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SIC TRANSIT GLORIA: THE RISE AND FALL OF MUTUALITY OF DISCOVERY IN CALIFORNIA EMINENT DOMAIN LITIGATION

by Gideon Kanner*

Eminent domain litigation presents unique discovery problems.¹ Aside from the few cases that give rise to the issue of whether the condemnor has the right to take the property being expropriated, there is but one major question before the court: what is the amount of just compensation payable to the owner?

Moreover, eminent domain litigation rarely involves disputes over family homes whose value might be within the knowledge of the lay owner. The grist for the judicial mills in expropriation cases typically consists of partial takings of tracts of unimproved land that diminish the value of the remaining land, income-producing parcels and other properties of substantial value, where the "spread" between the parties' contentions of value runs into many thousands of dollars, and where a realistic assessment of damages calls for considerable expertise and sophistication. Under prevailing rules the small property owner is, for all practical purposes, barred from access to the courts by the prohibitive cost of litigation.² The California Supreme Court has quite con-

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1. This general topic has been the subject of a number of commentaries. See, e.g., Hoffman, *The Use of Discovery Procedure in Eminent Domain Cases*, in *INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN*, SW. LEGAL FOUNDATION 267 (1971); Goldstein, *The Discovery Process in Highway Land Acquisition*, 14 *AM. U.L. REV.* 38 (1964); Comment, *Civil Procedure: Discovery in Eminent Domain as Applied to the Opinions, Conclusions and Reports of Appraisers*, 22 *U. FLA. L. REV.* 470 (1970); Note, *Discovery of Expert Opinion in Land Condemnation Proceedings*, 41 *IND. L.J.* 506 (1966); Note, *Pretrial Discovery in Condemnation Proceedings: An Evaluation*, 42 *ST. JOHN'S L. REV.* 52 (1967).

2. See Huxtable, *Trial Preparation, Discovery, Pretrial, and Jury Instructions*, *CALIFORNIA CONDEMNATION PRACTICE* 223, 229-30 (C.E.B. 1960), which notes that the cost of an appraiser may run from \$750 to \$5,000, and that a lawyer's fee is likely to exceed \$2,500. It takes no great economic acumen to realize that, with litigation costs of that magnitude (exacerbated by the relentless inflation of the decade-plus that

sciously closed the courthouse door to small property owners; it has acknowledged that precluding such owners from recovering their litigation costs, even if the condemnor's pre-litigation offer is unconscionably low, may well bar them from recovering their constitutionally guaranteed just compensation by compelling them to settle for an unreasonably low amount,³ but has offered nothing more substantial by way of relief than sympathy.⁴

In this context, eminent domain litigation almost without exception is resolved in a battle of experts. Typically, the experts are real estate appraisers. However, others may be called upon to testify. In partial takings involving cuts or fills placed on the taken property, the services of civil engineers and hydrologists may be required. Controversies over the highest and best use may involve development feasibility studies. Occasionally, when service station sites are taken or damaged, service station developers or brokers may be called for. Machinery and fixture appraisers may enter the picture to assess value when industrial property finds itself in the bulldozer's path.⁵ And inventive counsel

has elapsed since Mr. Huxtable's able analysis), an eminent domain action is no place for "the little guy."

3. Note that in an eminent domain action, a property owner may not even avail himself of the statutory provisions which provide for recovery of expert witness fees by a party whose offer to settle for a specified amount is rejected and who thereafter receives a more advantageous result at trial. CAL. CODE CIV. PROC. § 998(f) (West Supp. 1973). The equal protection aspects of this arbitrarily discriminatory legislative proviso call for close judicial scrutiny.

4. See *County of Los Angeles v. Ortiz*, 6 Cal. 3d 141, 148 n.8, 490 P.2d 1142, 1147 n.8, 98 Cal. Rptr. 454, 459 n.8 (1971). One finds it difficult to reconcile this conscious judicial sacrifice of the constitutionally guaranteed right to just compensation of perfectly innocent citizens with the simultaneous punctilious observance of the constitutional rights of impecunious citizens caught in a criminal act. The rationale of affording free counsel to indigent criminal defendants is rooted in the disparity of economic and legal resources between the powerful government and the lone, unmonied defendant. See, e.g., *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). Since the Constitution protects "property" as well as "life and liberty" against government invasion (see *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972), rejecting "the dichotomy between personal liberties and property rights" as false), how can one rationally fail to apply the *Gideon* analysis to the small landowner with a small equity in his home (usually his only significant asset), who finds himself in the path of a condemnor's bulldozer but is offered "compensation" which in effect wipes out his equity? See *Riley v. District of Columbia Redev. Land Agency*, 246 F.2d 641, 643 (D.C. Cir. 1957), for a grim example of how the small property owner can fare in the courts.

5. See *City of Los Angeles v. Sabatasso*, 3 Cal. App. 3d 973, 83 Cal. Rptr. 898 (1970); *Concrete Service Co. v. State*, 274 Cal. App. 2d 142, 78 Cal. Rptr. 923 (1969); *Redevelopment Agency v. Diamond Properties*, 271 Cal. App. 2d 315, 76 Cal. Rptr. 269 (1969).

may from time to time find use for still other experts.⁶ Thus, discovery in eminent domain litigation usually means discovery of expert opinions and their bases.

THE NATURE OF THE PROBLEM

The discovery of expert opinions has traditionally spawned its share of discovery problems,⁷ but in eminent domain cases there are special twists. Governmental agencies have traditionally resisted normal discovery procedures.⁸ Furthermore, California's eminent domain discov-

6. See *State v. Wherity*, 275 Cal. App. 2d 241, 79 Cal. Rptr. 591 (1969).

7. See, e.g., *San Diego Prof. Ass'n v. Superior Court*, 58 Cal. 2d 194, 373 P.2d 448, 23 Cal. Rptr. 384 (1962); *Scotsman Mfg. Co. v. Superior Court*, 242 Cal. App. 2d 527, 51 Cal. Rptr. 511 (1966); *Grand Lake Drive In Inc. v. Superior Court*, 179 Cal. App. 2d 122, 3 Cal. Rptr. 621 (1960). See also Friedenthal, *Discovery and Use of an Adverse Party's Expert Information*, 14 STAN. L. REV. 455 (1962).

8. The history of California's law of discovery in eminent domain is a history of condemnor's obdurate resistance to the policy and process of discovery. See e.g., *Mowry v. Superior Court*, 202 Cal. App. 2d 229, 20 Cal. Rptr. 698 (1962); *Rust v. Roberts*, 171 Cal. App. 2d 772, 341 P.2d 46 (1959) (both disapproved by the Supreme Court in *San Diego Prof. Ass'n v. Superior Court*, 58 Cal. 2d 194, 203, 373 P.2d 448, 453, 23 Cal. Rptr. 384, 388 (1962)). See also *People ex rel. Dept. of Public Works v. Donovan*, 57 Cal. 2d 346, 354-56, 369 P.2d 1, 5-7, 19 Cal. Rptr. 473, 477-79 (1962); *Oceanside Union School Dist. v. Superior Court*, 58 Cal. 2d 180, 373 P.2d 439, 23 Cal. Rptr. 375 (1962).

For an example of how far this governmental attitude can be pushed, consider *United States v. Meyer*, 398 F.2d 66 (9th Cir. 1968), *modifying and affirming* *United States v. 364.82 Acres of Land*, 38 F.R.D. 411 (N.D. Cal. 1965), wherein the government, after its motion for a protective order was denied, ignored the district court's ruling and instructed its appraisers to refuse to answer questions at a deposition. In a noteworthy example of arrogant defiance of the trial court's ruling, the government, in effect, granted itself the protective order that the district court had refused to grant—*i.e.*, the government's appraisers "declined to answer questions or produce documents whenever in the opinion of government counsel the discovery sought would have been barred by the protective order which the government had requested and the court had denied." 398 F.2d at 68. The district court, by way of sanction, dismissed the condemnation action and struck the declaration of taking. The opinion of the United States Court of Appeals can be fairly characterized as a paean of praise for liberality of discovery in eminent domain proceedings. However, in terms of disposition, the opinion ended on an inconclusive, if not downright wishy-washy, note. The court of appeals refused to review what it termed "the propriety of particular details of the proposed discovery" and vacated the trial court order striking the declaration of taking. *Id.* at 77. See *Pretrial Discovery in Eminent Domain*, 7 REAL PROP., PROB. AND TRUST J., 706 (1972).

While one could apply the usual legal/scholarly euphemisms to the *Meyer* opinion (*cf.* Rodell, *Goodbye to Law Reviews—Revisited*, 48 VA. L. REV. 279, 280 (1962)), the reality is that the government thumbed its nose at the district court's ruling denying its motion for a protective order. By way of sanction for this defiant conduct the trial judge ordered dismissal and striking of the declaration of taking, which he plainly had the power to do under Federal Rule of Civil Procedure 37(b)(2)(c). But the court of appeals, after abstractly elevating discovery in eminent domain to a stature or-

ery problems are compounded by two major factors: the statutory date-of-value provisions and the work habits of appraisers. In California the subject property is valued as of the date of issuance of summons,⁹ provided that the case goes to trial within one year of that date. If the trial does not commence within the year, and the delay is not caused by the defendant,¹⁰ the date of value shifts to the date of trial.¹¹ Since in California land has historically experienced a fairly steady upward trend in values,¹² this means in practice that condemnors are provided with a powerful incentive to see to it that the case is tried within one year of the issuance of summons.¹³ Both by statutory cal-

dinarily occupied by the Flag, Motherhood, and Apple Pie, overturned the trial court's sanction, thereby permitting the government to get away with its contumaciousness without so much as a slap on the wrist. At least one commentator has noted with justifiable disapproval that, in the federal courts, pro-government bias is expressly built into the rules of discovery. Note, *Developments in the Law—Discovery*, 74 HARV. L. REV. 942, 988-89 (1961); see FED. R. CIV. P. 37(f).

As will be demonstrated *infra*, this sort of judicial performance, in which lip service is assiduously paid to the policy of liberal discovery while the condemnor is permitted to get away with—and indeed benefit from—its defiance of the rules of discovery law and proper standards of conduct, has become the norm rather than the exception. It is merely another instance of the oft-noted fact of life that “[t]he ‘rules of the game’ are heavily weighted in favor of the condemnor.” McIntire, *Are Court Rules Made to Be Broken?—Eminent Domain Trial Preparation and the Swartzman Case*, 43 CAL. ST. B.J. 556, 559-60 (1968) [hereinafter cited as McIntire]. Professor McIntire is only one of many knowledgeable observers who have reached a similar conclusion. The late Associate Justice of the California Court of Appeal, Roy Gustafson, has noted, “[I]t is certainly true that both the decisional and the statutory law heavily favor the condemnor.” CAL. L. REV. COMM’N MEM. 70-29, at 5. Other commentators agree: “Few would dispute that eminent domain law has been slanted in favor of the condemnor” Miller, *Recent Developments in the Eminent Domain Field*, 60 THE APPRAISAL J. 286 (1972) (Mr. Miller is currently Chairman of the California Law Revision Commission). “The balance has always been weighed in favor of the condemnor.” Note, *The Unsoundness of California’s Noncompensability Rule as Applied to Business Losses in Condemnation Cases*, 20 HAST. L.J. 675, 676 (1969). Cf. Berger, *Nice Guys Finish Last—At Least They Lose Their Property: Gion v. City of Santa Cruz*, 8 CALIF. W.L. REV. 75, 80 n.22 (1971); Johnston, *Developments in Land Use Control*, 45 NOTRE DAME LAWYER 399, 426 (1970); Kanner, *And Now for a Word from the Sponsor: People v. Lynbar, Inc. Revisited*, 5 U.S.F.L. REV. 39, 44 (1970).

9. CAL. CODE CIV. PROC. § 1249 (West 1967); *Klopping v. City of Whittier*, 8 Cal. 3d 39, 44, 500 P.2d 1345, 1349, 104 Cal. Rptr. 1, 5 (1972).

10. CAL. CODE CIV. PROC. § 1249 (West 1967); *People v. Murata*, 55 Cal. 2d 1, 357 P.2d 833, 9 Cal. Rptr. 601 (1960).

11. *City of Santa Maria v. Alco-Pacific Enterprises, Inc.*, 266 Cal. App. 2d 477, 481-82, 72 Cal. Rptr. 204, 206-07 (1968).

12. See *People v. Murata*, 55 Cal. 2d 1, 5-6, 357 P.2d 833, 835, 9 Cal. Rptr. 601, 603 (1960), which recognizes this economic fact of life.

13. Regrettably, there has been no judicial attention devoted to the unfairness that flows from this practice. In a typical California condemnation, the trial commences about ten months after issuance of summons. By the time the trial is completed, the

endar preference¹⁴ and by the courts' enthusiastic desire to accommodate the condemnor,¹⁵ eminent domain trials are typically tried within

findings of fact and conclusions of law are settled and signed, the judgment is entered and the award is deposited into court, the first anniversary of the issuance of summons has gone by. As a result, the owner is actually paid what his property was worth a year before he receives the payment. The effect is that the condemnor receives a windfall and the owner is short-changed. This is so because the owner is not compensated for the increment of added value that has accrued, due to inflationary factors and real value increases, during the year that has elapsed between the issuance of summons and payment. California Code of Civil Procedure section 1249 assumes that the subject property will experience a not-insignificant increase in value during the year following the issuance of summons. When the owner goes into the market to obtain replacement property with his award, he must pay the price that prevails at that time. However, the award paid to him as his "just" compensation reflects land prices as of a year earlier. How this comports with the constitutionally-based admonition that "[t]he owner is to be put in as good position pecuniarily as he would have occupied had his property not been taken," (United States v. Miller, 317 U.S. 369, 373 (1943)) no one has bothered to explain.

The California cases upholding the constitutionality of section 1249 are a study in unenlightening judicial *ipse dixit*. See *Tehama County v. Bryan*, 68 Cal. 57, 8 P. 673 (1885); *California S.R.R. v. Kimball*, 61 Cal. 90 (1882). Note, however, that in *Klopping v. City of Whittier*, 8 Cal. 3d 39, 52, 500 P.2d 1345, 1355, 104 Cal. Rptr. 1, 11 (1972) the supreme court stated that interest is to run from the valuation date. Such a rule, if applied, would take some of the sting out of the present unjust situation discussed in this footnote. Since *Klopping* was decided on constitutional grounds, the court's declaration concerning accrual of interest casts doubt on the constitutional soundness of California Code of Civil Procedure Section 1255b(a), which purports to establish the dates from which interest runs, but fails to include the valuation date as one such date.

14. See CAL. CODE CIV. PROC. § 1264 (West 1967).

15. See, e.g., *County of San Mateo v. Bartole*, 184 Cal. App. 2d 422, 427-28, 7 Cal. Rptr. 569, 572 (1960), wherein an unprepared owner was ordered to trial on 13 days notice for no apparent reason other than the court's desire to protect the condemnor from losing the advantageous date of value under California Code of Civil Procedure section 1249. This was done even though the condemnor delayed service of summons for *five months* after its issuance. And in *Swartzman v. Superior Court*, 231 Cal. App. 2d 195, 199, 41 Cal. Rptr. 721, 724 (1964), the court asserted that 59 days was "ample opportunity" in which to evaluate a change in the taking, evaluate condemnor's new offer, retain an appraiser, have the appraiser complete his report, and prepare for trial. In both cases the courts eschewed the usual procedural requisites for setting a case for trial (see CAL. R. Cr. 206, 209(b)) and took the position that the condemnor's desire to preserve the advantageous valuation date constituted sufficient cause to disregard these rules. Neither *Bartole* nor *Swartzman* gave any consideration to the unfairness resulting from a condemnor's demand at the eleventh hour that the case go to trial on unreasonably short notice solely to preserve condemnor's advantageous date of value. Compare the discussion in *People v. Murata*, 55 Cal. 2d 1, 5-6, 357 P.2d 833, 835, 9 Cal. Rptr. 601, 603 (1960), and in *Bottoms v. Superior Court*, 82 Cal. App. 764, 771-72, 256 P. 422, 425 (1927). Not surprisingly, such harsh and unrealistic judicial pronouncements have been the subject of severe and well-founded criticism. See McIntire, *supra* note 8, at 556, and *Bottoms*, 82 Cal. App. at 771, 256 P. at 425.

one year of the issuance of summons. Since the local workload of trial courts is known, experienced counsel and appraisers can usually safely predict when a typical condemnation case will go to trial once the memorandum to set is filed.

As a result, appraisers retained to value the subject property and to testify for the parties can accurately predict when their testimony will be required, and they prepare accordingly. Efficiency in the expenditure of an appraiser's time dictates that he complete his work and form his opinion so as to be at the peak of his preparation at the time of trial. That way, in arriving at his opinion he can take advantage of any "comparable" sales¹⁶ occurring shortly before trial, and he is spared the need to go back to review and update an appraisal done months earlier. By working in this fashion he can do his job more efficiently and save his client's money.

These practices, however, have had a troublesome impact on discovery. Rule 222, California Rules of Court, provides that discovery must be completed 30 days before trial.¹⁷ This makes for difficult problems in eminent domain cases since appraisers, by reason of the factors outlined above, may still be at work during the 30 days preceding trial. Thus, counsel directing discovery to his adversary may find himself receiving frustrating responses to the effect that the appraiser has not completed his work and therefore the all-important opinion of value is not yet available.¹⁸

Swartzman v. Superior Court: MUTUALITY TO
THE RESCUE

These problems have not gone without note. Attempts at solution in California have come from two sources: the California Law Revision Commission¹⁹ and the Los Angeles County Superior Court. While

16. A comparison of the property being valued (known in condemnation jargon as "the subject property") with sufficiently similar (or "comparable") parcels that have sold sufficiently close to the date of value is often presented to "shed light" on the value of the subject property. This practice is known as the market data or comparable sale valuation method. See CAL. EVID. CODE § 816 (West 1968); County of Los Angeles v. Faus, 48 Cal. 2d 672, 312 P.2d 680 (1957).

17. Under Rule 222, during the 30 days preceding trial discovery may be conducted only with leave of court.

18. Indeed, under California Evidence Code section 814, an appraiser may base his opinion on matters made known to him up to the time of trial, or even at the trial.

19. See 1966 CAL. L. REV. COMM'N ANN. REP. 19 *et seq.*; 4 CAL. L. REV. COMM'N, RECOMMENDATION AND STUDY RELATING TO CONDEMNATION LAW AND PROCEDURE DISCOVERY IN EMINENT DOMAIN PROCEEDINGS (1963).

the Commission studied the problems, the Los Angeles court bore the brunt of them, since almost one-half of the state's eminent domain cases are filed in Los Angeles County.²⁰

In 1963, a committee of Los Angeles County Superior Court Judges tackled the problem on a local level. Its solution was a special, bifurcated pretrial procedure for eminent domain cases.²¹ At the first pretrial conference a pretrial order is issued which, in addition to dealing with the usual pretrial business, directs the parties to lodge their respective appraisal reports with the court by a specified date.²² Each report must spell out the appraiser's conclusions and describe the underlying valuation methods utilized. When the reports are lodged, the judge examines them and, upon determining that they are in compliance with the criteria of the first pretrial conference order and are fair counterparts of one another, supervises their *exchange* at the second (or final) pretrial conference. The final pretrial conference order provides that no further discovery will be allowed, and that a party will not be permitted to present valuation evidence at trial if such evidence is not disclosed in the exchanged appraisal report.

This procedure was implemented in the Los Angeles County Superior Court in 1963 under the *nom de plume* of "Los Angeles Superior Court Eminent Domain Policy Memorandum."²³ It remained to be

20. Statistics of the Judicial Council, published annually in the Report of the Administrative Office of the Courts, disclose a consistent prominence of Los Angeles County as the locale of most of California's condemnation cases:

<u>Fiscal Year Ending</u>	<u>Number of Condemnation Cases (Statewide)</u>	<u>Number of Condemnation Cases (Los Angeles County)</u>
1966	8617	4226
1967	9350	4686
1968	11,518	4985
1969	9363	3603
1970	8122	3071
1971	6937	2603

21. See McCoy, *Pretrial in Eminent Domain Actions*, 38 L.A.B. BULL. 439 (1963). This type of procedure was apparently first initiated in the United States District Court in Los Angeles several years earlier. See Carter, *Pre-Trial in Condemnation Cases—A New Approach*, 40 J. AM. JUD. Soc'y 78 (1956).

22. A representative example of the portion of an order directing an exchange of appraisal reports may be found in *Nestle v. City of Santa Monica*, 6 Cal. 3d 920, 928-29 n.5, 496 P.2d 480, 485 n.5, 101 Cal. Rptr. 568, 573 n.5 (1972). For the full text of the Los Angeles County Superior Court pretrial orders, see I. LEVEY, CONDEMNATION IN U.S.A. 639-42 (1969). *Caveat*: The standard or "boilerplate" portion of such first pretrial conference orders is subject to change from time to time. As this article is being written, the Los Angeles Superior Court is once again changing the language of its standard order.

23. The "Policy Memorandum" is published by the *Los Angeles Daily Journal* as part of its loose-leaf Court Rules book.

seen whether this bit of judicial legislation would be upheld by the reviewing courts.²⁴ It was—with a vengeance—in the notorious or celebrated (depending on one's point of view) decision of the California Court of Appeal for the Second Appellate District in *Swartzman v. Superior Court*.²⁵

Meyer M. Swartzman was visited with problems rivalling Job's. Not only was his land being taken, but additionally, the condemnor changed the extent of the taking after commencing litigation. In February, 1964, four months after the issuance of summons, the condemnor indicated that it was altering the extent of the take. Another month elapsed before Mr. Swartzman was supplied with a map of the revised taking. On July 15, 1964, after another four months had elapsed, the condemnor noticed a motion for leave to amend its complaint and for a special setting of the dates of the pretrial conferences and the trial. If the trial were not commenced prior to October 1, 1964, the condemnor would lose the advantage of having Swartzman's property valued as of the date of issuance of the summons.²⁶ The condemnor's motions were granted on July 21, 1964. The trial court set the first pretrial conference for August 19, the second pretrial conference for September 18, and the trial for September 30. With 71 days until the trial, this forced-draft schedule afforded Mr. Swartzman a scant 59 days in which to prepare his case.²⁷

24. Article III of the California Constitution, which articulates California's separation-of-powers doctrine, expressly forbids one branch of the government from exercising the functions of another. This gives rise to a fascinating problem. If the promulgation of a procedure requiring exchange of valuation data properly falls within the scope of judicial rule-making powers, then ineluctably such an exchange is an inappropriate subject of legislation. However, in 1967 the legislature enacted sections 1272.01-.09 of the California Code of Civil Procedure, which in essence codify for the rest of the state the Los Angeles County Superior Court procedure requiring an exchange of valuation data upon demand by the parties. The promulgation of rules concerning exchange of valuation data is either a legislative or a judicial function, but it cannot be both. See generally *Mosesian v. County of Fresno*, 28 Cal. App. 3d 493, 503-04, 104 Cal. Rptr. 655, 662 (1972). Modern California discovery is largely a creature of statute. See CAL. CODE CIV. PROC. §§ 2016-36 (West Supp. 1973); *Greyhound Corp. v. Superior Court*, 56 Cal. 2d 355, 371, 364 P.2d 266, 272, 15 Cal. Rptr. 90, 96 (1961). Thus, there is little basis on which to assert that, in eminent domain cases, formulation of discovery rules somehow becomes a judicial function. In short, the Los Angeles County Superior Court Policy Memorandum, however well intended, may be a nullity transgressing the separation of powers command of Article III of the California Constitution.

25. 231 Cal. App. 2d 195, 41 Cal. Rptr. 721 (1964).

26. See text accompanying notes 9-13 *supra*.

27. 231 Cal. App. 2d at 199, 41 Cal. Rptr. at 724. The 59 days encompass the period prior to the final pretrial conference. Actually, even this 59 day period is illusory. Re-

On August 28, 1964, Mr. Swartzman noticed what should have been, in light of earlier decisional law, a routine deposition of the condemnor's appraiser.²⁸ However, the condemnor moved for a protective order on the grounds that "taking the deposition at that time would be dilatory, annoying, oppressive, harassing, burdensome, expensive, and unjust, and that the only matters proper to the deposition not already covered by answers to interrogatories would be fully disclosed by the mutual exchange of appraisal reports at the [final] pretrial conference."²⁹ Translating this legal verbiage into reasonably straightforward English, the condemnor apparently argued that Mr. Swartzman's right to conduct discovery was limited to interrogatories and a court-supervised exchange of appraisal reports, but did not include depositions.³⁰

Notwithstanding this factual posture of the case, the trial court granted the condemnor a protective order. Mr. Swartzman thereupon sought a writ of mandate or prohibition from the court of appeal, which issued an alternative writ and, after hearing the matter on the merits, denied a peremptory writ.³¹ The court held that discovery of otherwise discoverable matters could be deferred until such time as the parties

call that under the "policy memorandum" each litigant must lodge his appraisal report with the court *before* the final pretrial conference (the standard first pretrial order requires that the reports be lodged five days before the final pretrial conference). Since the appraiser may not testify to matters not disclosed in his report, he must be fully prepared to articulate his opinion and its underlying reasons when he sits down to write his report. Thus, realistically speaking, Swartzman was given about 50 days in which to select an appraiser and prepare his case. Considering the scarcity of qualified forensic appraisers available to condemnees (many qualified appraisers prefer to work solely for the government which is a large and steady source of their fees), the workload of those appraisers, and the lead time necessary to prepare a proper appraisal report, the time given to Mr. Swartzman by the court was quite unrealistic. *See* McIntire, *supra* note 8, at 560-61. Mr. Swartzman could undoubtedly be faulted for not having retained an appraiser earlier. But the same fault attaches both to the condemnor's five month unexplained delay in translating its decision to make a change in the take into amended pleadings and to its unjustified failure to take any of the legally required steps to set the case for trial. *Cf.* *People v. Murata*, 55 Cal. 2d 1, 6, 357 P.2d 833, 835, 9 Cal. Rptr. 601,603(1960).

28. *Oceanside Union School Dist. v. Superior Court*, 58 Cal. 2d 180, 373 P.2d 439, 23 Cal. Rptr. 375 (1962), made it clear that opinions of condemnors' appraisers are subject to discovery.

29. 231 Cal. App. 2d at 198, 41 Cal. Rptr. at 724 (emphasis added).

30. *Cf.* CAL. CODE CIV. PROC. § 2016 (West Supp. 1973).

31. 231 Cal. App. 2d at 205, 41 Cal. Rptr. at 728. The controversial *Swartzman* opinion dealt with two topics in addition to discovery which have inspired scholarly criticism (McIntire, *supra* note 8) and swift legislative action (See the 1965 amendment (Ch. 1442 [1965] Cal. Stats. 3375) to CAL. CODE CIV. PROC. § 170.6 (West 1967)). Fascinating though they may be, they are not discussed here.

completed preparation of their respective cases, at which time they could be ordered to exchange their experts' reports, under court supervision. The *Swartzman* opinion concluded with a paean of praise expounding the virtues of mutuality of discovery:

The key element is mutuality. Were the courts not rigorous in insisting on mutuality of disclosure and were they to adopt a soft and wishy-washy attitude toward recalcitrant litigants reluctant to comply with their orders, they would quickly inhibit any genuine disclosure in advance of trial in the case of opinion witnesses, for parties could merely claim, as petitioners did here, that they had not yet decided whether to use any expert witnesses and could continue to profess indecision until the day of trial.³²

The rules of discovery contemplate two-way disclosure and do not envision that one party may sit back in idleness and savor the fruits which his adversary has cultivated and harvested in diligence and industry. Mutual exchange of data provides some protection against attempted one-way disclosure; the party seeking discovery must be ready and willing to make an equitable exchange.³³

Mr. Swartzman's very real and difficult problem of obtaining an appraiser and having that appraiser, together with counsel, prepare in time to permit reciprocal depositions and completion of an acceptable appraisal report was simply swept aside by this torrent of judicial rhetoric.³⁴ The court viewed Mr. Swartzman's problem with unabashed hos-

32. With all due respect, the court's rhetoric at this point departed from the facts of the controversy before it. Under no circumstances could Mr. Swartzman "profess indecision until the day of trial." The trial court's order of July 21, 1964, required the parties to lodge with the court their respective appraisal reports (or other statements of valuation data) before September 18, 12 days before trial. 231 Cal. App. 2d at 197-98, 41 Cal. Rptr. at 723-24. Thus, assuming for the sake of argument that Mr. Swartzman merely "professed" indecision, rather than being genuinely plagued by it, there was no factual basis for the court's fear of surprise at trial, as September 18 was the deadline on which Mr. Swartzman had to disclose the basis of his valuation case.

33. 231 Cal. App. 2d at 204, 41 Cal. Rptr. at 727 (citations omitted).

34. The court apparently assumed that the condemnor's first informal communication with Swartzman on the subject of change in the taking somehow imposed on Swartzman the duty to launch immediately into the preparation of his case on that changed basis. This assumption overlooks the fact that, had Swartzman done so and had the condemnor then failed to go through with its contemplated change in the taking, Swartzman would have expended significant sums of money in preparation for no purpose and without recompense. See *Hilltop Properties, Inc. v. State*, 233 Cal. App. 2d 349, 43 Cal. Rptr. 605 (1965), for an excellent insight into the predicament of an owner who acted on a condemnor's forecast of a taking which did not materialize. See also *Bank of America v. County of Los Angeles*, 270 Cal. App. 2d 165, 75 Cal. Rptr. 444 (1969), *disapproved in* *Klopping v. City of Whittier*, 8 Cal. 3d 39, 52 n.5, 500 P.2d 1345, 1355 n.5, 104 Cal. Rptr. 1, 11 n.5 (1972).

tility and imputed to him a degree of bad faith unjustified by the facts of the case.³⁵ For example, the court accused Mr. Swartzman of seeking "to play [his] hand with [his] cards close to the chest while demanding that [his] opponent play its cards face up from the table."³⁶ This accusation was based on the fact that "petitioners refused an offer of simultaneous depositions of experts on both sides after the state's appraisal witness had finished his preparation."³⁷ It is not clear why the court assumed that Mr. Swartzman's consent was necessary to order simultaneous depositions, or, for that matter, *any* depositions of either Mr. Swartzman or his expert. Why couldn't the court order that simultaneous depositions be taken? Or, even more basically, why couldn't the condemnor simply notice a deposition of the owner's valuation witness, whether the appraiser or the owner himself? Surely the court could not have intended to suggest that depositions can be taken only with the deponent's consent.

But, however harshly the court may have dealt with Swartzman's particular factual situation, it laid down the salutary principle that eminent domain discovery was to be a two-way street. In the process, the court expressly approved the Los Angeles Superior Court policy of requiring an exchange of appraisal reports before trial.³⁸ The problems inherent in assuring mutuality of discovery in eminent domain cases appeared solved, at least in Los Angeles County. As it turned out, however, hosannas were premature.

35. Parts of the *Swartzman* opinion give the impression that the court was quite willing, if not eager, to impute unwholesome motives to Swartzman. In fact, one of the attorneys for the successful condemnor has opined that the court was trying to punish Swartzman "for not acting in good faith." Holroyd, *A Search for Truth: A Condemnor's Reply*, 43 CAL. ST. B.J. 923, 925-26 (1968). While I have been in disagreement with Mr. Holroyd on this point, *i.e.*, that the *Swartzman* decision was punitive in nature (*cf.* Kanner, *More Search for Truth*, 44 CAL. ST. B.J. 236, 237-38 (1969)), I must concede that the *Swartzman* opinion does exude a considerable degree of hostility to Swartzman, without articulating a factual basis therefor. Indeed, the *Swartzman* opinion comes close to applying a double standard in judging what constitutes good faith preparation for trial. The court noted disapprovingly that Swartzman knew since March, 1964, the nature of the proposed taking and should have acted on it. *See* note 34 *supra*. But the condemnor knew of such change since at least February, 1964. 231 Cal. App. 2d at 197, 41 Cal. Rptr. at 723. Why was Swartzman's inaction derogated, while the condemnor's far greater inaction in failing to move to amend its complaint for *five months* and failing to comply with Rules 206 and 209(b) altogether (*see* note 15 *supra*) escaped censure?

36. 231 Cal. App. 2d at 205, 41 Cal. Rptr. at 728.

37. *Id.* at 204, 41 Cal. Rptr. at 728.

38. *Id.* at 201, 41 Cal. Rptr. at 726. But note that the constitutionality of the "policy memorandum" under article III of the California Constitution was neither raised nor decided. *Cf.* note 24 *supra*.

People v. Superior Court: WHAT'S MUTUALITY?

Before dealing with further developments in the law of mutuality of discovery in eminent domain, it may be worthwhile to juxtapose the *Swartzman* decision with *People v. Superior Court*,³⁹ decided by the Court of Appeal for the Third Appellate District on February 11, 1969. In the latter case, the owner, emulating the position taken by the condemnor in *Swartzman*, sought to condition his response to the state's interrogatories upon a simultaneous exchange of data by the state. The trial court, like the trial court in *Swartzman*, invoked the mutuality principle and denied the state's motions for further answers to interrogatories. The state thereupon petitioned the court of appeal for a writ of mandate, which was granted. The terse court of appeal opinion gave the owner's mutuality-of-discovery argument short shrift and never even mentioned *Swartzman*.

Although the owner was in some respects straining the concept of mutuality (for example, he sought to apply this concept to discovery of the gross income and expenses of his own property, items of information for which the state had no corresponding data but which the state would arguably need in order to prepare its appraisal report for exchange),⁴⁰ in other respects his position was indistinguishable from the state's position in *Swartzman*. He simply argued that disclosure of certain otherwise discoverable matters should be deferred until a mutual exchange of data could occur. The appellate court's response to that argument was a blend of intellectual hostility and linguistic ferocity:

As often occurs in these proceedings, the present action reveals a course of obstructionism on the part of the discovery-resisting attorneys, who apparently acted under the delusion that the law permitted them to frustrate legitimate discovery attempts by counterdemands for the exchange of unspecified "data." There is no good reason for burdening busy courts with the kind of dispute in issue here.⁴¹

The owner's argument (paralleling the state's argument in *Swartzman*), that the question of availability of discovery to one side should not be decided without regard to the other side's response to discovery, likewise became the subject of unrestrained denunciation by the court:

A noteworthy aspect of the landowners' position is that—with a limited exception—they do not raise questions of relevance or privilege. Instead, they accuse the State of a failure to cooperate with

39. Civil No. 12123 (Cal. Ct. App., 3d Dist., Feb. 11, 1969).

40. *Id.* at 3.

41. *Id.* at 2.

their own discovery attempts. They attach to their pleading in this court the State's responses to their own interrogatories, showing assertions of privilege and non-discoverability by the State. The landowners do not claim that this proceeding is an appropriate forum for resolving validity of the State's claims of privilege. The law provides the landowners with other procedures for enforcing their own discovery needs. Apparently, counsel for the real parties in interest are under the impression that the courts will assist them in forcing information out of the State without regard to the legitimacy of the State's discovery attempt.⁴²

It should be remembered that the essence of the state's argument in *Swartzman* was *not* that its appraiser's opinion was non-discoverable.⁴³ Rather, the state argued that its appraiser's *discoverable* opinion could be temporarily shielded from discovery until the owner exchanged his appraisal data. The court in *Swartzman* chastized the owner for his refusal to consent to mutual depositions,⁴⁴ and in crisply unequivocal language denounced "one-way discovery, no give and all take."⁴⁵ The essence of *Swartzman* is that, when considering the appropriateness of discovery undertaken by one litigant, the court is not only permitted but required—indeed, perhaps even on its own motion⁴⁶—to consider the extent of the discovery-seeking litigant's cooperation with his adversary's discovery: "The key element is mutuality."⁴⁷

It is difficult to reconcile *Swartzman's* emphasis on mutuality with the blunt pronouncements in *People v. Superior Court* that each party's discovery is to be viewed independently of the validity of the other party's resistance to discovery and that "[t]he law provides the landowners with other procedures for enforcing their own discovery needs."⁴⁸ Thus, although mutuality may be the "key element"⁴⁹ of discovery in the Second Appellate District, it apparently fares less well in the Third Appellate District.⁵⁰

42. *Id.* at 2-3.

43. The State could hardly make such an argument of nondiscoverability in light of *Oceanside School Dist. v. Superior Court*, 58 Cal. 2d 180, 192-93, 373 P.2d 439, 447, 23 Cal. Rptr. 375, 383 (1962), which held explicitly that such opinions *are* discoverable.

44. *See* 231 Cal. App. 2d at 204-05, 41 Cal. Rptr. at 727-28.

45. *Id.* at 205, 41 Cal. Rptr. at 728. "[T]he party seeking discovery must be ready and willing to make an equitable exchange." *Id.* at 204, 41 Cal. Rptr. at 727.

46. *Id.* at 201, 41 Cal. Rptr. at 726.

47. *Id.* at 204, 41 Cal. Rptr. at 727.

48. Civil No. 12123 (Cal. Ct. App., 3d Dist., Feb. 11, 1969) at 2.

49. *Swartzman v. Superior Court*, 231 Cal. App. 2d 195, 204, 41 Cal. Rptr. 721, 727 (1964).

50. *But cf.* *People v. Volz*, 25 Cal. App. 3d 480, 102 Cal. Rptr. 107 (1972).

People v. Superior Court is not the only instance in which the courts have given the mutuality principle short shrift when asserted by an owner. In *People v. Jennings Radio Manufacturing Corp.*,⁵¹ the owner sought to recover damage to an electronics plant caused by air contamination from a freeway being built adjacent to the plant. To present its case the owner retained an expert in air contamination control who, at great effort and cost, conducted studies and prepared an economic plan for curing the damage to the plant by means of additional air filtration equipment. The condemnor failed to retain an expert of its own until it received the owner's valuation data, exchanged pursuant to California Code of Civil Procedure sections 1272.01-.09, which were enacted in 1967 and substantially embody the Los Angeles County Superior Court exchange procedures.⁵² After the exchange of valuation data, the condemnor moved to open discovery in order to take the deposition of the owner's expert, avowedly hoping to save itself the \$10,000 cost of retaining an expert of its own who would conduct his own studies.⁵³ Notwithstanding the owner's vigorous objections to "[s]uch one-way discovery, no give and all take"⁵⁴ and heavy reliance on *Swartzman*, the trial court denied a protective order and permitted the unilateral deposition of the owner's expert to be taken. The appellate courts denied relief without opinion.⁵⁵

Regents v. Morris: MUTUALITY IS MUTUAL

The requirement of an exchange of appraisal reports, coupled with the standard provisions of the final pretrial order forbidding discovery after the exchange, have fostered a situation where the exchange of appraisal reports has supplanted other methods of discovery of appraisers' opinions of value and the reasons underlying these opinions.⁵⁶

51. Civil No. 201460 (Cal. Sup. Ct., Santa Clara County, Dec., 1968).

52. CAL. CODE CIV. PROC. §§ 1272.01-.09 (West Supp. 1973).

53. Civil No. 201460, Plaintiff's Declaration in Support of Motion for Bifurcation of Trial and Reopening of Discovery Rights (Nov. 22, 1968) at 5.

54. *Swartzman v. Superior Court*, 231 Cal. App. 2d 195, 205, 41 Cal. Rptr. 721, 728 (1964).

The rules of discovery contemplate two-way disclosure and do not envision that one party may sit back in idleness and savor the fruits which his adversary has cultivated and harvested in diligence and industry. *Id.* at 204, 41 Cal. Rptr. at 727.

55. *International Tel. & Tel. Corp. v. Superior Court*, Civ. No. 26357 (Cal. Ct. App., 1st Dist., Dec. 1968), *hearing denied*.

56. *Swartzman* took the position that, until it becomes "reasonably certain" that the appraiser consulted by a party will be called as a witness, his opinion is irrelevant and not subject to discovery. 231 Cal. App. 2d at 203, 431 Cal. Rptr. at 727. This is generally a salutary policy in ordinary litigation; it allows counsel to have the benefit of

Indeed, among Southern California practitioners the court-ordered exchange is sometimes referred to as "poor man's discovery."⁵⁷

This method, however, is not without its problems. The *Swartzman*-style mutuality of discovery, *i.e.*, compelling the parties to rely on their opponents' appraisal reports exchanged by the court, can work only if such reports contain a full and fair description of their authors' valuation opinions and the reasons underlying those opinions. But what if they do not? What if a party's appraisal report obscures rather than illuminates the reasons for the appraiser's opinion? Worse than that, what if the exchanged report is intentionally constructed so as to mislead the opposing party?

In theory, this problem does not appear too menacing. Both the Los Angeles County Superior Court standard pretrial conference order and its legislative version adopted for the rest of the state⁵⁸ provide for enforcement of the mutual exchange procedure: the party required to make a fair exchange, who nonetheless fails to do so, is barred from putting into evidence the material that should have been exchanged. On its face, this appears to be a rational method of enforcement of the principle of mutuality of discovery. It has been reasonably applied.⁵⁹ But, in practice, it can give rise to problems which are prob-

expert opinion, on both the favorable and unfavorable aspects of his case, without fear of the adversary looking in. *See Scotsman Mfg. Co. v. Superior Court*, 242 Cal. App. 2d 527, 531-32, 51 Cal. Rptr. 511, 514 (1966). These factors are also pertinent to eminent domain litigation. *Mack v. Superior Court*, 259 Cal. App. 2d 7, 66 Cal. Rptr. 280 (1968). *But cf. United States v. Meyer*, 398 F.2d 66, 75-76 (9th Cir. 1968). However, under the Los Angeles "policy memorandum" and its bifurcated pretrial procedure, it does not become "reasonably certain" that a particular appraiser is going to testify until his report is lodged with the court at the time of the final pretrial conference. But the final pretrial conference order, made at that time, provides that there is to be no further discovery. Similarly, under California Code of Civil Procedure section 1272.01, by the time the exchanged valuation data are served and lodged with the court (20 days before trial), no further discovery is permitted due to California Rule of Court 222. *See text accompanying note 17 supra*. Thus, the moment at which the appraiser theoretically becomes subject to discovery as a "reasonably certain" expert witness is also the moment at which the court forbids further discovery. The net result is that the exchanged appraisal reports become the sum total of discovery of the respective appraisers' opinions and reasons. To be sure, discovery of various facts which may be required by appraisers is still conducted, but *Swartzman* effectively put an end to conventional discovery of appraisers' opinions and their underlying reasons and studies, at least in Los Angeles County.

57. One of the purposes of the California Law Revision Commission in recommending the statewide adoption of the Los Angeles valuation data exchange principle was to provide "a relatively inexpensive means of discovery in eminent domain proceedings . . ." 1966 CAL. L. REV. COMM'N, ANN. REP. 21.

58. CAL. CODE CIV. PROC. § 1272.05 (West Supp. 1973).

59. *See, e.g., People v. Douglas*, 15 Cal. App. 3d 814, 820-21, 93 Cal. Rptr. 644, 648

ably best explored by a brief examination of the procedural structure of a California condemnation trial.

Notwithstanding the practice of calling the condemnor the "plaintiff" and the property owner the "defendant," in expropriation cases the order of proof is reversed. The "defendant" property owner puts on his valuation case first, and the "plaintiff" condemnor presents its valuation case last.⁶⁰ The order of jury arguments is likewise the opposite from that followed in other cases. In condemnation cases the "defendant" owner's counsel argues to the jury first and also closes first.⁶¹

It is this procedural structure of an eminent domain trial that pro-

(1971), holding that, where there has been a good faith attempt to comply with the provisions of California Code of Civil Procedure section 1272.01 *et seq.*, a witness whose name has not been exchanged may be called nonetheless, at least as an adverse witness, pursuant to California Evidence Code section 776. In *Douglas*, the witness in question was the condemnor's staff appraiser who apparently prepared an appraisal report expressing a higher opinion of value than that expressed by the appraisers called by the condemnor at trial. This witness was called by the owner to demonstrate that the state's opinion of value was actually higher than that testified to at the trial. The practice of having the staff appraiser's opinion of value (on which the pre-litigation offers are based) drastically reduced at trial by bringing in a new appraiser with a lower opinion of value is known among the condemnation bar as "lowballing". It is not an uncommon practice. See Huxtable and Matteoni, *Trial Preparation and Trial, CONDEMNATION PRACTICE IN CALIFORNIA*, at 244 (C.E.B. 1973), and Bigham, "Fair Market Value," "Just Compensation," and the Constitution: A Critical View, 24 VAND. L. REV. 63, 77-78 (1970). Its purpose is to coerce the owner into accepting the pre-litigation offer on pain of running the risk of a verdict below that offer. *People v. Douglas*, 15 Cal. App. 3d 814, 821-22, 93 Cal. Rptr. 644, 648 (1971) and *People v. Cowan*, 1 Cal. App. 3d 1001, 1004, 81 Cal. Rptr. 713, 714 (1969) have tended to curb this practice, as have the newly-enacted California Government Code sections 7267.2 and 7267.5.

60. *San Francisco v. Tillman Estate Co.*, 205 Cal. 651, 272 P. 585 (1928). The burden of going forward with the valuation evidence should be distinguished from the burden of persuasion on which the law is in utter conceptual disarray. The traditional view was that there existed a presumption that the government's valuation was right. *County of Monterey v. Cushing*, 83 Cal. 507, 23 P. 700 (1890). Since presumptions were then evidence, the owner's failure to overcome the presumption caused it to remain before the jury as the only evidence of value. However, in 1967 the California Evidence Code became effective, and section 600(a) thereof provides in pertinent part: "A presumption is not evidence." Thus, the legislature has cut the ground out from under the burden of proof rationale articulated by *Cushing* and its progeny. Unfortunately, no court has taken note of this fact, and even quite recent opinions continue to state without analysis that the "burden of proof" is on the owner. *E.g.*, *People v. Younger*, 5 Cal. App. 3d 575, 579, 86 Cal. Rptr. 237, 238 (1970). One can only hope that before too long the courts will focus on and clarify this anomaly. The Supreme Court of Alaska has recently scrutinized the nature of burden of proof and has concluded that this concept is inapplicable to determining value and has no place in expropriation proceedings. *State v. 45,621 Square Feet of Land*, 475 P.2d 553 (1970).

61. CAL. CODE CIV. PROC. § 1256.1 (West 1967).

vides an incentive for unscrupulous condemnors to tamper with their appraisal reports so as to mislead the owner. By contrast, the owner's opportunity to execute such a scheme effectively is much smaller. Since the owner puts on his valuation case first, a surprising departure from his exchanged appraisal report can be instantly noted by the condemnor and conveyed to the condemnor's appraiser,⁶² who can then check out the surprise evidence and meet it in the condemnor's case which is not put on until the owner has concluded his case.

However, when a condemnor's expert departs from or contradicts the material contained in his exchanged report, the prejudice to the owner is much greater, since, by the time the surprising testimony is elicited, the owner has already taken his position and rested his case-in-chief.

With such built-in potential for effective surprise, the temptation to tamper with appraisal reports and to spring a trap at trial proved to be too much for some condemnors.⁶³ The problem was first presented to the appellate courts in *Regents of the University of California v. Morris*.⁶⁴ *Morris* involved the controversial expropriation of a large apartment complex to provide additional space for U.C.L.A. married student and junior faculty housing.⁶⁵ The stakes were enormous: the condemnor's opinion of value was \$3,350,000; the owners' was \$5,700,000.

After the owners put on their case-in-chief, the condemnor's appraiser took the stand. His testimony on direct examination indicated that he was basing his opinion on certain studies not disclosed in his exchanged report. When cross-examined about discrepancies between his testimony and his exchanged appraisal report, the condemnor's appraiser testified, in essence, that at the instructions of condemnor's counsel he had prepared two appraisal reports: the "complete appraisal report" which he delivered to condemnor's counsel for the lat-

62. In fact, it is common practice among condemnors to have their appraiser in the courtroom while the owner's case is presented, to evaluate and check out the testimony of the owner's witnesses.

63. Former Los Angeles City Attorney Roger Arnebergh indicated that some condemnors routinely "edit and strip" their appraisal reports, submitting these stripped versions to the court for exchange. See Arnebergh, *Trial Tactics From the Standpoint of the Condemnor*, EIGHTH INSTITUTE ON EMINENT DOMAIN, SW. LEGAL FOUNDATION 1, 6 (1968).

64. 266 Cal. App. 2d 616, 72 Cal. Rptr. 406 (1968).

65. *Id.* at 620, 72 Cal. Rptr. at 408; Berman, *Judges Rap Officials Over U.C.L.A. Housing*, L.A. Times, Feb. 10, 1965, § 2, at 1; *Should Public Spokesmen Be Silenced?*, L.A. Times, Feb. 11, 1965, § 2, at 4.

ter's use, and an abbreviated, "bare bone" report prepared solely for exchange purposes and designed "to provide a limited amount of information."⁶⁶

The trial court, while denouncing this tactic as "reprehensible,"⁶⁷ did nothing to enforce the pretrial order requiring exchange of "full and fair" appraisal reports. If anything, the trial court's rulings helped to spring condemnor's trap. The trial court had originally granted the owners' motion to strike the surprise testimony. Later, however, when a list of specific record references to the stricken matters was presented so that the jury could be instructed on what to disregard, the trial court reversed its ruling and let the objectionable testimony stand.⁶⁸ By then the condemnor's appraiser was off the stand and beyond the reach of further effective cross-examination.

On appeal, the trial court judgment was reversed, and a new valuation trial was ordered. The reviewing court was emphatic in denouncing the condemnor's tactic of surprise and gave every indication of its awareness of the practicalities of the matter. The court assessed the situation from the pragmatic point of view of trial counsel caught in the sprung trap:

Morris was put at a considerable disadvantage in any attempted cross-examination of Shelger [the Regents' appraiser] when Shelger referred and testified to matters contained in his report to the Regents which were omitted from the abbreviated report he delivered to Morris. So far as the record goes, Morris did not know of the difference in reports until the matter was disclosed in the courtroom. It would be difficult to make any effectual cross-examination of Shelger, even if it had been resumed after the trial court had in effect, by restoring the stricken portion of the report to the record, placed its judicial imprimatur on testimony so restored.⁶⁹

As the dust settled on the *Morris* controversy, one could look at the state of eminent domain discovery law with some feeling of satisfaction. Notwithstanding Mr. Swartzman's travails, mutuality of discovery was to be observed, and the California courtrooms were to be free of the pernicious practice of responding to court-ordered discovery with misleading appraisal reports designed to decoy the opposition rather than provide good faith disclosure.

66. 266 Cal. App. 2d at 629-30, 72 Cal. Rptr. at 414.

67. *Id.* at 630, 72 Cal. Rptr. at 414.

68. *Id.*

69. *Id.* at 631, 72 Cal. Rptr. at 415.

But, like most good things, this state of affairs did not last. A scant half-dozen years after *Swartzman*, three cases decided in rapid succession, *Nestle v. City of Santa Monica*,⁷⁰ *People v. Sunshine Canyon, Inc.*⁷¹ and *County of Los Angeles v. Kling*,⁷² severely undermined the notion of strictly-enforced mutuality of discovery accomplished by means of appraisal data exchange. All three cases arose in Los Angeles County and involved the *Swartzman*-approved eminent domain "policy memorandum" of the Los Angeles County Superior Court. All three paid assiduous lip service to *Swartzman's* insistence that mutuality of discovery be strictly enforced. Yet, two of the three permitted the party engaged in tampering with his appraisal reports to get away with it,⁷³ while the third one flatly, and without explanation, held that the trial court's order barring a party from putting on unexchanged evidence of value was "error."⁷⁴

*Nestle v. Santa Monica: IT'S NOT WHAT YOU DO,
IT'S HOW YOU DO IT THAT COUNTS*

*Nestle v. City of Santa Monica*⁷⁵ has received considerable attention primarily because of its holding that governmental liability for nuisance was not abrogated by enactment of the 1963 Tort Claims Act.⁷⁶ Less publicized is the fact that the *Nestle* opinion contains a ruling relating to mutuality of discovery in eminent domain cases which has troublesome implications.

Nestle was an inverse condemnation case brought in the Los Angeles County Superior Court, and hence subject to the eminent domain "policy memorandum." Reports were exchanged pursuant to the usual pretrial order and the case went to trial. As in *Morris*, cross-examination of the city's appraiser disclosed that various items had been stripped from his appraisal report before it was delivered to the court for exchange with the owners.⁷⁷

70. 6 Cal. 3d 920, 496 P.2d 480, 101 Cal. Rptr. 568 (1972).

71. Civil No. 36371 (Cal. Ct. App., 2d Dist. 1972).

72. 22 Cal. App. 3d 916, 99 Cal. Rptr. 642 (1972).

73. *Nestle v. City of Santa Monica*, 6 Cal. 3d 920, 496 P.2d 480, 101 Cal. Rptr. 568 (1972), and *People v. Sunshine Canyon Inc.*, Civil No. 36371 (Cal. Ct. App., 2d Dist. 1972).

74. *County of Los Angeles v. Kling*, 22 Cal. App. 3d 916, 99 Cal. Rptr. 642 (1972).

75. 6 Cal. 3d 920, 496 P.2d 480, 101 Cal. Rptr. 568 (1972).

76. *Id.* at 931-38, 496 P.2d at 487-92, 101 Cal. Rptr. at 575-80. See Berger, *The California Supreme Court—A Shield Against Governmental Overreaching: Nestle v. City of Santa Monica*, 9 CALIF. W.L. REV. 199, 209-11 (1973), and *The Supreme Court of California 1971-1972*, 61 CALIF. L. REV. at 648 (1973).

77. The supreme court opinion dealt with this problem somewhat euphemistically by

Yet, unlike *Morris*, *Nestle* held that report-stripping does not per se entitle the victimized party to a new trial, even where prejudice in the form of a completely adverse result is present. In order to preserve the error for appellate review, the court held, it is necessary for the aggrieved party to make some sort of formal request for relief.⁷⁸ Just why formality should be required, or what degree of formality would constitute the indispensable minimal quantum, the *Nestle* opinion does not make clear.⁷⁹

Nestle thus restricted somewhat the circumstances under which appraisal report-stripping would constitute a ground for reversal. While in *Morris* the mere existence of report-stripping and its use as a basis for launching surprise testimony at trial were deemed sufficient to require reversal,⁸⁰ *Nestle* laid down the additional requirement that the aggrieved party must go through some sort of formal procedural ceremony to preserve his claim of error.

It is not at all clear why the supreme court chose to take such a retrogressive procedural step. At one time it was necessary in California to preserve a record on appeal by record-making exceptions to

stating: "Counsel ostensibly exchanged their respective reports. However, cross-examination of Mr. Tucker, defendant's appraiser, revealed that the witness had testified to matters which were not included in the exchanged reports." 6 Cal. 3d at 928-29, 496 P.2d at 485, 101 Cal. Rptr. at 573. The vacated opinion of the court of appeal, in reviewing the same case, was considerably more outspoken in detailing the city's transgressions. See *Nestle v. City of Santa Monica*, 97 Cal. Rptr. 235, 250 (Cal. App. 1971):

The appraiser-witness called by respondent testified with respect to matter not included in his report submitted to the court for exchange. The excluded matter consists of a chart correlating comparable sales data which had been supplied in a form uncorrelated to the parcels involved in the litigation, descriptions of the interiors of the ten parcels, comparable sales information developed after the appraisal report was deposited in court, photographs of various properties, some graphs and charts, and information contained in marginal notes of the appraiser relating to the subjective effect of aircraft noise upon persons in the area.

The assessment of this dubious activity by the court of appeal was also harsher than that made by the supreme court:

The record supports appellants' contention that respondent failed to comply with the pretrial order. That order requires that full and complete appraisal reports be submitted for exchange and that they be kept current by delivery of information to the adverse party as new data is developed. The order did not permit counsel for respondent to engage in a process of selection, culling out data from the report to be sprung upon their opponents at a psychological moment during trial. *Id.*

78. 6 Cal. 3d at 930, 496 P.2d at 486-87, 101 Cal. Rptr. at 574-75.

79. *Id.* at 929, 496 P.2d at 485-86, 101 Cal. Rptr. at 573-74.

80. See 266 Cal. App. 2d at 631-32, 72 Cal. Rptr. at 414, wherein the court made it clear that it viewed the report-stripping surprise tactic of the condemnor as prejudicial error, requiring reversal, and considered the trial court's denial of the motion to strike as an aggravation of that error.

trial court rulings.⁸¹ But following scathing judicial criticism of this practice,⁸² section 647 of the California Code of Civil Procedure was amended to its present form in which it provides in pertinent part:

[I]f the party, at the time when the order, ruling, action or decision is sought or made, or within a reasonable time thereafter, makes known his position thereon, *by objection or otherwise*, all other orders, rulings, actions or decisions are deemed to have been excepted to.⁸³

The treatment afforded by the reviewing courts in *Nestle* to the problem of "making a record" emphasizes the burden thrust on counsel victimized by an appraisal report-stripping scheme. The court of appeal held that even though the owner's counsel objected to the city's appraiser's reliance on matters stripped from the exchanged appraisal report, this was insufficient, and that the owner's counsel was required to go further and make a motion to strike the objectionable testimony or move for a mistrial. The language employed by the court of appeal leaves little doubt but that it viewed the making of a motion to strike

81. Technically, this is still a requirement. CAL. CODE CIV. PROC. § 646 (West 1967). As a practical matter, however, section 647 of the Code of Civil Procedure contains enough exceptions to the requirements of section 646 to effectively obliterate the latter's impact.

82. See *Grossblatt v. Wright*, 108 Cal. App. 2d 475, 479-80, 239 P.2d 19, 22 (1951), wherein the court denounced the practice, pointing out: "Its use now makes form a fetish."

83. CAL. CODE CIV. PROC. § 647 (West 1967) (emphasis added). Additionally, California Evidence Code section 353 provides that "a verdict or finding shall not be set aside" unless the record discloses a timely objection or motion to strike; but the real problem in *Nestle* involved the violation of the pretrial order rather than a purely evidentiary controversy. *Nestle* did not insist on a specific objection; rather, it stated that ". . . counsel must call to the court's attention any material failure to comply [with the pretrial order] . . . and must do so forthrightly." 6 Cal. 3d at 929, 496 P.2d at 486, 101 Cal. Rptr. at 574 (citations omitted and emphasis added). The court went to some pains to make it clear that it did not insist on making "a motion in a specific form or manner in order to inform the [trial] court of any departure from the pretrial order . . ." *Id.* Nevertheless, the Court *also* stated that an objection made in an "ambiguous or circuitous manner" was insufficient to preserve the point for appellate review. *Id.* This turn of events provides a fascinating insight into how very different an issue can look to counsel engaged in the trial as contrasted with later appellate court scrutiny. For, at the time of trial in *Nestle*, after a lengthy colloquy, counsel and the trial judge were convinced that their respective positions were expressed in the record with clarity. Indeed, the courtroom colloquy was concluded by the following statement of counsel for the City of Santa Monica:

All right, your Honor. I think we have all made our position perfectly clear and if there be any further proceeding, in some other court, at least we will know we are in agreement on this point, I think. Record, vol. 13, at 3921.

In what can only be termed an ironic twist, over three years later that very attorney prevailed on that very point before the supreme court on the grounds that the parties' position was anything but "perfectly clear" and that the record was "cloudy." 6 Cal. 3d at 930, 496 P.2d at 486-87, 101 Cal. Rptr. at 574-75.

as a well-nigh indispensable procedural minimum.⁸⁴

When the case reached the California Supreme Court, that court concluded on the same record that the owner's counsel did *not* object and therefore the error was not preserved.⁸⁵ The supreme court stated that it did not insist on any particular procedural form of objection or motion⁸⁶ and left undefined the precise procedural steps that one needs to take to insure appellate review of this type of misconduct.

The supreme court suggested that either a motion to strike or a motion *in limine*⁸⁷ would be adequate.⁸⁸ However, with all due respect this conclusion is indicative of the court's failure to assess the situation realistically. By its very nature, a motion *in limine* is made before the evidence is presented. Its employment presupposes that the moving party knows in advance that his adversary intends to offer objectionable evidence and therefore seeks preemptively to bar the introduction of such evidence *before the trial begins*. But in the case of stripping of valuation data to be exchanged, the objecting party has been deceived; he has no way of knowing that the appraisal report *delivered to him under the auspices of the court* has been tampered with to mislead him. He does not learn of his adversary's duplicity until the trap is sprung, *i.e.*, until *after* he has rested his case and his adversary's case-in-chief is largely or completely presented to the trier of fact. To tell such a victimized party that he should have made a motion *in limine* before trial is tantamount to telling him that he should have been clairvoyant.⁸⁹

84. "Appellant's counsel, *while objecting to the omissions from the report*, made no motion to strike the testimony of the appraiser." *Nestle v. City of Santa Monica*, 97 Cal. Rptr. 236, 250 (Cal. App. 1971) (emphasis added).

85. The court stated "[W]e do note that here counsel for appellants made their 'objections' in an ambiguous and circuitous manner, if at all." 6 Cal. 3d at 929, 496 P.2d at 486, 101 Cal. Rptr. at 574. The opinion is silent on what constitutes making one's position known to the trial court "by objection *or otherwise*" within the meaning of section 647 of the Code of Civil Procedure. The emphasis of the court's discussion is on which remedial procedures should be sought, *i.e.*, motion *in limine*, motion for continuance, motion to strike, request for exchange of the stripped material. *Id.* at 929-30, 496 P.2d at 486-87, 101 Cal. Rptr. at 574-75. The dubious efficacy of such "remedies" is discussed elsewhere herein. See text accompanying notes 88-95 *infra*. Suffice it to note here that the court apparently failed to consider section 647 and its impact on the formality of the procedure required to "make a record" for appeal purposes.

86. 6 Cal. 3d at 929, 496 P.2d at 486, 101 Cal. Rptr. at 574.

87. For an example of the use of a motion *in limine*, see *Sacramento Drainage Dist. v. Reed*, 215 Cal. App. 2d 60, 29 Cal. Rptr. 847 (1963).

88. 6 Cal. 3d at 930, 496 P.2d at 488, 101 Cal. Rptr. at 574.

89. Courts in the past have conceded that "prescience is not normally required of the practicing bar . . ." *City of Whittier v. Aramian*, 264 Cal. App. 2d 683, 685, 70

The other suggestions contained in *Nestle*⁹⁰ likewise suffer from the court's failure to assess their efficacy pragmatically. For example, the suggestion that the victimized counsel should request that the withheld material be exchanged when the condemnor's appraiser discloses his reliance thereon misses the whole point. That surely is no remedy; by that time the trap has been sprung, the surprise has been carried out, and the condemnor's counsel will undoubtedly be quite willing to make a "grandstand play" of offering to exchange the stripped appraisal studies which by then have served his dubious purpose.⁹¹ The whole idea of appraisal data exchange is to give each party a fair insight into his adversary's case *before going to trial*.⁹² After all, it is *pre-trial discovery* that we are dealing with.

The damage is done when the stripped report is exchanged. It cannot be undone at trial by the guilty party's offering to supply the withheld material and to make his appraiser available for further cross-examination. The point, as *Morris* made clear, is that "effective cross-examination of an expert witness *requires advance preparation*."⁹³ That is why the judgment in *Morris* was reversed even though there was no showing that the appraiser was not available for further cross-ex-

Cal. Rptr. 805, 807 (1968). See also *Parrott v. Furesz*, 153 Cal. App. 2d 26, 30, 314 P.2d 47, 51 (1957), expressing similar attitude towards the suggestion that counsel be possessed of a "gift of prophecy."

90. See 6 Cal. 3d at 929-30, 496 P.2d at 486, 101 Cal. Rptr. at 574.

91. Indeed, in *Nestle* the city's trial counsel offered to recess if appellants desired, in order that they might obtain any materials alleged to have been excluded and to be necessary for continued cross-examination. 6 Cal. 3d at 930, 496 P.2d at 486, 101 Cal. Rptr. at 574. This is a rather strange way to conduct *pretrial* discovery, particularly since the court recognized that a "proper exchange" of appraisal reports is of "crucial importance" to the avoidance of surprise. *Id.* at 929, 496 P.2d at 485-86, 101 Cal. Rptr. at 573-74.

92. The supreme court in *Nestle* clearly recognized these pragmatic aspects of *pre-trial* discovery when it observed:

We begin by emphasizing the value of such discovery practice to a full exploration of the issues at trial. Trial courts should compel the pre-trial exchange of appraisal reports in order that counsel might have sufficient information to prepare for trial. Such a procedure not only increases the likelihood of more expeditious proceedings by making requests for continuances less compelling, but elimination of trial surprises is likely to produce a more salutary result. *Id.*, 496 P.2d at 485, 101 Cal. Rptr. at 573.

Surely, the above salutary aspects of *pretrial* discovery are completely subverted where one party fails to comply with discovery orders, supplies his opponent with misleading data, springs his surprise at trial and *then* turns over the correct information to his adversary. See *Thoren v. Johnston & Washer*, 29 Cal. App. 3d 270, 274, 105 Cal. Rptr. 276, 278-79 (1972); *Campaign v. Safeway Stores, Inc.*, 29 Cal. App. 3d 362, 366, 104 Cal. Rptr. 752, 754 (1972); cf. *Rosenberg, Sanctions to Effectuate Pretrial Discovery*, 58 COLUM. L. REV. 480, 495 (1958).

93. 266 Cal. App. 2d at 632, 72 Cal. Rptr. at 413 (emphasis added).

amination, and despite the fact that no request for a continuance was made. Once the material had been stripped and, in the words of the court of appeal in *Nestle*, "sprung upon their opponents at a psychological moment during trial,"⁹⁴ the damage had been irreparably done. Further cross-examination could well be useless or even damaging. Thus, to say to a party that he can have his discovery after he has rested his case and his opponent's case is largely over, is something less than realistic.

The final suggestion, that the victimized party seek a continuance, likewise suffers from pragmatic shortcomings. To the extent the victimized owner has failed to deal with the withheld matters in his case-in-chief, the damage inflicted by the condemnor's surprise is irreparable. He cannot re-present his case; the suggestion is tantamount to an invitation to unscramble an omelet. Moreover, such a continuance would play right into the hands of the condemnor. By the time the report-stripping comes to light, the presentation of the owner's case is days or weeks in the past. Any delay in the midst of the condemnor's case causes memory of the details of the owner's presentation to recede further in the mind of the trier of fact who is thus left with the condemnor's case as the most recent and most vivid presentation.⁹⁵

In sum, the *Nestle* analysis of the problem was unrealistic. It dealt in legal, procedural abstractions and gave no weight to the real problems of flesh-and-blood people trying to resolve their disputes in a real trial courtroom. Or, to put it another way, the court's response to the cry of the victim of a machete slash was to offer a box of band-aids of assorted sizes and shapes.

The pragmatic implications of *Nestle* to trial counsel are both plain and grim. To resolve all doubts, careful trial attorneys would appear to have little choice but to load the record with every conceivable objection, motion and exception that comes to mind, even though this kind of ceremonial "record making" serves no rational purpose and constitutes a needless delay and complication in the conduct of trials that section 647 of the Code of Civil Procedure was intended to eradicate.

94. 97 Cal. Rptr. 235, 250 (Cal. App. 1971).

95. Cf. *Thoren v. Johnston & Washer*, 29 Cal. App. 3d 270, 275, 105 Cal. Rptr. 276, 279 (1972), suggests that a mid-trial continuance of this nature should be used only where the responses to discovery are "inadvertently misleading," and is not to be used in cases of wilfully false responses to discovery. See *People v. Volz*, 25 Cal. App. 3d 480, 487, 102 Cal. Rptr. 107, 111 (1972), for an excellent discussion of the disruptive effect on the trial of such an unexpected mid-trial continuance.

In this context, the observation of former Chief Justice Traynor bears repeating:

[T]he doctrine of waiver has been mechanically applied to deprive an appellant of a new trial, as on the question of timely objection. Ordinarily a litigant must alert the trial court to the error and set forth the grounds of his objection so that the court can nullify the error by appropriate action, such as *ordering a new trial* or admonishing the jury to disregard the objectionable matter. If the litigant fulfilled that requirement, it should not be fatal that he failed to use the magic words "I object."⁹⁶

One other aspect of the *Nestle* opinion suggests a pitfall for future victims of appraisal report-stripping. In spite of its ringing endorsement of *Morris*,⁹⁷ the supreme court in *Nestle* declared that "the trial court is in the best position to determine a violation of a pretrial order and whether such violation was prejudicial"⁹⁸ and therefore reasoned that the trial court's possible conclusion that the conduct of the defendant did not violate the pretrial order "compels us to uphold the [trial] court's determination."⁹⁹

This portion of the *Nestle* opinion represents an unfortunate beclouding of the criteria used to judge a party's compliance with the pretrial order. In the very sentence in which the supreme court deferred to the trial court's views as to whether there was a violation of the pretrial order and whether such violation was prejudicial, it *also* noted that "it appears that defendant resorted to unilateral selectivity in the exchange" of appraisal data.¹⁰⁰ And in the preceding sentence the

96. R. TRAYNOR, *THE RIDDLE OF HARMLESS ERROR* 77-78 (1970) (emphasis added and citations omitted). See also *Campain v. Safeway Stores, Inc.*, 29 Cal. App. 3d 362, 366, 104 Cal. Rptr. 752, 754 (1972).

97. 6 Cal. 3d at 929, 496 P.2d at 486, 101 Cal. Rptr. at 574.

98. *Id.* at 930, 496 P.2d at 486, 101 Cal. Rptr. at 574.

99. *Id.* at 930, 496 P.2d at 486, 101 Cal. Rptr. at 575. This conclusion is incompatible with *Morris*. There, the trial judge, in spite of his rhetorical denunciation of the report-stripping as "reprehensible," was of the view that it was not prejudicial, and so stated repeatedly. Memorandum to Counsel and Order Denying Motion for New Trial, *Regents of the Univ. of Cal. v. Morris*, Civil No. 832232 (L.A. Superior Ct., filed June 4, 1965). Nevertheless the court of appeal reversed. It thus becomes difficult to reconcile *Nestle's* emphatic endorsement of *Morris* with its simultaneous suggestion that appellate review is somehow precluded by the trial court's conclusion that the pretrial order was not violated by report-stripping. 6 Cal. 3d at 929, 496 P.2d at 486, 101 Cal. Rptr. at 574. Note also that the *Nestle* court of appeal, in reviewing the record, found no difficulty in concluding that the pretrial order had been violated. 97 Cal. Rptr. at 250 (Cal. App. 1971).

100. 6 Cal. 3d at 930, 496 P.2d at 486, 101 Cal. Rptr. at 574. Recall also that the court of appeal experienced no difficulty in concluding: "The record supports ap-

supreme court stated: "It is undeniable that the court's pretrial order did not authorize defendant to engage in a process of selecting certain items for exchange and withholding others to its advantage."¹⁰¹

One experiences considerable difficulty reconciling the supreme court's recognition that the city undeniably engaged in unauthorized culling of appraisal data, plainly contrary to the text of the pretrial order,¹⁰² with its simultaneous conclusion that the trial judge is in the best position to determine if a violation of the pretrial order occurred. Perhaps the court felt that the owners' refusal to engage in a "direct confrontation" with the city over the report-stripping¹⁰³ was indicative of the owners' desire not to pursue the matter.¹⁰⁴ But even if this were so, it was hardly logical for the court to have declared itself to be bound by the trial court's *possible* conclusion that the pretrial order had not been violated, after having itself concluded that the city had undeniably engaged in unauthorized "unilateral selectivity."¹⁰⁵

pellants' contention that respondent failed to comply with the pre-trial order." See note 77 *supra*, which quotes the court's denunciation of such tactics.

101. 6 Cal. 3d at 930, 496 P.2d at 486, 101 Cal. Rptr. at 574.

102. See 6 Cal. 3d at 928 n.5, 496 P.2d at 485 n.5, 101 Cal. Rptr. at 573 n.5 for the pertinent text of the pretrial order, which unequivocally commands each party to exchange the appraisal reports "upon which they intend to rely at the time of trial."

103. *Id.* at 930, 496 P.2d at 486, 101 Cal. Rptr. at 574.

104. I am at this point candidly "reaching" to provide justification for the court's conclusion, for the record was not all that "cloudy." The city's trial counsel asked the owners' counsel to state for the record whether the owners had had "a full, complete and adequate opportunity" to examine the city's appraiser. Record, vol. 13, at 3918, *Nestle v. City of Santa Monica*, 6 Cal. 3d 920, 496 P.2d 480, 101 Cal. Rptr. 568 (1972). The owners' counsel responded that he could not tell, and that there were other aspects to the denial to the owners of the city's full appraisal report. *Id.* at 3919. The trial court agreed that no such statement was called for and concluded:

[T]his is not a place for counsel to ask you to take a position. The position has been taken, if at all, by the conduct of the trial. . . . So there is no necessity to make such a request. *Id.*

Thus, the trial court made it clear that it did not deem it necessary to have the matter pressed any further. But whatever doubts may have existed should have been dispelled by the fact that the owners moved for a new trial, assigning as one of the grounds the misconduct arising from the report-stripping and the attendant surprise and other discovery irregularities. See Clerk's Transcript at 428-30; note 105 *infra*. Hence, it is difficult to justify the supreme court's conclusion that possibly "appellants were no longer asserting error." 6 Cal. 3d at 930, 496 P.2d at 487, 101 Cal. Rptr. at 575.

105. 6 Cal. 3d at 930, 496 P.2d at 486, 101 Cal. Rptr. at 574. Although not discussed in the supreme court's opinion, there was one other discovery aspect of the *Nestle* trial which made the irregularities in appraisal report exchange particularly prejudicial. Unlike the supreme court, the court of appeal in its vacated opinion noted this aspect of the discovery controversy and deplored what it termed "a disregard of counsel for respondent of the obligations imposed upon them by the requirements of civil discovery." *Nestle v. City of Santa Monica*, 97 Cal. Rptr. 235, 249 (Cal. App. 1971). The court went on to say: "The file is replete with unjustified refusals of re-

The supreme court's disposition of this point might have been more understandable if the court had been trying to save the trial court judgment in order to obviate the need for a new trial. The supreme court has done that in the past.¹⁰⁶ But, since the judgment of the trial court in *Nestle* was reversed on three out of the four issues considered on appeal and the case was remanded for retrial,¹⁰⁷ the rationale of the court's tolerant approach toward tampering with appraisal reports becomes even more difficult to fathom.

Notwithstanding this infusion of doubt as to the scope of appellate review of appraisal report-stripping,¹⁰⁸ *Nestle* does convey the clear impression that the right to reversal for this type of misconduct turns on the victimized party's unmistakable response to the surprising testimony by appropriate motion or unequivocal objection. Can one say, therefore, that a victimized party who *has* complied with *Nestle's* procedural strictures may expect a new trial? Hardly.

*People v. Sunshine Canyon: IT'S NOT HOW YOU PLAY THE
GAME, IT'S HOW BADLY YOU LOSE*

Enter, *People v. Sunshine Canyon, Inc.*,¹⁰⁹ decided by the court of appeal about two months before the supreme court decided *Nestle*. The scenario of *Sunshine Canyon* was basically familiar, but it had a few original twists. The surprise was two-fold. Not only did the condemnor's appraiser admit on cross-examination that portions of his exchanged appraisal report had been removed before exchange, but ad-

spondent to answer many interrogatories and with evasive answers to innumerable others." *Id.*

Thus, the owners in *Nestle* were unjustifiably denied both the fruits of conventional discovery and of appraisal report exchange. This regrettable result is difficult to reconcile with the supreme court's exhortation of "the value of . . . discovery practice to a full exploration of the issues at trial." 6 Cal. 3d at 929, 496 P.2d at 485, 101 Cal. Rptr. at 573, and that "the court must be vigilant in compelling compliance [with discovery orders]." *Id.*

106. See, e.g., *Sabella v. Southern Pac. Co.*, 70 Cal. 2d 311, 321, 449 P.2d 750, 756, 74 Cal. Rptr. 534, 540 (1969), wherein the court, "under the facts and circumstances of this case," affirmed the trial court's judgment notwithstanding what it termed "deplorable conduct of plaintiff's counsel."

107. 6 Cal. 3d at 940, 469 P.2d at 494, 101 Cal. Rptr. at 582.

108. Cf. *Buffington v. Wood*, 351 F.2d 292, 295-96 (3d Cir. 1964), which rejected the notion that the assessment of the prejudicial effect of a party's failure to comply with a pretrial exchange order is somehow the province of trial courts. *Accord*, *Campain v. Safeway Stores, Inc.*, 29 Cal. App. 3d 362, 104 Cal. Rptr. 752 (1972), wherein the court unhesitatingly reversed the judgment based on surprise evidence withheld from pretrial discovery.

109. Civil No. 36371 (Cal. Ct. App., 2d Dist., Mar. 1972).

ditionally his testimony contradicted certain matters contained in the report that *was* exchanged.¹¹⁰ Moreover, after the foregoing came to light, the trial court ordered condemnor's counsel to produce the withheld material. As the colloquies reproduced in the *Sunshine Canyon* opinion make clear,¹¹¹ such orders were complied with by the condemnor in a piecemeal fashion. Counsel for the owner, instead of being able to devote his full attention to cross-examination, was thus compelled to spend much time pursuing bits and pieces of information that should have been exchanged in pretrial, and which the trial court ordered exchanged at the trial.

But, unlike the situation in *Nestle*, the aggrieved owners made a full record, including repeated motions to strike which were denied. In a virtual blow-by-blow replay of *Morris*, the trial court at one point agreed that some of the objectionable testimony should be stricken, and counsel for the owners undertook to assemble in writing the pertinent parts of the record so that the motion to strike could be addressed thereto with precision. Yet, later, when the portions of the record were thus identified, the trial court changed its mind and denied the motion to strike,¹¹² even though it was of the view that the various items of objectionable testimony "have no value to the jury . . ."¹¹³

On review, the court of appeal was outspoken in its professed endorsement of *Swartzman* and *Morris*. After quoting from both with approval, the court concluded:

It is manifest that if an appraiser's testimony at the trial is a substantial departure from the basis of evaluation indicated in his exchanged appraisal report, the situation does not differ in essence from the situation, such as that in [*Morris*], wherein matters of substantial significance contained in the appraiser's report to the condemnor are omitted from the copy of the report delivered to the property owner. In either event the property owner is put at a considerable disadvantage in the cross-examination of the appraiser. The purposes of avoiding surprise and affording an adequate opportunity to prepare for effective cross-examination and rebuttal are not served in either instance.¹¹⁴

Yet, notwithstanding this able and clear-cut reiteration of the reasons underlying the policy of mutuality of discovery, the court refused to

110. *Id.* at 20-21.

111. *Id.* at 12-15.

112. *Id.* at 30; *cf.* *Regents of the Univ. of Cal. v. Morris*, 266 Cal. App. 2d 616, 630, 72 Cal. Rptr. 406, 414 (1968).

113. Civil No. 36371 (Cal. Ct. App., 2d Dist., Mar. 1972), at 27; *cf.* CAL. EVID. CODE § 352 (West 1968).

114. Civil No. 36371 (Cal. Ct. App., 2d Dist., Mar. 1972), at 21-22.

reverse. The reason? No showing of prejudice satisfactory to the court.¹¹⁵ The court based its conclusion on the fact that, even though the condemnor's appraisers testified to an absence of severance damages, the jury returned a verdict which included severance damages. Therefore, reasoned the court, the condemnor's tampering with the exchanged appraisal data did not "destroy the credibility" of the owner's appraiser.¹¹⁶ Needless to say, the court thus applied a criterion of prejudice which is extremely difficult to meet, and which is contrary to the criterion previously established by the California Supreme Court.¹¹⁷ Judgment was affirmed on this point,¹¹⁸ and the supreme

115. *Id.* at 22. Article VI, section 13 of the California Constitution (formerly article VI, section 4½) incorporates the so-called harmless error doctrine whereby errors of "misdirection of jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure" are not deemed adequate grounds for reversal unless they result in a "miscarriage of justice." It is certainly arguable that misconduct of counsel is not encompassed by any of the matters enumerated, which are plainly procedural and evidentiary in nature. In *Seboldt v. Pennsylvania R.R.*, 290 F.2d 296 (3d Cir. 1961), the court held that misconduct in the form of counsel's failure to obey a pretrial order requiring pretrial disclosure of evidence, followed by surprise use of that evidence at trial, was not within purview of the harmless error doctrine. The court left little doubt that it viewed this course of action as impermissible misconduct. *Id.* at 300. In California, too, the courts in some cases have refused to apply the curative provisions of article VI, section 13 to acts of intentional misconduct. *Gee v. Fong Poy*, 88 Cal. App. 627, 264 P. 564 (1928); *Love v. Wolfe*, 226 Cal. App. 2d 378, 394, 88 Cal. Rptr. 183, 192 (1964), (wherein the court, relying on *Seboldt*, indignantly pointed out that the party benefiting from misconduct of his counsel is "not entitled to the benefit of calculation, which can be little better than speculation, as to the extent of the wrong inflicted upon his opponent."); see *Minneapolis, St. Paul & S.S. Marie Ry. v. Moquin*, 283 U.S. 520, 521-52 (1931). Nonetheless, article VI, section 13 has been applied to misconduct of counsel in eminent domain trials. *People v. Graziadio*, 231 Cal. App. 2d 525, 534, 42 Cal. Rptr. 29, 34 (1964).

116. *People v. Sunshine Canyon, Inc.*, Civil No. 36371 (Cal. Ct. App., 2d Dist., Mar. 1972), at 25. The court's limited view of the prejudice resulting from such tampering ignores the surprise factor, discussed in the text accompanying notes 60-63 and 90-95 *supra*.

117. In *Garden Grove School Dist. v. Hendler*, 63 Cal. 2d 141, 144, 403 P.2d 721, 723, 45 Cal. Rptr. 313, 315 (1965), the court stated the controlling criterion of prejudice in eminent domain cases:

The question is not whether the award is a reasonable one, but whether it is reasonable to conclude that a verdict more favorable to defendants would have been reached but for the error. (Cal. Const., art. VI, § 4½). The *Hendler* standard is manifestly more reasonable and, being a decision of the supreme court, must be deemed controlling over the *Sunshine Canyon* criterion. See *Auto Equity Sales, Inc. v. Superior Court*, 57 Cal. 2d 450, 455, 369 P.2d 937, 939, 20 Cal Rptr. 321, 323 (1962).

118. It is noteworthy that *Sunshine Canyon* reversed the trial court on another point, never dealt with in a published opinion. Under section 1255(b) of the Code of Civil Procedure, interest purportedly stops accruing when the award is deposited into court.

court denied hearing.¹¹⁹

County of Los Angeles v. Kling: LET'S NOT DO IT
AND SAY WE DID

Whether one agrees or disagrees with applying the doctrine of harmless error to misconduct-ridden eminent domain trials,¹²⁰ the *coup de grace* was apparently delivered to the concept of mutuality in *County of Los Angeles v. Kling*.¹²¹ In *Kling* the owner failed to lodge with the court her appraisal report, as required by the first pretrial conference order. There is no indication in the opinion that this was intentional misconduct. Instead, it appears to have been a failure in the performance of Mrs. Kling's trial counsel. The pretrial judge invoked the sanction language of the first pretrial conference order, and the final pretrial order forbade Mrs. Kling from offering any valuation testimony at the trial, whether the testimony related to the property as a whole or to her tenants' leasehold interests. Pursuant to that order, the trial judge sustained an objection to the introduction of any valuation evidence by Mrs. Kling and directed a verdict in favor of the condemnor.¹²² This was followed by similar rulings in favor of Mrs. Kling's tenants in the proceeding to apportion the award among the owners and the

But an apportionment proceeding under section 1246.1 of the Code may thereafter consume additional time during which time the award is not available to the owners. *Sunshine Canyon* held that, under such circumstances, interest continues to accrue on the deposited award until such time as the apportionment is concluded and the award may be withdrawn by the parties entitled thereto. Civil No. 36371 (Cal. Ct. App., 2d Dist., Mar. 1972), at 21-22.

119. What significance, if any, is to be attached to the supreme court's denial of hearing is at best unclear. Most probably, no significance at all is evidenced thereby. See Kanner, *It's a Busy Court: The Effect of Denial of Hearing by the Supreme Court on Court of Appeal Decisions*, 47 CAL. ST. B.J. 188 (1972). For a fuller treatment of this topic, see Gustafson, *Some Observations About California Courts of Appeal*, 19 U.C.L.A.L. REV. 167, 177-83 (1972).

120. See notes 115-17 *supra*.

121. 22 Cal. App. 3d 916, 99 Cal. Rptr. 642 (1972).

122. *Id.* at 922, 99 Cal. Rptr. at 646. Notwithstanding *Kling*, there is persuasive authority that a directed verdict may be improper in condemnation cases. In *Hemmerling v. Tomlev, Inc.*, 67 Cal. 2d 572, 577, 432 P.2d 697, 699-700, 63 Cal. Rptr. 1, 3-4 (1967), the supreme court held that the trier of fact is not bound by uncontroverted evidence and may return a verdict of value differing therefrom. *Accord*, *Reed Orchard Co. v. Superior Court*, 19 Cal. App. 648, 662, 128 P. 9, 16 (1912), holding on constitutional grounds that, even if the owner were in default, this would not "affect the duty of the jury to determine the value of the land which was taken . . ." It necessarily follows that, if the trier of fact is not bound to accept an uncontroverted opinion of value, it cannot logically be compelled to do so by being directed to return a verdict in such amount.

tenants.¹²³

Upon Mrs. Kling's appeal the reviewing court flatly ruled that precluding Mrs. Kling from offering any testimony was error.¹²⁴ This error was held to be non-prejudicial as to the evidence of the property's entire value because the evidence Mrs. Kling sought to give at trial was inadmissible for independent reasons. However, the exclusion of valuation evidence regarding the leasehold interests was declared to be prejudicial error.¹²⁵ The court's terse refusal to uphold implementation of the sanctions contained in the first pretrial conference order has greatly weakened the conceptual basis for insisting on mutuality of discovery in eminent domain proceedings.

The most careful scrutiny of the *Kling* opinion leaves one at a loss as to the reasons for the court's conclusion.¹²⁶ One is tempted to surmise that the court felt that the true responsibility for Mrs. Kling's

123. The California practice under section 1246.1 of the Code of Civil Procedure is that the jury first returns a lump-sum verdict for the entire property being taken, and then, in a second-phase proceeding, that sum is divided among owners of the various interests in that property. See *Redevelopment Agency v. Penzner*, 8 Cal. App. 3d 417, 87 Cal. Rptr. 183 (1970). See also *Kanner, And Now, For a Word from the Sponsor: People v. Lynbar, Inc., Revisited*, 5 U.S.F.L. Rev. 39, 42-45 (1970).

124. 22 Cal. App. 3d at 922, 99 Cal. Rptr. at 646. Such "preclusion" orders have been the subject of a number of decisions in the federal courts. The prevailing view appears to be that, because such orders have a drastic impact on the parties' right to a day in court, they are improper unless the trial court first exhausts other remedies, such as requiring the recalcitrant party to pay the costs of his adversary (*Matheny v. Porter*, 158 F.2d 478, 480 (2d Cir. 1946); see *Texaco, Inc. v. Superior Court*, 32 Cal. App. 3d 609, 612, 108 Cal. Rptr. 375, 377 (1973)) or conducting a "direct conference with counsel" aimed at producing a satisfactory pretrial order (*Padovani v. Bruchhausen*, 293 F.2d 546, 550 (2d Cir. 1961)). The controlling criterion is that the power to issue a preclusion order "should be exercised only to the extent necessary to achieve the desired purpose—that is, an entirely just disposition of the case in a speedy and efficient manner." *Syracuse Broadcasting Corp. v. Newhouse*, 271 F.2d 910, 915 (2d Cir. 1959).

125. 22 Cal. App. 3d at 923, 99 Cal. Rptr. at 646-47.

126. The closest the court came to offering a reason is when it said: "[I]n this instance we do not believe prejudice would have resulted from an amendment to the pretrial order which would have allowed the owner to give her opinion of value." *Id.* at 922, 99 Cal. Rptr. at 646. Thereafter, the court noted that the terms of the pretrial order permitted the use of unexchanged evidence "if a party showed 'good cause to the court.'" *Id.* at 923, 99 Cal. Rptr. at 646. What then was the "good cause" that should have resulted in the amendment to the pretrial order? *Cf.* *People v. Douglas*, discussed in note 59 *supra*. Moreover, the opinion concludes that the trial court "should have exercised its discretion to permit Mrs. Kling to testify to the value of her property. . . ." 22 Cal. App. 3d at 923, 99 Cal. Rptr. at 646. But in light of the familiar rule that the exercise of trial court discretion will be deemed error only if the trial court abused that discretion, what were the facts in *Kling* that constituted an abuse of discretion? Once again, the opinion provides no concrete answer.

lacunae in complying with the first pretrial order lay with her trial counsel whose performance appears to have been less than exemplary. But such a surmise is weakened by the court's explicit holding that it would not afford Mrs. Kling a new trial due to ineffective assistance of counsel, a ground for reversal primarily encountered in criminal cases.¹²⁷ It is doubtful, therefore, that the ineffective counsel's failure to arrange for timely lodging of an appraisal report with the trial court (as required in the pretrial order) was the rationale used by the court of appeal to transform an otherwise proper trial court ruling into "error."¹²⁸

127. This holding in *Kling*, and the court's assertion that to afford a condemnee the due process right to effective counsel would require an "expansion" of criminal law, is bitter irony. The court apparently overlooked the fact that the right to counsel afforded to defendants in criminal prosecutions is an outgrowth or "expansion" of eminent domain law. The familiar selective incorporation doctrine (whereby selected portions of the Bill of Rights are deemed incorporated in the Due Process Clause of the Fourteenth Amendment and are thereby made binding on the states) had its origin in the construction of the Just Compensation Clause of the Fifth Amendment in *Chicago B. & Q.R.R. v. Chicago*, 166 U.S. 226 (1897). It was on the authority of *Chicago B. & Q.R.R.* that the Supreme Court observed in *Twining v. New Jersey*, 211 U.S. 78, 99 (1908), that:

[I]t is possible that some of the personal rights safeguarded by the first eight Amendments against national action may also be safeguarded against state action, because a denial of them would be a denial of the due process of law.

In the words of Justice Douglas:

The process of the "selective incorporation" of various provisions of the Bill of Rights into the Fourteenth Amendment, although often provoking lively disagreement at large as well as among the members of this Court, has been a steady one. It started in 1897 with *Chicago, B. & Q.R. Co. v. Chicago* . . . in which the Court held that the Fourteenth Amendment precluded a State from taking private property for public use without payment of just compensation, as provided in the Fifth Amendment. *Walz v. Tax Comm'n*, 397 U.S. 664, 701-02 (1970) (dissenting opinion).

Thus, in *Gideon v. Wainwright*, 372 U.S. 335 (1963), when the United States Supreme Court needed a doctrinal basis for its aborning rule of a federal constitutional right to counsel in state criminal proceedings, it turned to the incorporation doctrine and relied in part on *Chicago B. & Q. R.R.* *Id.* at 341-42. See also *Duncan v. Louisiana*, 391 U.S. 145, 148 (1968); *Malloy v. Hogan*, 378 U.S. 1, 4-5 (1964). And in *Camara v. Municipal Court*, 387 U.S. 523, 530 (1967), the Court noted that "[i]t is surely anomalous to say that the individual and his private property are fully protected [by the Constitution] only when the individual is suspected of criminal behavior." Still more recently, in *Lynch v. Household Fin. Corp.*, 405 U.S. 538 (1972), the Court addressed itself incisively to the spurious nature of the asserted distinction between "personal" rights and "property" rights, in a manner which bears repeating:

[T]he dichotomy between personal liberties and property rights is a false one. *Property does not have rights. People have rights.* The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a "personal" right, whether the "property" in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. *Id.* at 552 (emphasis added).

128. On the other hand, it is possible that the court considered the ineffectiveness of counsel in reaching its decision that the trial court should have exercised its discretion

Another possible explanation is that perhaps the court felt that the criteria for admissibility of testimony applied to a lay owner testifying on his own behalf should be different than those applied to an expert appraiser. Unfortunately, this surmise is dashed by the *Kling* holding that the error arising out of exclusion of Mrs. Kling's testimony as to the value of the property as a whole was not prejudicial because she sought to base her opinion on impermissible valuation matters.¹²⁹ In other words, the court apparently applied the same criteria for admissibility of opinion of value to the lay owner as would have been applied to an expert appraiser.

In summary, *Kling* unmistakably branded as error the exclusion of evidence pursuant to the sanction provisions of a first pretrial order without providing any hint as to *why* it was error. Does *Kling* mean that the exclusionary sanction is unenforceable? Is *Swartzman's* denunciation of "soft and wishy-washy" judicial attitude toward "recalcitrant litigants reluctant to comply with [discovery] orders" now *passee*?¹³⁰ Can a party's counsel simply ignore the judicial or statutory command to engage in mutual discovery and then put on his case anyway, to the surprise of his opponent who was in compliance with the law's requirements throughout?

to permit Mrs. Kling to testify as to the value of the property. The propriety of an exercise of discretion involves a consideration of all factors involved. While the court refused to extend the ineffectiveness of counsel doctrine to civil cases, so that this alone would be grounds for reversal, it is arguable that counsel's failure to file the appraisal report was one factor leading to the court's finding of reversible error in this case. See *Padovani v. Bruchhausen*, 293 F.2d 546, 548 (2d Cir. 1946), wherein the court, without reaching constitutional considerations, explained that one reason for its granting a writ of mandate vacating the preclusion order was "the drastic nature of the penalty inflicted upon a litigant for what at most is an error or dereliction of his lawyer." See also *Maresco v. Lambert*, 2 F.R.D. 163 (E.D.N.Y. 1941), stating that "the client should not suffer, in this instance, because of the lawyer's fault" (notwithstanding the court's characterization of reliance on the lawyer's poor performance as a lame excuse). Unfortunately, one is left to speculate on such matters as the *Kling* opinion gives no indication whether the court actually reasoned in this manner.

129. 22 Cal. App. 3d at 923, 99 Cal. Rptr. at 646.

130. *Swartzman v. Superior Court*, 231 Cal. App. 2d at 204, 41 Cal. Rptr. at 727. This is a question of considerable significance when it is recalled that *Swartzman* and *Kling* were decided by the same court, with the same justice authoring both opinions. Cf. *Campain v. Safeway Stores, Inc.*, 29 Cal. App. 3d 362, 104 Cal. Rptr. 752 (1972), a non-condemnation case in which the same court, speaking through the same justice, reversed the trial court's judgment upon finding that a party's responses to discovery, declaring that no recovery would be sought for loss of earning capacity, followed by a surprise claim of such damages at trial, constituted prejudicial error. See *Texaco, Inc. v. Superior Court*, 32 Cal. App. 3d 609, 612, 108 Cal. Rptr. 375, 377 (1973).

CONCLUSION

The conclusion which emerges from the cases is that the liberal judicial gloss put on the principle of mutuality in *Swartzman* and *Morris* is not to be taken as a black-letter rule of law, but rather as a somewhat glittering generality which as a matter of practice may not be available to aggrieved litigants.

Nestle made it clear that the benefit of strict enforcement of mutuality of discovery is available only if some sort of procedural ceremony is performed, including explicitly a motion to strike. *Sunshine Canyon*, however, demonstrates that actual availability of that rule is further restricted. *Sunshine Canyon* makes it painfully clear that, even where motions to strike are repeatedly made, they may avail the aggrieved party nothing. The initiative and the pragmatic tactical benefits go to the unscrupulous party who chooses to tamper with the integrity of his appraisal report, while the burdens of being subjected to surprise and misconduct fall on the victimized party. The latter's "remedy" (if that is the word) is to run an as-of-yet-undefined procedural obstacle course, at the end of which it may well turn out that the run was for naught.

Thus, the posture of eminent domain discovery law is most undesirable. The party who wants to conscientiously prepare his case may get the worst of both worlds. On the one hand, when he tries to conduct conventional discovery, he may be met with *Swartzman's* rule limiting discovery to reciprocal disclosure of appraisal data. But, on the other hand, if he complies with *Swartzman* and goes to trial on the basis of his opponent's exchanged report, or on the basis of data exchanged pursuant to section 1272.01 of the Code of Civil Procedure, he may find himself to have been tricked but without an effective remedy. Additionally, if he wants to assert the benefit of *Swartzman* for himself, his argument may be brushed aside as in *People v. Superior Court*. And finally, as if that were not enough, his opponent may simply fail to make *any* exchange and nevertheless, if *Kling* means what it plainly appears to say, get to put on his valuation case anyway.

Further judicial consideration of the subject of mutuality of discovery in expropriation cases is plainly called for. If *Kling* and *Sunshine Canyon* represent the last word, then perhaps the time has come to reconsider the mutuality requirement of sections 1272.01 *et seq.* and the Los Angeles "policy memorandum." Surely, if the parties in expropriation cases are to be deprived of effective use of the discovery act, which is available to all other litigants, then the substitute discov-

ery procedure imposed on them in the name of "mutuality" must be strictly enforced. Yet, the cold fact is, that notwithstanding the lip service paid to that proposition by the cases, the policy of mutuality is not being "strictly" enforced. Indeed, in light of *Kling* and *Sunshine Canyon*, it is a valid inquiry as to whether mutuality of discovery in eminent domain litigation is being enforced at all.

Even more disturbing is the sad lesson which emerges from the cases that the party who engages in misconduct is favored. The upshot of *Nestle* and *Sunshine Canyon* is that the party who tampers with the integrity of his appraisal report prior to its exchange is rewarded for his misconduct with all the procedural and tactical advantages. He can pull off his scheme and then sit back with satisfaction. On him rests no burden to justify his conduct or to perform any curative acts. Nor need he defend or justify his misconduct on appeal. It is his victim who, in addition to the normal onerous burdens of lengthy and substantial litigation, is stuck with the ill-defined obligation to execute some sort of motion or other procedural ceremony which is pragmatically useless and which may avail him nothing—neither by way of relief in the trial court nor by way of remand after a long and costly appeal. And, even if he should succeed in being awarded a new trial, the property will be valued on retrial at the same old date of value as in the first trial.¹³¹ Thus, if successful on appeal, the owner suffers further delay in receiving his award while the condemnor's sole detriment consists of having to comply with the constitution and conduct a fair trial. In this context, the cynic may well be justified in asserting that, while virtue is its own reward, misconduct pays handsome dividends.

The courts have not paid sufficient attention to the more fundamental aspects of eminent domain litigation. Both parties in a condemnation action are theoretically without fault. The owner is being called upon by the condemnor to surrender his property for the public good (which forms the rationale for the entire proceeding) without any suggestion of fault on his part.¹³²

131. See *People v. Murata*, 55 Cal. 2d 1, 357 P.2d 833, 9 Cal. Rptr. 601 (1960).

132. As one commentator put it: "The owner, in effect, is in the position of an innocent party dragged into court without fault on his part, bearing the burden of proving the government's evaluation of full compensation is incorrect." Comment, *Civil Procedure: Discovery in Eminent Domain Proceedings As Applied to the Opinions, Conclusions and Reports of Expert Appraisers*. 22 U. FLA. L. REV. 470, 475 (1970). See also Note, *Pretrial Discovery in Condemnation Proceedings: An Evaluation*, 42 Sr. JOHN'S L. REV. 52, 72 (1967).

Even when being most generous, the courts deny the owner compensation for a host of factors which may be seriously damaging or even economically destructive.¹³³ The owner is required to suffer uncompensated losses which in non-condemnation litigation would be readily compensable.¹³⁴

It therefore follows as a basic ethical consideration that, within that area of eminent domain in which the owner's loss *is* compensable, he should be afforded a maximally fair opportunity to litigate the quantum of his just compensation, in keeping with the United States Supreme Court's admonition that the just compensation command of the Fifth Amendment evokes ideas of "fairness and equity."¹³⁵ These considerations are all the more important when juxtaposed with the punctiliously fair treatment afforded in the courts to criminal defendants, including those indisputably guilty of the most heinously anti-social conduct. Surely, a faultless citizen who finds himself in a legal battle against his government, which now bears the label of "condemnor" rather than "prosecutor," should be entitled to similar considerations of fairness.¹³⁶

133. See, e.g., *People v. Ayon*, 54 Cal. 2d 217, 226, 352 P.2d 519, 524, 5 Cal. Rptr. 151, 156 (1960), wherein the court points out that even if an owner's business were to be entirely destroyed he would still not be entitled to compensation. This rule has been the subject of much well-founded criticism. See Aloï and Goldberg, *A Reexamination of Value, Goodwill and Business Losses in Eminent Domain*, 53 CORNELL L. REV. 604 (1968); Kanner, *When is "Property" Not "Property Itself": A Critical Examination of the Bases of Denial of Compensation for Loss of Goodwill in Eminent Domain*, 6 CALIF. W.L. REV. 57 (1969); Note, *Just Compensation for the Small Businessman*, 2 COLUM. J. LAW & SOC. PROB. 144 (1966); Note, *The Unsoundness of California's Non-compensability Rule As Applied to Business Losses in Condemnation Cases*, 20 HAST. L.J. 675 (1969); Comment, *Non-Compensable Business Losses in Eminent Domain Proceedings: A Time for Re-Evaluation*, 46 TEMP. L.Q. 72 (1972); Comment, *Eminent Domain Valuation in an Age of Redevelopment: Incidental Losses*, 67 YALE L.J. 61 (1967).

134. See *Crittenden v. Superior Court*, 61 Cal. 2d 565, 393 P.2d 692, 39 Cal. Rptr. 380 (1964). For example, moving expenses are compensable in litigation against private parties (*Klein v. Lewis*, 41 Cal. App. 463, 467, 182 P. 789, 790 (1919)), but not against a condemnor (*Town of Los Gatos v. Sund*, 234 Cal. App. 2d 24, 25, 44 Cal. Rptr. 181, 182 (1965)). The same is true of loss of business goodwill and profits. Compare *Smith v. Bull*, 50 Cal. 2d 294, 302-03, 325 P.2d 463, 469 (1958), with *People v. Ayon*, 54 Cal. 2d 217, 226, 352 P.2d 519, 524, 5 Cal. Rptr. 151, 156 (1960).

135. *United States v. Virginia Power & Elec. Co.*, 365 U.S. 624, 631 (1961); *United States v. Commodities Trading Corp.*, 339 U.S. 121, 124 (1950).

136. I am not unmindful of the profound policy which compels punctiliously fair treatment of citizens charged with crimes, as a fundamental bulwark of a free society. But some of the very factors which operate in the area of constitutional rights in the criminal forum are equally applicable to civil litigation against the government (see note 4 *supra*), which is why the Due Process Clause of the Fourteenth Amendment pro-

The trenchant observations of the court in *People v. Volz*¹³⁷ bear emphatic repetition as a closing theme of this article:

The question is not one of burden of proof at all, but of adherence to fair and orderly procedures. Two procedural sources demanded early disclosure of the state's intentions. One source was adherence to the spirit and purpose of pretrial, that is, "to find out what the lawsuit is about." The 1967 change to optional pretrial should heighten judicial alertness to prevent its exploitation as a trap. The state's choice of tactics effectively frustrated the pretrial procedure. Its pretrial statement was highly selective, omitting any mention of the earlier Riverside Boulevard easement. The pretrial conference order called for an exchange of maps; the state withheld one which, according to its own argument, had great financial significance.¹³⁸

The court's earlier value judgment of the state's tactics likewise bears repeating:

While the landowners were investing in revised appraisals, counsel for the state held the 1910 deeds in readiness for the coming jury trial. Destruction of the landowners' valuation evidence and loss of the defendants' investment in appraisals were the goals of the state's tactic. Landowners faced with condemnation are often in an unenviable position, forced to gamble trial preparation expenses in defense of their own interests. Inflation of the financial gamble through state-engineered surprise is unconscionable. It offends judicial notions of fair play. To put the matter plainly, the state sought to sandbag the opposition.¹³⁹

In sum, what is at stake is the condemnee's right to fair trial—the crucial ingredient of due process of law. And that fundamental proposition has been largely neglected by the courts.

tects "life, liberty, or property." See *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972).

137. 25 Cal. App. 3d 480, 102 Cal. Rptr. 107 (1972). In *Volz* the trial court ordered at the pretrial conference that the parties exchange maps depicting their respective contentions as to correct street location, which was of critical importance to the value of the subject property. *Id.* at 483-84, 102 Cal. Rptr. at 109. The maps were exchanged and then, after the owner had prepared his appraisal on the basis of the state's exchanged map and had put on his case-in-chief, the state called a witness who sprung as a surprise a map which the state had withheld from the exchange in violation of the trial court's order. *Id.* at 486, 102 Cal. Rptr. at 109-10.

After the trial court sustained the owner's objection to the surprise evidence, the state had the temerity to appeal. However, the judgment of the trial court was affirmed, albeit only after the court softened the blow to the condemnor's pride by inquiring as to whether exclusion of the surprise testimony was too severe a sanction. *Cf. Thoren v. Johnston & Washer*, 29 Cal. App. 3d 270, 105 Cal. Rptr. 276 (1972).

138. 25 Cal. App. 3d at 487, 102 Cal. Rptr. at 111 (citations omitted).

139. *Id.* at 486, 102 Cal. Rptr. at 110.

If we are to adhere to the salutary principle that "[a] condemnation trial is a sober inquiry into values, designed to strike a just balance between the economic interests of the public and those of the landowner,"¹⁴⁰ then tampering with the evidence should be viewed as anathema. Instead, the present posture of the law not-so-tacitly encourages the unscrupulous to engage in such tampering.

A simple and effective remedy for the existing unwholesome situation would be for California courts to apply the rule of *Chapman v. California*¹⁴¹ to misconduct in civil cases, including eminent domain cases involving appraisal report-stripping. The *Chapman* rule would be plainly appropriate in such cases, since the victim of the misconduct is being subjected to two threats to his constitutional rights: his right to a fair trial and his right to just compensation. But, whether by applying *Chapman* or otherwise, it is morally incumbent on California courts to adopt rules which refrain from confusing the victim with the wrongdoer¹⁴² and which fairly and rationally allocate the litigational burdens among them. It seems no more than fair to hold that the party who chooses to tamper with the integrity of the evidence should be deemed to undertake thereby the risks of having to bear the burden of justification of his conduct and of not being able to shift such a litigational burden onto his victim.

It is unfortunate that the application of *Chapman* has been confined largely to criminal cases. For law-abiding citizens, the same as criminal defendants, are entitled to the benefit of *their* constitutional guarantees.¹⁴³ As the United States Supreme Court has pointed out:

It is surely anomalous to say that the individual and his private property are fully protected . . . [by the Constitution] . . . only when the individual is suspected of criminal behavior.¹⁴⁴

140. *Sacramento Drainage Dist. ex rel. State Reclamation Board v. Reed*, 215 Cal. App. 2d 60, 29 Cal. Rptr. 847, 853 (1963).

141. 386 U.S. 18 (1967), holding that, where the error complained of is of constitutional dimension, the party benefitting from such error, not its victim, is required to demonstrate freedom from prejudice and must persuade the court that the error was harmless beyond a reasonable doubt. *Id.* at 24.

142. In this context, it seems appropriate to recall that a special obligation to refrain from impropriety rests upon government attorneys. Counsel for the government "may strike hard blows, [but] he is not at liberty to strike foul ones." *Berger v. United States*, 295 U.S. 78, 88 (1934). See also ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANON No. 7, ETHICAL CONSIDERATIONS NOS. 7-14, which specifically impose on government lawyers prosecuting civil actions the "responsibility to seek justice and to develop a full and fair record."

143. Cf. *People v. Elliot*, 54 Cal. 2d 498, 505, 354 P.2d 225, 229, 6 Cal. Rptr. 753, 757 (1960).

144. *Camara v. Municipal Ct.*, 387 U.S. 523, 530 (1967).