Pretrial Discovery in Condemnation Proceedings: An Evaluation

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NOTES

PRETRIAL DISCOVERY IN CONDEMNATION PROCEEDINGS: AN EVALUATION

Eminent domain is generally defined as the power of the nation or sovereign state to take, or to authorize the taking of, private property for a public use without the consent of the owner. This taking is conditioned upon the payment of just compensation.\(^1\) In a government of limited and specified powers such as ours, the power of eminent domain must be exercised as provided by law.\(^2\) Thus, the use of the condemnation power is subject to all the prohibitions found in the constitution, namely: (1) the requirements of just compensation, and (2) the due process clauses of the fifth and fourteenth amendments which allow the property owner opportunity to be heard and to contest the issues involved in the taking.

Since in every taking the exercise of eminent domain powers is conditioned upon the payment of a fair and just compensation, the primary concern in the past centered on the determination of the meaning and application of this term. The United States Supreme Court noted that just compensation meant a full and perfect equivalent in money for the property taken,\(^3\) and also that the compensation to an owner of property should be reciprocal, i.e., it must be fair to the state as well as to the owner.\(^4\) Furthermore, since each parcel of land is unique, the valuation of real property is an issue particularly within the realm of the trial court.\(^5\)

This concern, with regard to the determination of the meaning of just compensation, focused upon substantive law questions, e.g., whether damages should be awarded for loss of good will, moving expenses, and permanent fixtures appurtenant to the land. However, time and a plentitude of judicial decisions have settled most of the substantive just compensation problems.\(^6\) Today, the

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\(^4\) Ibid.

\(^5\) *United States v. Lambert*, 146 F.2d 469 (2d Cir. 1944).

\(^6\) A.B.A. REPORT OF COMMITTEE ON CONDEMNATION AND CONDEMNATION PROCEDURE 137 (1965) [hereinafter cited as A.B.A. REPORT].
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procedural aspects of condemnation suits are being emphasized, particularly in the area of pretrial discovery of appraisers and their reports. This emphasis on pretrial procedure seems to arise from the very nature of a condemnation action. Since an eminent domain proceeding involves the extensive use of technical terms and expert witnesses, pretrial discovery tends to reduce trial preparation. Also, a liberal discovery procedure increases the possibility of settlement and tends to give a more equitable treatment to both condemnor and condemnee. Emphasis upon pretrial technique appears to be further warranted from the relationship of the parties in a condemnation action. In no other civil action is the power of sovereignty, public interest and individual interest more intertwined. The condemnor, whether federal or state, not only owes a duty to the public to acquire the land at a price no higher than the reasonable market value, but also is obliged to pay the condemnee a just compensation. The current question is whether this obligation should be examined solely by looking at the monetary award, or whether the criterion of just compensation requires examination into the methods used by the sovereign in determining the compensation figure.

The purpose of this note is to analyze and evaluate the pretrial discovery procedures employed by the federal government and the various states, particularly New York, with regard to appraisal reports and their use by parties to the litigation. Particular emphasis will be placed on the problem of whether the just compensation principle might require a free disclosure of all such reports in a condemnation proceeding.

Procedural Aspects of the Problem

The general standards for discovery and pretrial procedures in the federal district courts are contained in the Federal Rules of Civil Procedure. Implicit in these discovery rules is the principle that mutual knowledge of all relevant evidence and issues prior to trial is essential to the just, speedy and inexpensive disposition of the litigation. Rule 26 is of primary importance because it establishes the fundamentals necessary for the application of the discovery statutes. It states that discovery is extended to any person, and

7 Ibid.
9 FED. R. CIV. P. 16, 26-37, 45.
10 FED. R. CIV. P. 1 states that the rules "shall be construed to secure the just, speedy and inexpensive determination of every action."
11 FED. R. CIV. P. 26(a).
any matter, not privileged, which is relevant to the subject matter involved in the pending action... 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.12

The vague concept of "reasonably calculated" has generally been taken to mean "relevant," not under the normal concept of "limited by the pleadings," but in a broader sense of "whether the discovery will serve any substantial purpose."13 Thus, if a deponent refuses to answer any question "reasonably calculated to lead to the discovery of admissible evidence," a motion may be made to compel an answer.14

In pretrial condemnation proceedings, federal rules 33 and 34 are of primary importance. At the outset it should be noted, however, that these rules are merely means to achieve discovery of certain material, and that before these means may properly be employed, the material sought to be discovered must be allowable under rule 26. Rule 33 provides that a party may serve written interrogatories upon an adverse party. In condemnation proceedings, these interrogatories usually relate to the value an appraiser placed upon a certain parcel of land and the various factors he used to determine this valuation. Rule 34 establishes a procedure whereby, upon motion of a party showing good cause, the court may order another party to produce and permit the inspection and copying of any designated document, not privileged, which might constitute or contain evidence material to any matter involved in the pending action. This motion usually takes the form of a request to examine the appraisal report. It is interesting to note that under rule 34, the party seeking discovery is charged with the burden of proving the justness of the discovery, whereas under the other rules, the person against whom discovery is sought has the burden of showing prejudice.15

The rules regarding discovery simply provide guides to be followed in seeking disclosure. Although the purpose behind these rules was to make the trial a fair contest with full disclosure of the basic facts and issues,16 it was not until the decision of Hickman v. Taylor17 that the Supreme Court attempted to formulate definitive standards for interpretation and control of discovery procedures. The issue in that case was whether pretrial procedural devices could be used to inquire into material collected by an

12 Fed. R. Civ. P. 26(b). (Emphasis added.)
13 Goldstein, supra note 8, at 46-47.
deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case. . . . The deposition-discovery procedure simply advances the stage at which the disclosure can be compelled from the time of trial to the period preceding it. . . . 18

The Court explained that where relevant non-privileged facts were hidden, and these facts were essential to the preparation of one's case, discovery might properly be had.19 Despite this liberal premise, the Court further noted that not even the most liberal theory could justify an invasion into the files and mental impressions of an attorney. This material was privileged as the "work product" prepared by an attorney in preparation for litigation.20

The holding of this case has caused doubt as to the liberality that had been imposed on the federal rules applicable to discovery. It has led some courts to place an overemphasis on the existence of facts as opposed to mental processes. For example, in condemnation cases, a distinction is often drawn between the discovery of a fact, i.e., the existence, use and market value of certain land, and the mental process used by an appraiser to arrive at a finding of value. However, the case has seemed to foster a greater awareness that these federal rules should be applied as the facts of the case might indicate.

Aside from the problem of how the federal discovery rules should be applied, a condemnation proceeding presents a further and distinct problem in the discovery area. In most instances, the condemnee is seeking information in the form of interrogatories of the appraiser or an examination of the appraisal. In both instances, the condemnee is seeking information from an expert witness. Generally, the courts have decided this issue of expert discovery without regard to the procedural device employed.21 The issue in almost every case has been whether the discovery rules extend to experts, and, if so, what is the scope of their application.22

19 Id. at 511.
20 Id. at 510.
21 E.g., United States v. 900.57 Acres of Land, 30 F.R.D. 512 (W.D. Ark. 1962) (motion under rule 34); United States v. 6.82 Acres of Land, 18 F.R.D. 195 (D.N.M. 1955) (motion to quash subpoena duces tecum under rule 45); United States v. 50.34 Acres of Land, 12 F.R.D. 440 (E.D.N.Y. 1952) (motion to limit examinations under rule 30(b)).
22 See, e.g., United States v. Certain Acres of Land, 18 F.R.D. 98 (M.D. Ga. 1955) wherein the court said, "the question for decision boils down basically to the extent of discovery which will be ordered . . . from an adverse party's experts." Id. at 100.
The opinions on this question have ranged from allowing full disclosure of an appraiser's conclusions,23 to an absolute denial of disclosure of the name of the appraiser employed by the condemnor or condemnee.24

Case Approach to Discovery

While the relevance of expert opinion varies according to the matters contested at trial, there is little doubt that in eminent domain cases the expert occupies a particularly significant position. In most instances, the value to be placed upon the taken property is the sole issue before the court, and the opinions of the experts usually constitute the sole evidence upon which a conclusion can be reached. Nevertheless, an analysis of the cases shows that one (or more) of the following defenses has been used successfully to defeat disclosure of appraisals and appraisers' opinions in condemnation cases: (1) a fact-opinion distinction which will allow disclosure as to the facts used by an appraiser in reaching his conclusion as to value, but will deny disclosure as to the mental processes (opinion) used by such expert and the weight assigned to the different elements present in evaluating property; (2) an attorney-client privilege (in a condemnation proceeding the state is the client and usually a district attorney is the attorney); (3) a work product privilege which exempts material prepared by an attorney in preparation for trial; (4) a finding of fundamental unfairness in allowing one party to the suit to incur expenses in procuring expert opinion and then compelling him to disclose the findings to the adverse party free of cost.

The fact-opinion defense was established in United States v. 6.82 Acres of Land,25 wherein the defendant-condemnees sought to take depositions of plaintiff's expert witnesses by serving a subpoena duces tecum upon each of the prospective deponents pursuant to rule 34. The condemnor resisted on the ground that the documents sought contained investigative reports prepared by the plaintiff's experts, and, therefore, a disclosure in advance of trial of the opinions and findings of these experts would be prejudicial to the character and quality of the testimony at the trial. The court stated that the defendant had failed to sustain the burden of showing good cause which was required in a motion under rule 34. It found that since the physical factors which contributed to the value of the property were open to inspection

25 Ibid.
by the opposing parties, the defendant was actually seeking to force disclosure of the mental processes used by the appraiser in determining the land's value. "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 expert opinion.26

In another case,27 the condemnees filed motions for production, inspection and copying of documents. The condemnor argued that the opinions of experts were not discoverable. Although the court recognized that the issue was one of determining just compensation and that rules 33 and 34 should be construed liberally, it stated that the information sought, and not the mere fact of a motion, should determine whether discovery motions should be granted. Since the condemnee had the burden of proof and since the land was equally available for his own inspection, the court denied the condemnee use of the condemnor's reports. The "good cause" submitted by the condemnee was that each of the condemnor's appraisers had valued the land at more than the government had deposited at the time of the taking, and consequently the condemnee was prejudiced. The court noted that this down payment figure was immaterial and not a statement of the maximum or minimum amount just compensation required.

It would appear that the fact-opinion defense is faulty in two respects. First, it appears to limit the landowner's opportunity to acquire just compensation. In seeking pretrial discovery, the condemnee is actually availing himself of an opportunity to prepare for cross-examination at trial on the one relevant issue—just compensation for his land. By limiting the discovery to actual facts, the condemnee loses the chance to evaluate the means used by an appraiser, and perhaps loses the opportunity for effective refutation. Secondly, while an expert's opinion would not be

26 Id. at 197. (Emphasis added.) See also United States v. Certain Parcels of Land, 15 F.R.D. 224, 233 (S.D. Cal. 1953), where the court noted that the opinion of experts was wholly immaterial as evidence until the expert was called as a witness and shown to be competent to testify as to the value of the property. Numerous other decisions have declared that an adverse party might have discovery as to the facts but not as to the expert opinion of an appraiser. E.g., United States v. 284,392 Sq. Ft. of Floor Space, 203 F. Supp. 75 (E.D.N.Y. 1962); United States v. 19.897 Acres of Land, 27 F.R.D. 420 (E.D.N.Y. 1961); United States v. 50.34 Acres of Land, 12 F.R.D. 440 (E.D.N.Y. 1952). The fact-opinion defense has also been sustained despite the condemnee's argument that since the sole issue in a condemnation proceeding was just compensation, he had shown good cause by contending that production of the appraisal reports would narrow the issues at trial. United States v. 4.724 Acres of Land, 31 F.R.D. 290 (E.D. La. 1962).

admissible as evidence until he is qualified by the court, it does not necessarily follow that such an opinion could not lead to admissible evidence within the relevance criterion of rule 26(b).

As mentioned above, the attorney-client privilege and an application of the work product rule are also frequently used as grounds for dismissing pretrial discovery motions. The attorney-client privilege is usually asserted where the state, through its agent, the hired appraiser, receives information on the value of the land which it transmits to the attorney for his use in the preparation of the condemnation case.

The work product privilege primarily arises where the attorney hires the appraiser as his own agent. In this case, the product of the appraiser is deemed to be the product of the attorney who has gathered this material in preparation for trial. However, it seems clear that unlike an attorney's own impressions or those of his client, "the opinions and conclusions of an expert constitute evidence in themselves, and may be the only way in which to establish facts material to the case." 28 It should be emphasized that it is these opinions and conclusions which are sought as evidence. Thus, it would appear inequitable to protect them merely because they have been given to an attorney. 29 Further, the work product theory, as it evolved in Hickman, did not absolutely deny discovery to opinions and conclusions, but merely limited the discovery to cases where good cause could be shown. It would appear that, by the very nature of the condemnation proceeding which involves the exercise of sovereign power, together with the twofold obligation to render fairness to both the public and the individual, it can be argued that good cause always exists. The condemnee is being ousted from his land against his wishes, and all he seeks is just compensation. Hence, in this type of proceeding, the limitation of any means that could be exercised to combat the condemnor's strength would seem to be unacceptable. 30

The fourth, and perhaps newest of the defenses, is a denial of discovery on the ground that it would be unfair to enable one party to use another's trial preparation without paying compensation. 31 But, where valuation is the sole issue, there appears to be nothing unfair in allowing one party to know what his

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29 Id. at 472. See also United States v. Certain Parcels of Land, 15 F.R.D. 224, 234 (S.D. Cal. 1953), which noted that if the court granted discovery, this would constitute "the taking of property without due process of law."
30 See United States v. 23.76 Acres of Land, 32 F.R.D. 593 (D. Md. 1963) and authorities cited therein.
31 Ibid.
adversary intends to prove. In addition, simply because one party to a litigation knows what a witness will say does not necessitate the conclusion that he will become a witness for that party. On the contrary, in the majority of condemnation cases, the condemnee, by the use of pretrial procedures, is merely attempting to gain information which will be relevant to the final determination of just compensation. If a further problem arises as to the payment of the expert, it appears that there is no reason why a court could not condition disclosure upon the payment of a reasonable portion of the fee by the party seeking discovery.

Although the majority of cases hold that the opinions and conclusions of expert witnesses (appraisers) are exempt from pretrial discovery, there are a number of well-reasoned decisions which have allowed full discovery. It should be noted that these cases, in deciding the question of discovery, place emphasis on the very nature of the condemnation proceeding and the problems contained therein. They do not merely apply the rules developed for expert witnesses in general.

The earliest condemnation case to allow full discovery was United States v. 50.34 Acres of Land. There, the defendant brought a rule 34 motion to inspect the appraisal reports of the condemnor. The defendant alleged that the plaintiff-condemnor had used two reputable appraisers and that the latter planned to use neither of the two as witnesses at the trial because they had reported findings of value which were unfavorable to the condemnor. The court held that since the government had obtained the reports for the express purpose of determining compensation and neither the reports nor the authors were available to the defendant, the condemnee was entitled to inspect the contents of the appraisal reports. Accordingly, the "good cause" requirements of rule 34 had been satisfied by the defendant's allegation that the condemnor was not going to use the reports as evidence because they were unfavorable to its position. Most important, however, was the manner in which the court dismissed the condemnor's objection that the subject matter sought to be discovered was privileged material within the prohibition of rule 26. It tested the discoverability of the appraiser's reports by the principle of relevancy contained in rule 26 and stated that "there can be no question as to the relevancy of the documents, as they bear

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32 For a position that, in condemnation cases, the strict adversary system should be abandoned see Goldstein, The Discovery Process in Highway Land Acquisitions, 14 AM. U.L. REV. 38 (1964).
directly on the question of just compensation for land involved in a condemnation action." 36

A more recent case 37 posed the same problem. The court, in a lengthy and well-reasoned decision, attacked the various defenses that had arisen in pretrial procedures. It almost summarily dismissed the attorney-client and work product defenses noting that since by its very nature expert opinion was subjective, there was actually no basis to believe that the information sought could be obtained in any manner other than disclosure. However, the court was much more concerned with the unfairness defense. It reasoned that, unlike certain states and their political subdivisions, there was no obligation imposed upon the federal government, as a condition precedent to the exercise of its power of condemnation, to negotiate with the landowner and demonstrate in court that the condemnee had been offered just compensation and refused such allowance. 38 On the contrary, the federal government could institute a suit in eminent domain without notice to the landowner, and, by filing a declaration of taking and depositing a sum in court, obtain title to the land sought before the condemnee was aware of the proceedings. Thus, the court concluded, the sole issue in any condemnation case must be the question of just compensation, and, in determining this question, experts must be employed because the property owner is usually ignorant of the value of his own land. Therefore,

where value is the basic, if not sole, issue in litigation, it is not unfair for either party to know in advance of trial what the other party intends to prove, what opinions his opponent's experts hold, the method by which those opinions were formulated and the facts upon which they are based. 39

The movement towards recognition of the need for pretrial discovery in eminent domain cases has been highlighted recently

36 United States v. 50.34 Acres of Land, 13 F.R.D. 19, 21 (E.D.N.Y. 1952). (Emphasis added.) For a criticism of this case and a statement that it was decided because of the existence of extraordinary facts see United States v. 900.57 Acres of Land, supra note 27.


38 United States v. 23.76 Acres of Land, id. at 597. For an example of state statutes which recognize the importance of pretrial negotiations see footnotes 68 & 87 infra.

39 United States v. 23.76 Acres of Land, id. at 597. Note that the court, although recognizing that unfairness had to be tested by federal law, took notice that Maryland law allowed for full discovery in condemnation cases and that the results were that issues were sharpened, trial time was reduced and fair settlements were encouraged.
in federal legislative investigations. In analyzing the problem, the Committee on Public Works noted that there were reports of many persons who had suffered major hardships and financial losses in compensation cases due to a lack of uniformity in the various federal programs. It appeared that citizens were paid varying amounts depending on the program involved rather than the immediate loss suffered. The Committee emphasized that the federal government must play an active role in the fair handling of condemnation cases. This is so because federal moneys are instrumental in the acquisitions of approximately 1.4 million acres of privately owned land per year at a compensation rate of 1.3 billion dollars, 395 million dollars coming from federal sources.

Recognizing that it is the duty of the federal government to pay landowners just compensation, the report recommended that every “federal agency should provide the property owner with reasonable information concerning its opinion of the value of the property.” The Committee reported that some of the agencies offer approximately seventy-five percent of the owners less than the agency-approved amount. One of these agencies is the United States Army Engineers, which operates under a

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41 Id. at 1-11.

42 Id. at 10-11. Note also that the number of ownerships acquired by federally assisted programs averages 154,790 per year.

43 Id. at 123.

44 Id. at 117. "Purchases in which the initial offer was less than the agency approved appraisal and actual purchases at less than the agency approved appraisal."

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<tr>
<th>Acquisition Program</th>
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<th>Purchases where agency initial offer less than agency approved appraisal</th>
<th>Purchases made at less than agency approved appraisal</th>
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<tr>
<td></td>
<td>Number</td>
<td>Number</td>
<td>Percent</td>
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<tr>
<td>Urban Renewal</td>
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<td>Federal-aid highways</td>
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<tr>
<td>Low-rent housing</td>
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<td>57</td>
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"one-price" policy, offering the condemnee a compensation figure on a take it or leave it basis. Furthermore, their appraisers do not even consult with landowners as to operations conducted on the land. Therefore, the study concluded, such attitudes on the part of the government precluded serious attempts to resolve the varying differences that arose as to the value of the property.45

Some agencies will not reveal the exact amount of a particular appraisal or the details surrounding its creation because they believe that disclosure would lead to further controversy and that it is confidential information in case the land has to be condemned.46 The adversary approach of the federal government was further emphasized when it was noted that in some cases, a person who does not agree to accept the amount initially offered receives only a portion of the agency's estimate upon surrender of the land. The balance is not received until after the condemnation proceeding, thus often resulting in undue hardship upon the condemnee who needs the money immediately to purchase new land. Quite possibly this accounts for the ability of the government to settle most claims at less than their full appraisal valuation. Further, the Committee found that an agency might not condemn the property if an owner refused to agree on a purchase price. The threat of condemnation then undermines the title of the owner to the land, causing a depreciation in value.47

The above findings concerning federal condemnation proceedings led to legislative action, although unsuccessful, in the 89th

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<th>Acquisition Program</th>
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<th>Purchases where agency available</th>
<th>Purchases made at initial offer less than agency approved appraisal</th>
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<th>Percent</th>
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<td>TOTAL</td>
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45 Id. at 117-18.
46 Id. at 402-03.
47 A.B.A. Report 185-86.
Congress.\textsuperscript{48} A resolution was proposed to afford fair and equitable treatment to all persons affected by federal real property acquisitions. Title I of the proposed legislation contained two important measures calculated to insure prospective condemnees fair pretrial treatment:\textsuperscript{49} (1) all property should be appraised before negotiation and the land owner should accompany the appraiser during his inspection; and (2) after appraisal, the agency should make a prompt offer which should not be less than the appraised value approved by the agency. The agency would still acquire several appraisals and use the lowest, but the condemnee would have a bargaining position not previously enjoyed.

In retrospect, federal procedures in pretrial condemnation cases have been far from satisfactory. It is urged that the federal government adopt a type of legislation similar to the act proposed in 1965. By this means, it seems likely that a condemnee will be better able to adjudge true property value and thus, more realistically, approach the problem of receiving just compensation. It is further submitted that by lifting the veil of secrecy that surrounds condemnation pretrial procedures, the federal government will be in a more favorable position to exercise its eminent domain powers within the dictates of law, and offer the landowner the true value of his land.

\textit{The States}

At the outset, it should be noted that a majority of the states have adopted the federal discovery rules either in full or in part. Therefore, much that has already been mentioned concerning the various means used to deny disclosure in condemnation proceedings in the federal courts is applicable to the states. However, it appears that the state courts have taken a more liberal view with respect to allowing the disclosure of appraisal reports and conclusions of experts. This is evidenced in such states as California, Arizona, Wisconsin and New York which have, either judicially or legislatively, made provisions for mandatory pretrial discovery in condemnation actions.

\textit{Case Law}

An examination of the state judicial decisions relevant to pretrial discovery in condemnation cases indicates that, although

\textsuperscript{48} Fair Compensation Act of 1965, H.R. 3421, 89th Cong., 1st Sess. See \textit{Public Works Study} 147. Although this measure failed to pass, there appears to be a good opportunity for its success the next time it reaches the House floor.

the aforementioned four defenses applied in the federal courts are available, the state courts have placed particular emphasis upon the attorney-client privilege and the work product defense. However, the other defenses also have a substantial vitality. For example, in *Hornback v. State Highway Comm'r*, the Virginia court in applying the fact-opinion defense, denied disclosure on the grounds that the land in question was open to all for examination, and that what the landowner actually sought was the appraiser's opinion concerning the value of the property. This decision was reached despite a Virginia Code provision which permitted discovery of writings containing material evidence if the moving party had no other means of acquiring this information. Since the condemnee could examine the property and ascertain value on his own behalf, the requisite need was found lacking. In at least one state, this fact-opinion distinction has been embodied into legislation, thus denying discovery of an expert witness' value conclusions.

Although the attorney-client privilege plays a forceful role in state condemnation cases, certain jurisdictions have distinguished the discovery of the principal-agent communication from the discovery of an independent contractor's opinion. In *Brink v. Multnomah County*, the court held that the attorney-client privilege extended to an appraiser's communication to a deputy district attorney where the appraiser had been employed by the county. However, the court indicated that this privilege would not extend to communications which were prepared by the appraiser in his regular course of business without reference to any existing or threatened lawsuit.

Perhaps the most forceful argument advanced in any state court against pretrial discovery in condemnation proceedings is found in a recent case decided by the Superior Court of Connecticut. In this case, the court held that the reports of appraisers were privileged in that a "good cause" prerequisite was

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51 VA. CODE § 8-325 (1957). Note that Rule of Court 3:23(c) in Virginia provides that in civil actions at law, names and addresses of witnesses may be discovered and any writing may be made available. But in *Williamson v. Hopewell Redevel. & Housing Authority*, 203 Va. 653, 125 S.E.2d 849 (1962), the court held that the Rules of the Court were not applicable to eminent domain proceedings.
not satisfied merely by the condemnee attempting to limit issues and prepare for cross-examination. The court rejected the theory that just compensation was the basic issue involved and found that the real question was whether the condemnee had a right to discover the condemnor's appraisal before trial. The court indicated that since a condemnation proceeding was in essence a civil action, it was actually no different from any other case where experts testify and conflicts arise that must be resolved at trial. The court concluded that appraisal reports were materials gathered in preparation for trial and thus privileged by the work product defense. This work product rule, similar to the one enunciated in *Hickman v. Taylor,* has been substantially adopted in at least eight states. In addition, several states, such as Illinois and Texas, have legislatively granted absolute immunity to reports or documents made in preparation for trial. This same result has been reached in several other states by means of judicial decisions.

Despite the fact that many of the states have strictly applied the principles enunciated in the federal decisions which have denied pretrial discovery, it is evident that several states, which in the past denied discovery, are now permitting and encouraging free disclosure in eminent domain cases.

In *Rust v. Roberts,* a California court held that the attorney-client privilege was applicable in a situation where the condemnee sought to compel disclosure of the contents of the appraiser's reports which had been delivered confidentially to the state's attorneys. A later decision circumvented this logic when it allowed a defendant to examine an appraiser as to his subjective knowledge and opinions. In that case, the court reasoned that although communications to a state's attorney were privileged, the defendant was not seeking a disclosure of that communication. She sought only the opinion of the expert with regard to the fair market value of the property condemned. This inquiry goes only to matters peculiarly within the subjective knowledge of the appraiser, as

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59 Neff v. Hall, 110 Ohio App. 519, 170 N.E.2d 77 (1959); State v. Jensen, 362 S.W.2d 568 (Mo. 1962); State v. Washington Horse Breeders Ass'n, 64 Wash. 2d 756, 394 P.2d 218 (1964).
distinguished from his disclosures to the condemnor's counsel. The court concluded that "this knowledge, in and of itself, is not privileged, nor does it acquire a privileged status merely because it may have been communicated to the attorney."\(^{62}\)

In a more recent decision,\(^{63}\) the California court allowed full discovery as to all the facts and opinions of an appraisal report declaring that these items were not within the protection of the attorney-client privilege.\(^{64}\) The court stated that it could not hold the material as privileged merely because it was the result of an expert's mental calculations and was delivered to an attorney. Further, in discussing the condemnor's contention that discovery would be contrary to public policy, the court stated:

The purpose of the condemnation action... is to determine the fair market value of the property. Assumedly, petitioner believes that its appraisers have arrived at a fair market value. If public interest, as the words are used in section 1881, would suffer by disclosure of the fair market value of the condemned property, then the statute on privilege would have to fall before the constitutional requirements that no private property be taken without due process of law.\(^{65}\)

As a result of these decisions, the California legislature adopted a new pretrial system, effective July 1, 1963, which, in effect, requires disclosure of appraisals, as well as a pretrial conference system to better aid in the settlement of condemnation claims.\(^{66}\) Complete disclosure was allowed in a recent Wisconsin case despite the condemnor's assertion of the attorney-client privilege and the work product defense.\(^{67}\) The court emphasized that it found no invasion of the proprietary rights of the experts in such a situation. It reasoned that by allowing the pretrial discovery, the condemnee would simply gain an opportunity to prepare

62 People ex rel. Dep't of Public Works v. Donovan, supra note 61, at 355, 369 P.2d at 5-6, 19 Cal. Rptr. at 477 (1962).
64 Id. at 190 n.8, 373 P.2d at 444 n.8, 23 Cal. Rptr. at 381 n.8. The court noted that although bound by the federal rule of Hickman v. Taylor, the local rules for the United States District Courts, Northern and Southern Districts, in California required parties in a condemnation action to disclose the subject matter of appraiser's reports.
65 Id. at 187, 373 P.2d at 443, 23 Cal. Rptr. at 379. (Emphasis added.)
67 State ex rel. Reynolds v. Circuit Court for Waukesha County, 15 Wis. 2d 311, 112 N.W.2d 686 (1961), rehearing denied, 113 N.W.2d 537 (1962).
for cross-examination and assemble rebuttal material, whereas the condemnor would merely lose the tactical advantage of withholding the testimony until the time of the trial. Despite the fact that the Wisconsin courts had already recognized the need for broad pretrial discovery in condemnation proceedings, it is significant that the state has, in addition, amended its procedural statutes to require the full disclosure of appraisal reports gathered in preparation for determining just compensation.68

Although Iowa had originally adopted the work product privilege as a defense in a condemnation proceeding,69 it was later rejected in Crist v. Iowa State Highway Comm'n.70 The court rejected the condemnor's contention that the interrogatory called for an expression of opinion and decided the case on the basis of whether or not an answer would serve any substantial purpose. The facts of this case highlight a problem which is prevalent in pretrial condemnation proceedings. The appraiser against whom discovery was sought had appraised the value of the land at $18,500. Since this figure was far in excess of the value placed upon the land by the condemnor's experts, and even in excess of the condemnee's appraisal, discovery would have been beneficial to the condemnee. The court's reason for allowing discovery was the twofold responsibility of the state of Iowa in a condemnation proceeding: (1) the state must realize the property at a price which was fair to the taxpaying public; and (2) in this taking, the individual citizen was entitled to be fairly compensated.71 In response to the unfairness argument that had been raised by the condemnor, the court concluded that the condemnor's "duty to see that the condemnee is fairly paid for his land removes any element of unfairness which might obtain in a similiar controversy between private parties." 72

The reversal of position on pretrial discovery of appraiser's reports may be found also in Florida. In an early case, the court denied the taking of depositions against three of the condemnor's appraisers on the ground that the information sought was the work product of the condemnor's attorney and not subject to

68 Wis. Stat. Ann. §§ 32.05(2), 32.06(2) require that the condemnor shall have made at least one appraisal of all property to be acquired, and §§ 32.05(3)(e), 32.06(3) require that the condemnor send notice that one or more of the appraisals of the property on which his offer is based is available for inspection.


70 255 Iowa 615, 123 N.W.2d 424 (1963).


72 Id. at 627, 123 N.W.2d at 431. See also State v. Vanderburgh Circuit Court, 211 N.E.2d 181 (Ind. 1965).
discovery. One year later, however, the Florida Supreme Court ordered the condemnor to produce its appraiser's worksheets for inspection by the condemnee. The Florida court reviewed its local authority and concluded that, in the ordinary case, data compiled by experts constituted the work product of the attorney or his agents.

Nevertheless, conceding that in private litigation the reports and opinions of experts should be considered a 'work product'... we are convinced that the 'work product' immunity should not extend to the type of information sought in this eminent domain proceeding.

The court realized that the rule it proposed was diametrically opposed to the general rule in litigation, but "there is no inconsistency because both rules are based upon sound public policy when the sphere in which each operates is properly analyzed." The court was particularly concerned with the "dog-eat-dog" attitude that was prevalent in eminent domain proceedings. It felt that in an action where land was taken without the consent, and through no fault, of the owner, the condemnor should strive to afford the owner all the prerequisites necessary to establish full and just compensation. The court also believed that once an appraisal has been revealed, the landowner might be more apt to settle, with a resultant speedy and inexpensive determination of the claim.

New York State

New York State has been active in the promulgation of rules and law concerning pretrial discovery in condemnation cases. In one of the earliest reported decisions on this subject, the court held that it had the power to, and should, in the proper case, direct the taking of a pretrial examination of an adverse party in a condemnation case. Generally speaking, the New York courts have permitted discovery of pertinent information in a condemnation proceeding where the issue was one of determining

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73 State Road Dep't v. Cline, 122 So. 2d 827 (Dist. Ct. App. Fla. 1960).
74 Shell v. State Road Dep't, 135 So. 2d 857 (Fla. 1961). This case is especially noteworthy because it allowed discovery not only against the appraisers, but also against the appraisal reports. Goldstein, supra note 69, at 63.
75 Shell v. State Road Dep't, id. at 860.
76 Ibid.
77 Id. at 861. See also State ex rel. Willey v. Whitman, 91 Ariz. 120, 370 P.2d 273 (1962).
78 Algonquin Gas Transmission Co. v. Schwartz, 206 Misc. 437, 132 N.Y.S.2d 639 (Sup. Ct. 1954). The court seems to limit the application of this theory to cases where there is a bona fide issue as to the necessity of the taking.
just compensation or fair market value. However, in 1957, the Court of Claims denied pretrial discovery on the grounds that the material sought was confidential and investigatory in nature and that the divulgence of such matters would prejudice the state. The court found that the work of the state appraisers was an intrinsic part of the appropriation proceeding preliminary to the filing of the legal papers and that what the condemnee actually sought, discovery of expert opinion, was contrary to the rule of allowing discovery of facts only.

Prior to 1963, all pretrial disclosure in New York was subject to the principles enunciated in the Civil Practice Act. In that year, however, New York adopted the new Civil Practice Law and Rules [hereinafter referred to as CPLR]. Although these new rules substantially changed many of the old procedural standards, they did not expand the scope or method of discovery. Section 3101(a) of the CPLR establishes an initially broad criterion which permits disclosure of “all evidence material and necessary in the prosecution or defense of an action. . . .” However, this broad outline is significantly narrowed by the three exceptions: (1) privileged matter; (2) the work product of an attorney; and (3) material prepared for litigation. The first two categories are absolutely immune from disclosure, whereas the third category is conditionally immune. If it can be shown that although the item is material prepared for litigation, a change in conditions has made the item not susceptible of duplication and that withholding it will result in injustice or hardship, the court may compel disclosure.

An example of the effect of CPLR 3101 on condemnation cases is In re Matter of the City of New York. In that case, the effect of CPLR 3101(d) forced the court to reason that since there was no indication that the appraisals at issue were prepared exclusively for litigation, their purpose could have been to aid the Board of Estimate in performing its functions or the

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81 CPA §§ 324-28, 351-54.

82 CPLR 3101 (b).

83 CPLR 3101 (c).

84 CPLR 3101 (d).

85 43 Misc. 2d 173, 250 N.Y.S.2d 664 (Sup. Ct. 1964). But see, In re Newbridge Ave., 50 Misc. 2d 101, 209 N.Y.S.2d 874 (Sup. Ct. 1960), which denied disclosure of the expert opinions on the theory that the requirements of CPLR 3101 (d) had not been met.
city in the acquiring of property. Therefore, the court held that discovery was proper.

In a recent case, the court used CPLR 3101(d) to deny disclosure of appraisals which had been prepared for litigation. Even though the court recognized that there was a trend towards requiring pretrial discovery of appraisals because of the special nature of a condemnation proceeding, it held that without a showing of inability to duplicate or undue hardship, discovery must be denied.

**Legislative Changes**

The different positions of the various New York courts as to the proper method of disposing of pretrial disclosure claims in condemnation cases has led to two recent legislative developments. In 1965, the legislature enacted an amendment to the Court of Claims Act which requires an exchange of appraisals no less than one hundred and twenty days from the date of the filing of the claim. The need for such an innovation resulted from the out-dated New York procedures for acquiring property which were keyed to infrequent acquisitions. The purpose of the act was to insure more settlements, avoid undue waste of time at trials, and guarantee that right and justice would prevail. The new amendment appears to have been successful in accomplishing

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86 *In re* Brooklyn Bridge Southwest Urban Renewal Project, 50 Misc. 2d 478, 270 N.Y.S.2d 703 (Sup. Ct. 1966).

87 **COURT OF CLAIMS RULE 25(a)** provides in part that:

1. Within six (6) months from the date of the filing of a claim in an appropriation case the parties shall file with the Clerk of the Court four (4) copies of their appraisals.

2. When the Clerk shall have received the appraisal reports of all parties he shall send to each attorney of record a copy of the appraisal report of all other parties to the claim.

3. Within thirty (30) days after the service upon a party of an appraisal report of any other party, any party to the proceeding may file and serve on all other parties an amended or supplemental appraisal report or reports.

4. Within sixty (60) days after the final filing a party may because of unusual developments make a motion for permission to file and serve an additional appraisal report the granting of which shall rest in the sound discretion of the Court.

5. 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 appraisal reports.

6. Six (6) months after the filing of a claim a judge may conduct a pre-trial conference.

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89 *Id.* at 122.
its objectives in that the first case tried under its requirements was expeditiously handled. 90

However, there has been one major objection to the new enactment. It allows the parties to file an amended appraisal, as of right, within 30 days of the original filing. 91 This has led to an abuse whereby one of the parties to the litigation files a one-sheet appraisal and the other files a detailed report. The one-sheet appraisal, for all practical purposes, is useless, and the right to amend has given one party the advantage of using his adversary's appraisal. There is presently a movement to amend rule 25(a) to provide for the filing of supplemental appraisals only upon a showing of special circumstances. 92

The second major legislative proposal was an amendment to CPLR 3101 which would eliminate subparagraph (c) and add a new subparagraph which would require mandatory pretrial discovery in condemnation cases in all the courts in the state. 93 The Judicial Conference which proposed the amendment felt that this change would lead to more expeditious handling of condemnation cases within the supreme court because such free disclosure is presently hampered by the material-prepared-for-litigation provision in the CPLR. 94 However, this amendment was vetoed by the Governor after passage in the legislature, the principal objection being that it invited "disuniformity" by having the individual courts establish their own rules rather than one definitive statewide procedure. 95 It was the opinion of the Conference that if a uniform practice was submitted in a future amendment, the Governor's objections would be satisfied. 96

A recent study 97 of condemnation procedure in Nassau County has pointed out many of the existing disparities in the New York system. The report stated that in 48 per cent of the land takings in Nassau, the county paid less than its lowest appraisal. In

90 Court of Claims Semi-Annual Report to the Governor 11, June 1966. For a case upholding the new amendment see Route 304 Realty Corp. v. State, 49 Misc. 2d 438, 267 N.Y.S.2d 530 (Ct. Cl. 1965).
91 Op. cit. supra note 88, at 125. The original proposal provided this could be done only by a motion to the court with sufficient reasons.
92 Id. at 131.
93 1966 N. Y. LEG. DOC. NO. 90, ELEVENTH ANNUAL REPORT OF THE JUDICIAL CONFERENCE 209. The amendment would read, "if the rules of the particular court shall so provide, a party in condemnation ... proceedings may ... obtain from his adversary the latter's appraisals and the data on which they are based."
94 Id. at 203-04. See In re Newbridge Ave., 50 Misc. 2d 101, 269 N.Y.S.2d 874 (Sup. Ct. 1966).
96 Ibid.
another 39 per cent of the takings, the compensation figure ranged between 90 and 109 per cent of the county’s lowest appraisal.98 The report further indicated that the amount of compensation paid varied according to the manner of the disposition of the claim, but did not vary significantly with the presence or absence of an attorney.99 The authors argued that the failure of the condemnor to pay the full value of its appraisal might violate the constitutional duty to pay “full compensation.”100 The study proposed two alternatives: (1) the county could start negotiation at the full value of the lowest appraisal with a 10 per cent variance figure; or (2) negotiations could begin at 90-95 per cent with variance up to the full value of the appraisal.101 The authors of the study recognized the various inherent problems involved in such proposals, but felt that either of the two proposals would better insure the condemnee of just compensation.

**Conclusion**

From the above discussion, it would appear that some states have made noteworthy progress in the area of pretrial discovery in condemnation cases. The judicial and statutory law in such jurisdictions as California, Wisconsin and New York have indicated that the free disclosure of appraisal reports has led to a more equitable handling of the situation.

It appears that there is a new liberal tendency in both the federal and state areas, favoring pretrial discovery in condemnation cases. Due to the unique nature of a condemnation proceeding, it is evident that additional measures for protection of the condemnee should be adopted. It is urged that a recognition of this fact in a procedural rather than substantive law vein will cause the veil of secrecy to be lifted in condemnation cases. The inequity of a situation which allows the sovereign to negotiate with an ignorant condemnee requires rectification. In this manner, the condemnee who is losing his land through no fault of his own will be better able to conduct proper and useful pretrial negotiations in seeking to receive the just compensation reserved for him by the constitution.

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98 *Id.* at Table 7.
99 *Id.* at Tables 8 & 9-A.
100 *Id.* at 24.
101 *Id.* at 25-27.