized in accordance with the commission's determination of the following elements of damage:

A. The highest and best use of the property at the date of taking;
B. The highest and best use of the property remaining after the taking;
C. The fair market value of the real property as of the date of taking;
D. Special benefits, accruing to the remaining property by reason of the public improvement for which part of the property is taken, to be set off against the value of the property taken;
E. Net damage and offering price.

Maryland Rule 410

Scope of Examination — Gen'l.

a. Generally.

Unless otherwise ordered by the court, a deponent may be examined, either orally or upon written questions, regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action.

(1) whether it relates to the claim or defense of the party examining or submitting questions or to the claim or defense of any other party, and

(2) including the existence, description, nature, custody,

condition and location of any books, documents or other tangible things and

(3) including any information of the witness or party, however obtained, as to the identity and location of persons having knowledge of relevant facts and

(4) whether or not any of such matters is already known to or otherwise obtainable by the party examining or submitting questions.

(G.R.P.P. Pt. Two, II, Rule 3.)

Editor's note—The language of this section, particularly in the opening paragraph, differs from that of former Discovery Rule 3, cited in the source line. However, matters (1), (2), (3) and (4) are practically identical with the old rule except that the word "question" has been substituted for the word "interrogatories." See Federal Rules of Civil Procedure, Rule 26(b).

b. No Objection Based on Inadmissibility at Trial.

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.

Editor's note—This section is new. It is the last sentence of Federal Rules of Civil Procedure, Rule 26(b). It makes clear the broad scope of examination and that it may cover not only evidence for use at the trial but also inquiry into matters in themselves inadmissible as evidence but which will lead to the discovery of such evidence.

c. Writings Obtainable

Except as otherwise provided in Rule 406 (Order to Protect Party and Deponent), a party may by written interrogatory or by deposition require that an opposing party produce or submit for inspection:

1. Party's Own Statement.

A signed statement previously given by him to the opposing party.

2. Report of Expert.

A written report of an expert, whom the opposing party proposes to call as a witness, whether or not such report was obtained by the opposing party in anticipation of trial or in preparation for litigation. If such expert has not made a written report to the opposing party, such expert may be examined upon written questions or by oral deposition as to his findings and opinions.

(Amended Sept. 26, 1957.)

Committee note—The scope of examination as defined by this Rule is applicable to interrogatories by virtue of Rule 417 c.

Effect of amendment.—The amendment substituted "written interrogatory" for "question" in the first paragraph of the section.

d. Writings Not Obtainable.

Except as otherwise provided in Rule 406 (Order to Protect Party and Deponent), a party or deponent shall not be required to produce or submit for inspection:

1. Object Prepared for Trial.

A writing, statement, photograph or other object obtained or prepared in anticipation of litigation or in preparation for trial, except as provided in section c of this Rule, unless the court otherwise orders on the ground that a denial of production or inspection will result in an injustice or undue hardship.

2. Reflecting Attorney's Conclusions.

A writing which reflects an attorney's mental impressions, conclusions, opinions or legal theories.

New York Civil Practice Law and Rules

§ 3140. Disclosure of appraisals in proceedings for condemnanation,* appropriation or review of tax assessments.

Notwithstanding the provisions of subdivisions (c) and (d) of section 3101, the appellate division in each judicial department shall adopt rules governing the exchange of appraisal reports intended for use at the trial in proceedings for condemnation, appropriation or review of tax assessments. Added L. 1967, c. 640, eff. Sept. 1, 1967.

New York Supreme Court, Appellate Division, Third Department, Albany

Special Rule

Exchange of Appraisal Reports in Proceedings for Condemnation, Appropriation and Review of Tax Assessments

(a) In all proceedings for the determination of the value of property taken pursuant to eminent domain, and in all proceedings for the review of tax assessments on real property where value is in issue, the attorneys for the respective parties shall file with the administrative judge of the judicial district in which the proceedings are pending, not later than 30 days before the date set for trial, one copy (or, in the event that there are two or more adversaries, a copy for each of such adversaries) of a report of each appraiser or expert witness whose testimony is intended to be relied upon at the trial, with proof of service upon each adversary of a notice of the filing of such reports.

(b) When the administrative judge shall have received the appraisal reports of all parties, or twenty-eight days before the date set for trial, whichever is earlier, he shall distribute copies of the appraisal reports filed with him to each of the attorneys of record of all other parties to the claim. In proceedings where more than one parcel is involved, the appraisal reports shall only be distributed to the taking or taxing authority and to the claimant or claimants who are owners of parcels which are the subject of the appraisal report.

(c) Each appraisal report shall contain a statement of the method of appraisal to be relied on and the conclusions as to value reached by the expert, together with a complete and detailed statement as to the facts, figures and calculations by which the conclusions were reached. If sales, leases or other transactions of comparable properties are to be relied on, they shall be set forth with such particularity as to permit the transactions to be readily identified. Appraisal reports shall be in compliance with the Standard Form For Appraisal Reports which is obtainable from the Director of Administration for the Third Judicial Department, Courthouse, Albany.

(d) Upon the trial of the proceedings, all parties shall be limited in their proof as to value based on appraisal to matters set forth in their respective appraisal reports. Any party who fails to file an appraisal report as herein required shall be precluded from offering any expert testimony on value.

(e) Upon the application of any party on such notice as the court in which the proceeding is pending shall direct, the court may, upon good cause shown, relieve a party of a default in the filing of a report, extend the time for filing reports or allow an amended or supplemental report to be filed upon such conditions as the court may direct. No such application shall be entertained after the trial of the issue has begun except in extraordinary circumstances.

(f) Motions hereunder shall not be made to the administrative judge.

* So in original. Probably should read "condemnation."

Standard Form for Appraisal Reports

Note: This report is required by rule of the Appellate Division Third Department, a copy of which appears on the reverse side of this form. Information requested shall be furnished under each category, unless clearly inapplicable to a particular proceeding. Notwithstanding the specification of information on the form, parties shall furnish complete information as to the elements of the appraisal.

I. Introduction
   (a) Title and number of action; Attorney; Reference to the Appropriation Project or Tax Assessment Proceeding.
   (b) Purpose of Appraisal.
   (c) Qualifications of Appraiser.

II. Description of Property
   (a) Ownership, location of subject property and description of neighboring lands.
   (b) Description of land and improvements and facilities available.
   (c) Present use; economic trends; highest and best use; zoning.

III. Description of Acquisition or Explanation of Assessment
   (a) Description of all interests affected with full particulars concerning extent and nature of the appropriation, if such, or the assessment, if such.

IV. Value of Property Before Appropriation or at Time of Assessment
   (a) Describe in detail the valuation and all methods by which it was arrived at. Include data on comparable sales.

V. Value of Property After Appropriation (Not Applicable to Assessments)
   (a) Giving highest and best use of remainder, detail the direct damages and consequential damages, if any, to the land and improvements.
   (b) Allocate damages to the land and the various improvements.

VI. Miscellaneous
   (a) Attach any maps, drawings or photos which are pertinent.

New York Court of Claims Rule 16

PRACTICE PROVISIONS

§ 16. Proceedings as to evidence in appropriation cases

1. Upon the trial of any claim for the appropriation of real property or an interest therein, evidence of the price and other terms upon any sale, or of the rent reserved and other terms upon any lease, relating to the property taken or to be taken or to any other property in the vicinity thereof shall be relevant, material and competent, upon the issue of value or damage and shall be admissible on direct examination, if the court shall find (1) that such sale or lease was made within a reasonable time of the vesting of title in the state, (2) that it was made in good faith in the ordinary course of business, and (3) in case such sale or lease relates to other than property taken or to be taken, that it relates to property which is similar to the property taken or to be taken; provided, however, that no such evidence shall be admissible as to any sale or lease, unless at least twenty days before the trial the attorney for the party proposing to offer such evidence shall have served either personally or by mail a written notice in respect of such sale or lease, which said notice shall specify the names and addresses of the parties to the sale or lease, the date of making of 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 attorney-general shall be served upon all claimants or their attorneys named in the claim; or if served on behalf of a claimant, shall be served upon the attorney-general and upon all other claimants or their attorneys named in the claim.

2. Upon the trial evidence showing the amount or valuation for which each parcel of such real property taken has been assessed for purposes of taxation on the city, town or village assessment rolls, wherein the real property is situated, for each of the three years preceding the date of said taking shall be received as evidence, such assessed valuation, in case only part of an entire plot in a single ownership is to be acquired, shall include the valuation of all buildings encroaching upon or within the bounds of the taking provided, however, that when offered such evidence shall be subject to objection upon any legal ground.

New York Court of Claims Rule 25a

Rule 25a. [Appraisals] As Amended to June 1, 1967

1. Within six (6) months from the date of the filing of a claim in the appropriation case, the parties shall file with the Clerk of the Court four (4) copies of their appraisals which shall set forth separately the valuation of land and improvements and data upon which such evaluations are based including but not limited to the before value and after value, direct, consequential and total damages and details of appropriations, comparable sales and other factors on which said party will rely on the trial. If all of the details required by Section 16 of the Court of Claims Act relating to alleged comparable sales are included in the appraisal report prescribed herein, the same shall be deemed compliance with said Section 16.

2. When all parties to a claim shall have filed their appraisals as herein provided, the Clerk shall send to each attorney of record a copy of the appraisal reports of all other parties.

3. Within sixty (60) days after such exchange of appraisals a party may move for permission to file and serve an amended or supplemental appraisal, which may be granted in the Court's discretion provided such motion is limited to correcting errors or to adding matter pertinent to the main appraisal.

4. (a) A party confronted with unusual and special circumstances requiring more time than prescribed above for the filing of appraisal reports may make a motion for an extension of time, which may be granted in the Court's discretion, for such period and under such conditions as the interests of justice require. Such extension shall also extend the time of all parties for the same period.

(b) At a reasonable time before trial a party may apply for relief from the requirements of this Rule, provided that the party can show unusual and substantial circumstances which if not remedied would cause undue hardship. Such relief may be granted in the discretion of the Court.

5. (a) Upon the trial of a claim for the appropriation of property the parties shall be precluded from offering any proof on matters not contained in the appraisal reports or amended or supplemental appraisal reports as required by this Rule; however, a party may offer proof on matters reasonably and properly contained in Bills of Particulars and Examinations before Trial in accordance with the usual procedures and Rules of this Court.

(b) This Rule shall not apply to a party who within six

(6) months of the filing of a claim files a statement to the effect that he will not introduce expert evidence of value and damages upon the trial.

6. Formats of minimal requirements of an appraisal, have been added to the suggested forms of this Court, for the guidance of counsel and appraisers.

7. The purposes and intent of this Rule are (a) to aid and encourage the early disposition and settlement of appropriation claims, and (b) to compel a full and complete disclosure so as to enable all parties to more adequately and intelligently prepare for a trial of the issues.

8. This Amended Rule shall apply to all claims filed on and after July 1, 1966. Added eff. March 1, 1965; amended eff. July 1, 1966.

APPENDIX TO RULES

I. FORMS

The following forms are suggested as aids to claimants.

FORM E

Suggested Content of Appraisal Report on Estimated Damages in Excess of One Thousand Dollars.

(File with the Clerk pursuant to Court of Claims Rule 25a)

1. PROJECT
   - a. Map Parcel
     Map Parcel
     Map Parcel
   - b. Reputed Owner
2. LOCATION OF PROPERTY
   - a. Description of property and improvements
   - b. Utilities available to property
3. DESCRIPTION OF AREA
   - a. Zoning (actual and probable)
   - b. Economic trends
   - c. Present use
   - d. Highest and best use
4. DESCRIPTION OF STATE ACQUISITION
   - a. Purpose
     Fee
     Permanent easement
     Temporary easement
   - b. Number of acres or feet
   - c. Value by acres or feet of direct taking
5. VALUE OF THE WHOLE BEFORE STATE ACQUISITION OF PROPERTY
   - a. Land—basis of evaluation—explain
   - b. Improvements—basis of evaluation—explain
6. WHAT IS VALUE OF REMAINDER?
   - a. Land
   - b. Improvements
7. RESULTING CONSEQUENTIAL DAMAGES, IF ANY, TO REMAINDER

   (If consequential damages are claimed, describe)
   - a. To land (per acre or per square foot or per frontage foot)
   - b. To improvements (be specific as to each, where possible)
8. CALCULATION OF DAMAGES
   - a. Land (direct, consequential)
   - b. Improvements (direct, consequential)
   - c. Total
9. OTHER INFORMATION

   Comparable sales Photos
   Sketch 5-year sales data

   Any other data deemed necessary

PART I. General

1. Purpose of the Appraisal
2. Definition of Value Appraised
3. Appraisal Problem
4. Area and Neighborhood Analysis
5. Economic Trends
6. Ownership and Occupancy
7. Sales History of the Property

PART II. Valuation

1. Description of:
   - Land
   - Land Improvements
   - Building Improvements
   - Utilities Available to Property
2. Present use of the Property
3. Highest and best use of the Property
4. Zoning of the Property
5. Taxes and Assessed Valuation
6. Indicated Value by Cost Approach
7. Indicated Value by the Income Approach
8. Indicated Value by the Market Data Approach
9. Correlation and Conclusions of Value

PART III. Property and Rights Taken

1. Description of Property and Rights Taken
2. Effect of Taking on Property

PART IV. Valuation of Remainder

1. Highest and Best Use
2. Indicated Value by the Cost Approach
3. Indicated Value by the Income Approach
4. Indicated Value by the Market Data Approach
5. Correlation and Conclusions of the Value

PART V. Allocation of Damages

1. Value of Part Taken
   - a. Land Fee P.E. T.E.
   - b. Land Improvements Fee P.E. T.E.
   - c. Building Improvements Fee P.E. T.E.
2. Noncompensable damages
3. Benefits
4. Severance Damages
5. Recapitulation

PART VI. Appraised Compensation

FORM F

Appraisal Report

(Total Damages Not to Exceed $1,000)

(File with the Clerk pursuant to Court of Claims Rule 25a)

PROJECT: _____

_____

_____

Map _____ Parcel _____

Map _____ Parcel _____

Map _____ Parcel _____

REPUTED OWNER: _____

_____

_____

PROPERTY LOCATION _____

Town-City _____

County of _____

VALUE BEFORE TAKING _____ _____ _____

VALUE AFTER TAKING _____ _____ _____

VALUE OF TAKING _____ _____ _____

OTHER _____ _____ _____

VALUE OF T. E. _____ _____ _____

TOTAL _____ _____ _____

I. PURPOSE OF APPRAISAL
(State purpose of the report.)

II. DESCRIPTION OF PROPERTY

III. HIGHEST AND BEST USE

IV. ZONING

V. ESTIMATED VALUE OF ENTIRE PROPERTY

VI. LAND VALUE

VII. DESCRIPTION OF APPROPRIATION AND EFFECTS

VIII. VALUE OF DAMAGES

IX. BENEFITS
(Briefly state benefits to subject, if any, and deduct lump sum from value of damages.)

X. ATTACHMENTS Comparable Sales ___ Photos ___ Sketch ___ 5-year sales data ___ Affidavit ___ Other _____

XI. REMARKS

Pennsylvania Eminent Domain

§ 1–703. Trial in the court of common pleas on appeal

At the trial in court on appeal:

(1) Either party may, as a matter of right, have the jury, or the judge in a trial without a jury, view the property involved, notwithstanding that structures have been demolished or the site altered, and the view shall be evidentiary. If the trial is with a jury, the trial judge shall accompany the jury on the view.

(2) If any valuation expert who has not previously testified before the viewers is to testify, the party calling him must disclose his name and serve a statement of his valuation of the property before and after the condemnation and his opinion of the highest and best use of the property before the condemnation and of any part thereof remaining after the condemnation, on the opposing part at least ten days before the date when the case is listed for pre-trial or trial, whichever is earlier.

(3) The report of the viewers and the amount of their award shall not be admissible as evidence. 1964 Special Sess., June 22, P.L. 84, Art. VII § 703.

Washington State

NEW SECTION. Sec. 8. There is added to chapter 125, Laws of 1965 ex. sess. and to chapter 8.25 RCW a new section to read as follows:

After the commencement of a condemnation action, upon motion of either the condemnor or condemnee, the court may order, upon such terms and conditions as are fair and equitable the production and exchange of the written conclusions of all the appraisers of the parties as to just compensation owed to the condemnee, as prepared for the purpose of the condemnation action, and the comparable sales, if any, used by such appraisers. The court shall enter such order only after assurance that there will be mutual and reciprocal contemporaneous disclosures of similar information between the parties. (S.B. 310, Laws 1969 Ex. Sess.)

Wisconsin Eminent Domain Code § 32.09

(8) 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 the 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.

(9) A condemnation commission or a court may make regulations for the exchange of the statements referred to in a sub. (8) by the parties, but only where both owner and condemnor furnish same, and for the holding of prehearing or pretrial conference between parties for the purpose of simplifying the issues at the commission hearing or court trial.

APPENDIX B

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