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IN THIS ISSUE

The Discovery Process in Highway Land Acquisition, *by Sidney Goldstein, James Rice, and William Lavelle* 21

An Evaluation of Partial Taking of Property for Right-of-Way, *by G. V. Broderick and F. I. Thiel* 38

New Publications 44

TITLE SHEET, VOL. 32

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The Discovery Process in Highway Land Acquisition

BY THE
ECONOMIC RESEARCH DIVISION
BUREAU OF PUBLIC ROADS

Reported[1] by SIDNEY GOLDSTEIN, Chief, Socio-Economic Research Branch, and JAMES RICE and WILLIAM LAVELLE, Research Assistants

Research on the current trend in court decisions regarding the use of the discovery process in condemnation cases (procedures by which one party may obtain information from an adverse party prior to actual trial) was undertaken by the Bureau of Public Roads to provide immediate information to highway lawyers, appraisers, right-of-way personnel, engineers, and others concerned in land acquisition for construction of the National System of Interstate and Defense Highways and other Federal-aid highways. It was believed that the latest information would be helpful to these highway personnel in establishing the legal boundaries for the discovery of appraisers' names, file materials, facts, and opinions. About 125 condemnation cases, as well as the relevant statutes in all States, covering the past 20 years were reviewed and analyzed as the basis for an evaluation of procedural developments in the use of discovery procedures.

A comparison is presented in this article of Federal and State developments since the Federal Rules of Civil Procedure have been effective (1938), and the influence of the Federal rules on State statutes and procedures is discussed. Detailed information is presented on cases and statutes involving discovery of expert fact and opinion, books, documents, and the attorney's work product. The attitude of the courts toward the government as a party is given particular attention.

This research indicated that a tendency exists toward liberalization of the use of discovery procedures in eminent domain proceedings. Development of the discovery doctrine has a long history, but only recently has this doctrine affected right-of-way litigation to any appreciable extent. As other substantive fields of law have adapted to new procedures, a compatibility of discovery procedures and eminent domain law is expected to develop. The authors point out that in those few States where discovery of opinion as well as fact is permitted, the litigants' best defense against inordinate use of the discovery process is well-prepared documents, papers, and other materials. In most jurisdictions however, opinion of appraisers, work papers, etc. are protected as being part of the attorney's work product or are subject to other judicial or legislative protection against disclosure.

Introduction

AN EVALUATION of the fundamental nature of the process of discovery in litigation and its significance in the land acquisition process is presented in this article. This evaluation is expected to provide helpful information to legal counsel and right-of-way personnel in the Bureau of Public Roads, other Federal agencies, and State highway departments on the development of adequate procedures to: (1) counter the inordinate use of discovery rules against State highway departments and the Federal Government in eminent domain cases, and (2) encourage the use of the discovery procedure where it would be relevant to a determination of fair compensation for the property owner.

Of particular significance to agencies concerned with public works programs is land acquisition and their courtroom efforts. About 10 percent of highway land acquisitions culminate in trial. In the normal process of trial, standard rules of evidence apply, but even these evidentiary rules, accepted over the years, have caused the erection of barriers against a complete exchange of information between litigants.

A new area of legal effort has been created by the acceptance of the Federal Rules of Civil Procedure (*1*)[2] and the discovery rules included therein. Discovery is applicable to every substantive field of civil law. Hence eminent domain proceedings are not exempt from the discovery rules. Therefore, these rules have affected the statutory and the case law of eminent domain. In some respects, discovery meets different problems in this field, for in condemnation sovereignty and public interest are involved. Many questions arise: Should the exchange of information be the same in condemnation as in other types of litigation. Are States and the Federal Government reachable by discovery to a greater extent than private citizens. Does the application of discovery rules to the field of eminent domain, and experts such as appraisers, etc., introduce a new dimension to the problem that makes it necessary for public personnel to be more painstakingly file conscious than they otherwise would need to be.

The nature of discovery rules produces considerable concern of both private and public litigants as to the contribution of the process to the fairness of courtroom proceedings. Public officials, at both the Federal and State levels, have been concerned with the possibility that inadequate data will be disclosed and that the secrecy of trial preparation will be disturbed (*2*).

Background

Legal philosophers and practitioners have held different views with respect to the purpose of legal proceedings. Legal practice has been considered by some to be a substitute for trial by battle, a medieval institution from which a more refined adversary procedure has evolved. To others, adversary practice has represented the only way to settle a dispute; that is, with the most efficient counsellor—one who can make the most telling presentation of facts at his command and one who is able to effectively persuade the arbiter, court, or jury.

This attitude toward adversary procedure when related to another of the substantive and philosphical goals of the legal process, to do justice or to pay fair compensation in the field of land acquisition, has caused a gradual reduction in the opposition process. This has been accomplished through attempts at pretrial conferences and discovery procedures, which are judicial processes to reveal pertinent information to opponents before trial, and

[1] Presented at the 43d annual meeting of the Highway Research Board, Washington, D.C., January 1964.

[2] References indicated by italic numbers in parentheses are listed on page 30.

through other legal mechanics. One objective of these mechanics, of course, is to reduce the courtroom drama.

Land acquisition programs

Public improvement agencies are intimately involved in land acquisition. The Federal-Aid Highway Act of 1956, for example, created a tremendous land acquisition program for both the Federal Government and the individual States. It is anticipated that more than 750,000 individual parcels of land will have been acquired by 1972 for the National System of Interstate and Defense Highways at a cost of almost $7 billion. The ABC system of highways will probably affect twice this number of parcels by the same date (3). Other public improvement programs involving urban renewal, housing, reclamation, flood control, etc., also are involved in such proceedings.

Individual government units, at both the local and State levels, and Federal Government units may be engaged in litigation arising from the exercise of their eminent domain powers at any time. Many of these government units are concerned with the applicability of general evidentiary rules to right-of-way acquisition and litigation. Questions regarding discovery of expert witness materials, appraisal records, appraiser names, or evidentiary reports and data have recently arisen in right-of-way litigation because the number of these cases has increased.

Discovery tactics have a long history dating back to the bills of discovery used in equity courts. To ensure fairness in trial, different methods have been built upon the equity experience in Federal and State jurisdictions, involving both pretrial and discovery procedures. Wherever discovery procedures are in use in the United States, they are based upon the early experience with California and New York codes; these codes are the basis for the discovery provisions of the Federal Rules of Civil Procedure. In turn, the reciprocal influence of the Federal rules upon State procedure is apparent today and the tables in appendix III indicate the similarity of these statutory provisions. In general, discovery rules are being interpreted very liberally today, which has consequent implications for public agencies in land acquisition.

To evaluate these discovery implications for eminent domain proceedings, information is presented on such items as: (1) the scope of discovery examination, (2) when and how these examinations may be made, (3) the discoverability of government information, and (4) expert testimony and the lawyers' work product.

The Discovery Process

The nature of discovery

Discovery is a judicial process conducted, prior to an actual trial, according to rules of procedure adopted by the courts or legislature of a particular jurisdiction and overseen by the judge of the court in which the action is pending. The basic purpose of this process is to furnish pertinent information to one adverse party that the other party may have in his possession or control. Modern discovery procedures may be conveniently dated from the inception of the Federal Rules of Civil Procedure in the United States District Courts, which became effective Sept. 16, 1938. The idea of discovery, however, is much older; it originated in the early equity courts as a bill of discovery (*4*), as well as in some of the early code States such as California and New York. The purpose of the bill was to enable the party to prove his own case, not to disprove the case of his adversary (*5*). This same criterion has been set by the courts today.

The Federal rules, for example, provide for discovery and pretrial procedures in rules 16, 26–37, and 45. Appendix I is a compilation of the rules highlighted in this article—rules 16, 26(b), 30(b), 30(d), 31(d), 33, 34, 45(b), 45(d), 71A(a). Appendix III shows that the Federal courts and all 50 States have some provision for discovery procedures, and that a majority of the States has adopted either the Federal rules per se or has very similar statutory provisions for deposition and discovery procedures.

Each of the rules cited is interrelated, and they must be construed together (*6*). This principle is particularly true in those States that have adopted the Federal rules or have substantially the same provisions (*7*). Discovery by written or oral interrogatory, deposition, or production of documents or other tangible things is not limited to the specific provisions of rules 26 to 37, but rather by an understanding of these rules, as well as rules 16, 45(b), and 45(d), as one interrelated process. In many ways pretrial procedures and discovery procedures are synonymous.

Federal rule 16 provides for a pretrial conference to consider: (1) The simplification of issues. (2) The necessity or desirability of amendments to the pleadings. (3) The possibility of obtaining admissions of fact and of documents that will avoid unnecessary proof. (4) The limitation of the number of expert witnesses. (5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury. (6) Such other matters as may aid in the disposition of the action (*8*).

As shown in appendix III, 37 States and the District of Columbia presently have some provision for pretrial conferences. The majority of these State jurisdictions has followed the provisions of Federal rule 16 verbatim. In California, Connecticut, Iowa, Maryland, North Carolina, and New Jersey, the scope of the pretrial conference has been expanded to specifically include matters not included under the Federal rule. The applicable rule in the 1962 Code of Iowa, shown in appendix II, is a good example of such expansion. New York, however, is among those States that make no provision for a pretrial conference (*8*). Nonetheless, pretrial conference exists in New York as a matter of judicial practice.

Pretrial

The purpose of the pretrial conference and procedure has been described in different ways, but the majority of these explanations appears to arise from the six considerations listed in the text of Federal rule 16. All of the States that have a pretrial provision list similar considerations. The proper application of discovery includes the use of rule 16, as well as the deposition and discovery procedure in rules 26–37, coupled with the subpoena power of rule 45.

As land acquisition involves the use of technical terms and expert witnesses, pretrial procedures tend to reduce the amount of trial preparation and court time required (*10*). Thus, discovery can be used in land acquisition cases (1) to simplify the issues before the actual trial, (2) to arrive early at a fair market value through the use of appraisal reports and taking of depositions of appraisers and other qualified expert witnesses, and (3) to satisfy the constitutional requirement of just compensation. The purpose of pretrial preparation is not to harass the adverse party or merely to uncover the mistakes or weaknesses of the opponent but to balance the interests of both parties so that the proceedings may be expedited (*11*). By pretrial conferences the possibility of settlement is greatly increased, unnecessary expense to the parties may be eliminated, and fair treatment may be given to both the landowner and the condemnor. Thus, the problem of crowded court dockets might be alleviated. Concerning the advantages of pretrial, it has been said that: "Pretrial is now generally considered one of the accepted means of obtaining the fullest possible knowledge of the issues and facts before trial. It and the whole system of discovery help us find the truth, and that is what a lawsuit is intended to do under our system of justice under law" (*12*).

Consideration of the implications of pretrial and discovery procedure, particularly in land acquisition proceedings, has been discussed recently in articles and speeches; some of them are: a paper by Micah H. Naftalin concerning the development of pretrial practice in State condemnation cases, presented at the 40th annual meeting of the Highway Research Board (*13*); J. D. Buscher, special assistant attorney general in Maryland, spoke of the favorable experience of the Maryland State Roads Commission with discovery practice at the 1962 Workshop on Highway Law (*14*) and John P. Holloway, assistant attorney general, Colorado Department of Highways, discussed pretrial discovery at the annual Western Association of State Highway Officials (WASHO) Conference in 1962 (*15*). In addition, the California Law Revision Commission has instituted a recent study concerning Pretrial Conferences and Discovery in Eminent Domain Proceedings.

Although the Federal rules on discovery have been used in land condemnation litigation, albeit with some confusion, since the inception, they were made applicable to land condemnation in 1951 by direct provision in Federal rule 71A, Condemnation of Property, which reads: "(a) Applicability of Other Rules. The Rules of Civil Procedure for the United States District Courts govern the procedure for the condemnation of real and person

property under the power of eminent domain, except as otherwise provided in this rule." Prior to the adoption of this provision, procedure in Federal courts suffered from a lack of uniformity in the applicability of Federal statutes to condemnation procedures. Rule 71A(a) represents an effort to provide uniformity (*16*). Accordingly, it has been held that discovery is available in condemnation proceedings (*17*). The feeling was recently expressed that all opinions in condemnation cases prior to the adoption of rule 71A(a) were mere dicta (*18*).

Alaska, California, Delaware, Kentucky, Maryland, and Missouri have adopted provisions similar to the Federal rule (*19*). In relating discovery practice to condemnation cases, Illinois passed the Civil Practice Act of 1956, which made the rules of discovery, including sanctions, appropriate in condemnation cases (*20*). Other States, which have recently adopted the Federal rules or a similar version but have not adopted rule 71A, have recognized and reserved it for future legislation. This recognition together with recent court interpretations favoring liberal construction (*21*) of these States' rules, following the spirit of the Federal rules, indicates that the use of discovery in condemnation cases is a new and growing combination of procedural and substantive law.

Scope

The specification of the unity of pretrial and discovery practice and the reference in the Federal rules and elsewhere to the use of this practice in condemnation indicates a public policy in favor of discovery in general. But such a policy has limitations; therefore, this article indicates what is discoverable.

Very often the condemnor, a public agency, is concerned with the confidentiality of its internal materials, which may have usefulness in a particular trial. A State highway department, for example, in preparation for condemnation proceedings, may have gathered appraisal reports prepared by an expert in anticipation of litigating the issue of just compensation. Similarly, the opinion of the appraiser, the factual material gathered as to the value of the land taken, as well as the highest and best use of the remainder parcel, are items that might be best to hold until trial. Also, matter may be in the agency files that is absolutely senseless and incompetent and being poorly drawn should not be exposed to public scrutiny. Furthermore, the condemnee may wish to obtain such information because he believes that it would make the best case for him. In fact, the success or failure of a case may sometimes hinge on the pretrial discovery stage despite the courtroom expertness of the attorneys.

The limits of examination by deposition and discovery for cases pending in the United States District Courts, are set forth in rule 26(b) of the Federal rules. Although this rule reads as though it defines the scope of depositions, it also sets forth the limits for the entire discovery procedure. Rule 26(b) provides that: "Unless otherwise ordered by the court as provided by rule 30 (b) or (d), the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts. It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence."

As shown in appendix III, several States have adopted rule 26(b) without any substantial additions or deletions. Illinois, South Dakota, and Tennessee have adopted it with the exception of the last sentence. Idaho, Maryland, Minnesota, New Jersey, Washington, and West Virginia have added to their comparable rule 26(b) the proposed amendment to the Federal rules. Also, California and Maryland have made other additions to their version of rule 26(b).

Under rule 26(b), the examination is not limited to a party to the action, but any person having knowledge of relevant, unprivileged facts can be examined. But under rule 33, Interrogatories to Parties, and rule 34, Discovery and Production of Documents and Things for Inspection, Copying, or Photographing, only the adverse party may properly be examined. The scope of examination permitted under rule 26(b) is not extended into rules 33 and 34, and the limits of the examination as to persons are prescribed by each individual rule.

Discovery and Land Acquisition

One of the most troublesome areas of the discovery rules with regard to land acquisition involves the determination of the proper scope of examination as to subject matter. Any matter, not privileged, which is relevant to the subject matter of the pending action is properly discoverable according to rule 26(b). The courts, however, have been far from unanimous in their delineations of the scope of discovery, especially in the interpretation of the meaning of any matter.

Fact and opinion

The most significant point, especially for appraisal records in land acquisition cases, is the distinction between fact and opinion. Although no such distinction is made in the rules, the courts have interpreted rule 26(b) as if there were. The consequences of these holdings are far reaching and will be given detailed consideration later in the article.

Before a court makes a decision as to whether the material sought constitutes fact or opinion, the extent to which one party must divulge the identity and location of persons having knowledge of relevant facts is determined. Discovery of such persons is specifically provided for under rule 26(b) (*22*). The court must decide whether the person taking the deposition is actually seeking the identity of persons having knowledge of relevant facts or whether he is attempting to obtain a list of the witnesses that his opponent intends to call at the trial. Apparently, it is permissible under rule 26(b) to inquire into the identity and location of persons having knowledge of relevant facts for the purpose of discovery (*23*). This provision must not be confused with an attempt to obtain a list of witnesses whom the adverse party intends to call at the trial, however. Discovery has sometimes been denied where the object was to obtain a list of witnesses to be called (*24*).

A New York court has ruled that a showing of some special circumstances will justify nonadherence to the general rule prohibiting discovery of witnesses (*25*). But disclosure of witnesses has been ordered by some courts (*26*). A New Hampshire court, for example, in a personal injury action, ordered disclosure of a list of names and addresses of witnesses; the court ruled that those witnesses were not the exclusive property of either party and that, in the interest of justice, their testimony should be introduced in the action (*27*).

Protection of Expert Witness

Whether the names of witnesses must be disclosed has an important bearing on land acquisition cases, because many of the witnesses to be called will be appraisers and other persons having expert knowledge of the subject matter. Consequently, those persons having knowledge of relevant facts will often coincide with the witnesses to be called at the trial. To compel disclosure in accordance with rule 26(b) would often violate the provision denying discovery of the names of potential witnesses. Once the appraiser's identity had been disclosed, he would be subject to the full range of the discovery procedure as to his knowledge of the property. The courts have generally held that the condemnor could refuse to answer interrogatories seeking the names, addresses, and positions of persons who had aided in compiling the appraisal data (*28*).

New Jersey, recognizing this problem and attempting to protect the expert witness, amended their rule 26(b) in 1955. Their rule 4:16–2, states: "A party may require any other party to disclose the names and addresses of proposed expert witnesses; except as provided in R.R. 4:25–2, such disclosure shall be solely for the purpose of enabling the party to investigate the qualifications of such witnesses in advance of trial."

In 1960 a New Jersey court handed down an interpretation of its rule. In a personal injury action, the plaintiff was required to disclose the name and address of his expert witness, but the defendant could not take the deposition of the expert as to facts within his knowledge on the theory that the expert was a person having knowledge of relevant facts (*29*). The court decided that the language of the rule was clear and interpreted the word "solely" in a literal fashion. By

analogy, this decision indicates a policy of protecting the work of an appraiser from discovery, even though the appraiser's name must be disclosed.

Some discrepancy also exists as to whether information that is known by or is equally available to the interrogator is discoverable. One position is that the interrogator is not limited to facts exclusively or peculiarly within the knowledge of the adverse party, even when the interrogator has at his disposal an adequate or even better source of information (*30*). As recently as 1959, however, in a condemnation proceeding a California court held that, although there was no valid objection to the discovery of relevant, unprivileged factual data, discovery would be denied as the data was readily available to the defendant by other means (*31*). But some States have adopted by statute a more liberal approach and try to remove some of the uncertainty surrounding the proper scope of examination. Thus, New Jersey and Idaho have added the following sentence to their rules governing the scope of examination: "Nor is it ground for objection that the examining party has knowledge of the matters as to which testimony is sought." (*32*)

In compelling discovery of matters already within the knowledge of the interrogator, the rationale sometimes used by the courts is that a party is entitled to elicit such information for the purposes of cross-examination or for the purpose of impeaching the creditability of the witness at the trial. The converse reasoning is that discovery constitutes an invasion of the work product of an expert or attorney or that it would give to one party a free ride and promote laziness. These contentions are discussed more fully in another part of this article. With regard to the discoverability of matter that one party intends to use as evidence in establishing his case, a New Jersey court has held that the moving party cannot be allowed to pry indiscriminately into the opponent's case to ferret out evidence by which the case will be proved (*33*).

Furthermore, matters are discoverable if they are not privileged. The uncertainty surrounding the concept of privilege is significant in land acquisition cases where the expert witness is important. Thus, information gathered by an appraiser in the preparation of a land acquisition proceeding has been held to be privileged matter (*34*) that need not be disclosed either at the time discovery is sought or at the trial; but, this is not a unanimous holding. Attempts have been made to place such reports within the scope of the immunity set forth in the *Hickman* v. *Taylor* case (*35*), although other courts have rejected such an interpretation. This case is invariably the basis upon which the Federal courts base their reasoning, but many State courts rely upon the amendment proposed to the Supreme Court (See p. 28.) to limit the scope of the examination and to protect a party's expert witness from the necessity of disclosing information. As enacted by Idaho, the amendment to rule 26(b) reads as follows.

"The deponent shall not be required to produce or submit for inspection any writing obtained or prepared by the adverse party, his attorney, surety, indemnitor, or agent in anticipation of litigation and in preparation for trial unless the court otherwise orders on the ground that a denial of production or inspection will result in an injustice or undue hardship; nor shall the deponent be required to produce or submit for inspection any part of a writing which reflects an attorney's mental impressions, conclusions, opinions or legal theories, or, except as provided by rule 35, the conclusions of an expert."

Although the amendment does not make mention of any privilege that is to attach to the writing of any of the enumerated persons, some courts have read it as if a privilege were granted.

A third major area of disagreement as to the scope of examination concerns the sentence of rule 26(b): "It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence." The Federal courts, in accordance with the policy of liberal construction of the rules, allow a wide range of discovery, and discovery is permitted of what might normally be regarded as inadmissible evidence.

South Dakota, which has adopted a substantial portion of the Federal discovery procedure, but has not included that sentence in rule 26(b), has developed the unique position that the discovery rules are to be interpreted individually as to scope (*36*). Pennsylvania has recently restricted discovery to the bounds of the trial itself regarding evidence (*37*). In New Hampshire, although the Federal rules have not been adopted, the State's supreme court has held that the liberal interpretation given to the rules allows evidence to be discovered, although it may be inadmissible at the trial (*38*).

Relevancy

The development of rule 26(b) through court interpretations has led ultimately to the establishment of relevancy as the basic criterion for determining the scope of a discovery examination. Relevancy is not generally to be equated with relevant as ordinarily used in the admissibility of evidence. Rather, the relevancy of the subject matter is the test, and subject matter is broader than the precise issues presented by the pleadings (*39*). Elsewhere the real test is considered to be whether an answer would serve any substantial purpose, either in leading to evidence or in narrowing the issues (*40*).

With such a vague definition of relevancy, control of the discovery procedure in effect rests with the discretion of the court. For example, the discovery of documents was denied in a recent action under the Federal Tort Claims Act, because a "minimal showing of general relevancy and no more" was not considered a sufficiently good cause for compelling disclosure (*41*). Besides the several restrictions incorporated into rule 26(b), there are provisions in the subsequent rules that vest the courts with the authority to issue protective orders for the benefit of the deponent.

Rule 30(b) sets forth a number of specific orders that the court may issue at its discretion upon a showing of good cause by the person to be examined. It is also provided that the court may make any other order that justice requires to protect the party or witness from annoyance, embarrassment, or oppression. With this broad power, a court can substantially control the scope of the discovery procedure.

Good cause

In keeping with the policy that all of the rules for discovery are to be read *in pari materia*, these protective provisions were specifically incorporated into Federal rules 31, 33, and 34, thereby giving the courts wide discretion in every aspect of the discovery procedure. Rule 30(b), which concerns Depositions Upon Oral Examination, requires a showing of good cause by the deponent before one of the restrictive orders will be issued. The courts have generally interpreted this as implying that depositions may be had as a matter of right, and that they can only be denied for good cause shown. As the rules are to be liberally construed to effect a greater measure of discovery, the courts have shown some reluctance in issuing any orders that would narrow the scope of the examination and inhibit the discovery procedure.

Rule 33, providing for Interrogatories to Parties, permits any party to "serve upon any adverse party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or partnership or association, by any officer or agent, who shall furnish such information as is available to the party." Both the scope of examination of rule 26(b), and the restrictive provisions of rule 30(b) are applicable to interrogatories. As under rule 30(b), the serving of interrogatories to be answered by an adverse party is considered by the courts to be a matter of right so that a protective order will be granted by the court only upon a showing of good cause by the party interrogated.

In some condemnation cases, objections have been made to certain interrogatories propounded in accordance with rule 33. These objections were overruled because the purpose was no more than to ascertain the existence of documents supplied to the appraisers (*42*). Similarly, discovery was also permitted where the moving party sought a list of the sales of properties that might have been or should have been considered in reaching an evaluation of the property (*43*).

The Work Product

Most litigation involves matters of evidence that are solely within the knowledge of the individual attorneys. This evidence is developed as part of the trial preparation and in pursuit of the confidential relation between attorney and client. Names of witnesses, testimony, and individual statements of fact

re included in the record of an attorney for rial presentation. In this respect, courts ave tended to expand the privilege of ttorney-client to work papers that are equired for the litigation of the case. Questions then arise as to: how far this attorney-lient privilege extends; whether all documents nd facts within the knowledge of experts or ther witnesses should be required; whether ome way exists to disengage the attorney's work papers from those of witnesses, and f so, does it violate the attorney-client elationship.

This subject has been discussed fully in the ecent literature because of a 1947 case that nswered many questions and raised a number f others. The interpretations of additional oints since 1947 have provided the rationale or both Federal and State interpretations of hese issues.

Landmark case

The landmark case, *Hickman* v. *Taylor*, rose as the result of an accident involving he sinking of a tugboat. After the claim ad arisen but before the action was instituted, he plaintiff's attorney filed many interrogaories on the defendant under rule 33. One nterrogatory inquired whether any oral tatements of members of the crew were aken in connection with the accident and equested that exact copies of all such statements be attached, and that the defendant et forth in detail the exact provisions of any uch oral statements or reports. The defendant refused and was held in criminal contempt by the District Court. The court permitted discovery (*44*) on the rationale that discovery of all matters relevant to a suit should be allowed to the fullest extent consistent with orderly and efficient functioning of the judicial process. Also, the court held that the mere fact that statements of third parties have been taken by the attorney does not of itself give rise to the traditional privilege accorded to communications between attorney and client.

The Court of Appeals reversed the District Court and coined the concept of the *work product of the attorney* (*45*). This concept represented a new extension of the traditional privilege afforded to the attorney-client relationship by United States courts, though it was already firmly rooted in English law (*46*). The Supreme Court (*47*) rejected the extended privilege theory but accepted the new category of work product on a public policy basis and denied discovery of the material sought. As a result, the continuing problem of the scope of the work product was initiated. The Supreme Court in *Hickman* v. *Taylor* spoke of this problem as "a problem that rests on what has been one of the most hazy frontiers of the discovery process"(*48*).

The Court qualified the work product category, and thus distinguished it from the absolute category of privilege with the following explanation: "We do not mean to say that all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in all cases. Where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had. . . .

"Were production of written statements and documents to be precluded under such circumstances, the liberal ideals of the deposition-discovery portions of the Federal Rules of Civil Procedure would be stripped of much of their meaning."(*49*)

In other words, some material may be classified as the attorney's work product and still be discoverable; whereas, any material that is privileged is per se nondiscoverable.

Necessity

The conditions by which work product material may be discovered are based primarily upon a showing of necessity (*50*). Necessity, however, may be shown although it cannot be specifically defined so as to provide a formula to determine when discovery will be permitted or denied. "Good cause is equivalent to necessity. It usually consists of a combination of need factors which justify discovery of what would otherwise not be discoverable. There is no all-embracing practical formula and definitions are of relatively little help." (*51*)

Need factors have been predicated upon such considerations as the demands of justice, the purpose for which the material is sought, whether it is essential to the litigation, whether it is otherwise available, and whether undue hardship would result if discovery were denied. Thus the question of necessity becomes circuitous and rests ultimately upon the discretion of the court for a determination.

The scope of the holding in the *Hickman* v. *Taylor* case is explicitly limited to only the trial preparations of attorneys and does not include the work product of experts such as land appraisers, economists, realtors, and experts in general. The 1946 proposed amendment to the Federal rules was designed to provide for reports of experts. The U.S. Supreme Court, however, rejected the Advisory Committee's proposal and handed down the decision for omitting experts and parties other than the attorney. In 1949, the vacuum was filled by an extension of the Hickman rationale in *Alltmont* v. *United States* (*52*), an action against the United States Maritime Commission for personal injuries. The Court of Appeals reversed the District Court and held that it was improper to construe Admiralty rule 31, which is the same as Federal rule 33, as permitting the libellants, without any showing of good cause, to compel the respondent in answer to interrogatories to produce copies of written statements of prospective witnesses taken by its agents. In extending the Hickman rationale to include the attorney's agent, the court reasoned: " . . . we can see no logical basis for making any distinction between statements secured by a party's trial counsel and those obtained by others for the use of the party's trial counsel. In each case the statements are obtained in preparation for litigation and ultimately find their way into trial counsel's files for his use in representing his client at the trial." (*53*) Consequently, the Hickman protection has been extended to include agents other than the attorney who obtained statements for counsel's use (*54*).

Since 1950 and the extension made in the *Alltmont* case, the courts have utilized the work product concept of the *Hickman* case in dealing with land appraisers, their opinions and factual reports; in condemnation cases; and in dealing with expert testimony in general. A review of the condemnation cases of the past decade reveals a tendency of the courts to assume work product as a category and to deny or permit discovery on the basis of work product without explaining what is meant by the work product. Apparently the material sought will be considered work product, if it is shown that the material is of a legal or technical nature requiring the abilities of counsel, or an expert employed by counsel, to prepare the case in direct anticipation of litigation. Once the material sought is found to be work product, discovery will be denied unless factors of necessity are found to outweigh the merits of work product, and thus demand production of the material in the interest of justice (*55*).

Matter Subject to Discovery

Facts versus opinions

Many courts distinguish between factual and opinionative matter. As a result, the scope of examination has been circumscribed in Federal District Courts by judicial interpretation. Several States, however, have placed the opinion or conclusion of an expert beyond the bounds of discovery by enacting the proposed 1946 amendment to the Federal rules, (See p. 28.). A tabulation of the status of the State laws is in appendix IV.

In the Federal District Courts, discovery in land acquisition cases is usually permitted of factual data but denied when opinionative matter is requested. For example, a Federal court observed that the reports of land appraisers included two types of information: (1) opinions of the appraisers, and (2) statements as to the factual bases upon which the opinions were predicated. The court then declared that the landowner might inspect, copy, or photograph the factual material but that the opinion material, to be determined by the court at an *in camera* inspection, would be withheld from the landowner (*56*).

Discovery has been denied, however, of not only the opinionative matter but also of the factual material contained in an appraiser's report (*57*). A court ruled that no special circumstances were present that justified an exception to the general rule as to the nondiscoverability of opinionative matter (*58*), and discovery of the facts of the appraisal report was denied on the basis that said facts were readily available to the landowner's appraisers. Accordingly, it was held in a recent case (*59*) that, without a showing of necessity, discovery would be limited to the facts upon which the opinions or conclusions were based but a liberal approach would be

used in determining what was fact and what was opinion.

In only one Federal case involving land acquisition, has the court ordered the production of appraisal reports for inspection and copying by the landowner without limiting discovery to factual material (*60*). The landowner's motion for production of the appraisal reports was granted, but the landowner was willing to pay part of the appraiser's expenses and neither the reports nor their authors were otherwise available. Upon a motion by the Government in this proceeding for an order limiting the matters to be inquired into in the taking of the deposition of the appraiser by oral examination, the court restricted the deposition to such matters as pertained to the fair market value of the subject matter of the litigation as of the date of taking and imposed no limitation upon the discovery of opinionative matter. This decision, however, has been distinguished (*61*), criticized (*62*), and questioned (*63*) in subsequent cases. In several other cases, the courts have followed similar rationale but have restricted discovery to factual data (*64*).

State courts have been much less inclined to make the fact-opinion distinction. An Iowa case (*65*) is the only example in which discovery of opinionative matter in a condemnation proceeding was denied. But here the conclusion of an expert was protected by the 1946 Amendment to the Federal rules, which Iowa had adopted. Virginia's Supreme Court of Appeals acknowledged that it at times had "made some distinction between the opinion of an expert and the evidence of a witness to facts." (*66*) However, this court permitted discovery of the appraiser's opinion on the gound that the appraiser was not the exclusive agent of the condemnor.

Yet, in a California condemnation case (*67*) a broad decision was made indicating that the appraiser's reports and their contents were within the attorney-client privilege (*68*). The privilege here did not extend to preclude the questioning of the expert as to his opinions and conclusions regarding the value of the lands and interest condemned, the reasons for the opinions, or to test the worth of the opinions by such inquiry on cross-examination as was relevant to the subject matter.

Expert opinions

In an even more recent California condemnation case (*69*), the court opined that material, whether factual or opinionative, is not privileged merely because it is the result of an expert's mental calculations, when the information on which it was predicated did not emanate from the attorney's client. Factual data is unprivileged because it did not emanate from the client, and an opinion formed by the expert thereon is similarly unprivileged. As a result of this decision, the reports and opinions of an appraiser are subject to discovery in California, because the appraiser would derive his information from an inspection of the land itself and not from the Government or condemning body.

Discovery of appraisal reports was permitted in Wisconsin though part of the file of the attorney general was prepared for litigation (*70*). The attorney-client privilege did not preclude the expert appraisers from disclosing any relevant opinions they had formed, whether reported or not. Neither were these opinions deemed to be protected from discovery as part of the work product of the attorney. Similarly, in Arizona, facts gathered by an adverse party's prospective witness and his opinion were subject to pretrial discovery (*71*). No validity was accorded the objection that the State was invading the work product of the landowner's attorney. The court said that the rules of civil procedure respecting discovery by interrogatories, fail to make any distinction between facts and opinions.

These cases indicate a tendency for some State courts to exclude opinion from the attorney-client privilege and work product categories of the Federal courts and leave opinionative material within the scope of examination. In only one case have Federal courts agreed with this trend and that has been distinguished as previously described. The Federal courts simply deny or permit discovery on the basis of whether the material sought is considered opinion or fact in the discretion of the court.

The confusion concerning the discoverability of expert opinion prompted Pennsylvania to amend its rules when contrary decisions were handed down in two cases that had similar factual patterns (*72*). The applicable rule was amended, effective April 1962, to read, "No discovery or inspection shall be permitted which . . . (f) would require a deponent, whether or not a party, to give an opinion as an expert witness, over his objection" (*73*). An explanatory note contains the statement that subdivision (f) does not attempt to define the difference between facts and opinion as an expert witness (*74*). This distinction must be made in each case. The amendment is also applicable in condemnation cases (*75*). Thus, in Pennsylvania, the opinions of an appraiser are protected from discovery before trial by an explicit statement in the rules permitting objection by the appraiser.

The Federal District courts have not permitted discovery of opinionative matter, whereas the State courts have been much more liberal in sanctioning such discovery. The recent holding in a New York District Court antitrust case may indicate a more liberal Federal approach, however. The court said: "Rather than impose an inflexible rule which would require laborious search for the intricate and elusive (and perhaps illusory) dividing markers separating fact, opinion, contention, and conclusion, it seems preferable to allow those interrogatories which might possibly call for opinion, conclusion or contention, if, on the balance of convenience, answers to them would serve any substantial purpose, either in leading to evidence or in narrowing issues" (*76*). This type of case can be distinguished from land acquisition cases by the complex factual situations involved in the antitrust cases.

Names of expert witnesses

In addition to the fact-opinion division, problems arise in connection with the discovery of appraisal reports and their preparation, names of the expert witnesses, the employer of the expert witnesses, the methods of appraisal, the qualifications of the appraiser and a breakdown of values. The Federal courts have consistently held in condemnation cases that the names and addresses of expert witnesses were not a proper subject of discovery (*77*). Nor may the agency or party for whom the appraisers made such reports be discovered (*78*). Discovery of the methods of appraisal used by the appraiser has been denied in two Federal court decisions (*79*), but in a 1963 decision in Louisiana, it was held that the State's witnesses would be required to answer all questions of fact asked in regard to their appraisal of the property and the method and manner used in making the appraisal (*80*). A U.S. District Court has held that the qualifications of the appraisers are not discoverable (*81*). Discovery of the specific values that the appraisers have placed on certain properties has likewise been denied in several cases (*82*).

Discovery of Government Information

A unique situation exists in the discovery of information against the Government, particularly in land acquisition cases where appraiser's reports, opinions, photographs, and statements are involved as provided in Federal rules 26(b), 33, 34, and 45. These rules apply to both the government as the condemnor and the private party. But the private parties are often concerned because of what seems to be the tendency against unnecessary disclosure of files of the executive branches of the Government. The disclosure of information in government files, however, must be evaluated in relation to the public interest and as to whether documents are of evidentiary value needed to obtain a just decision (*83*).

Disclosure of Government information has been permitted or denied on such considerations as: is the information necessary solely for the purpose of determining just compensation; is it privileged; is it fact or opinion was it obtained in the ordinary course of business; is it the result of satisfying the requirements of Federal rules 26, 33, and 34 is it otherwise available; and was it obtained directly for the pending litigation. Among the kinds of information that have significance for discovery in right-of-way cases are documents, reports and statements, and expert materials. The status of the law of discovery with reference to these kinds of evidentiary matter is evaluated in the following paragraphs.

Documents, and Reports and Statements

A succinct summary of the law on documents, and reports and statements is in an analysis by Tolman: "There are now three

ethods of obtaining documents from the dverse party before trial: by initial court rder under rule 34; by interrogatories under ule 33 followed by court order to produce nder rule 34; and by *subpoena duces tecum* t an oral deposition examination under rule 5, which, since 1946, does not specifically equire initial court order and which commentators believe, and most courts hold, still hould be construed to require it as to parties n order to provide consistency with rule 34. ll of these procedures are subject to the rotective control of the court on motion, nder rule 30(b), of the party to whom the equest for the document is directed." (*84*)

In permitting or denying discovery of overnment documents and reports in condemnation cases, courts have considered the urpose for which the report was made; whether it was obtained in preparation for rial or in the ordinary course of business; whether good cause was shown in satisfaction f rule 34; whether the material sought is to e considered privileged; whether the information is essential to the litigation and otherwise navailable; and whether the material sought equires discovery of fact or opinion.

When the issue was solely one of establishing fair market value of the land at the time equired by the condemnor, the burden to stablish a fair value was on the defendant andowner, and the landowner was not ntitled to the opinions or reports of the overnment's expert appraisers in advance f trial (*85*).

A New York District Court condemnation roceeding in 1952 (*86*) permitted discovery f appraisal reports under certain limited onditions. The court stated: "It is shown hat the appraisal reports in question were btained by the Government for the express urpose of determining the compensation which would have to be paid for purchase of he property in question; that these reports re in possession and control of the government; and that neither the reports nor the uthors thereof are otherwise available to he moving party. There is nothing to ndicate that these reports can be regarded as rivileged matter." (*87*)

In a 1959 proceeding in Ohio to condemn and for a ballistic missile launching site, liscovery by interrogatories was permitted to ascertain the existence of documents supplied o appraisers, in order to determine the manner nd criterion for valuation. But the discovery rocess did not apply to the valuation arrived at by the government's appraisers. The court ollowed the purpose test set out in *United States* v. *50.34 Acres of Land*, and said: ". . . while not wishing to express an opinion at this time on the extent to which the court n that case went—requiring disclosure of the final expert opinion—I think the principle is sound." (*88*) Discovery of certain statements and reports in a noncondemnation case in 1959 was permitted, the decision was based upon the following reasoning: "Statements or reports made in the ordinary course of business and not in preparation for trial do not embody the lawyers opinions, tactics, or conclusions, and accordingly they do not enjoy the privilege afforded the attorney's work." (*89*) The consensus is, however, that material gathered in preparation for trial either by the attorney or by someone retained by the attorney is generally considered a part of the attorney's work product and is not discoverable under the rationale of the *Hickman* and *Alltmont* cases.

The courts have been consistent in their requirement that the party seeking discovery satisfy the good cause requirement of rule 34. Discovery has been denied repeatedly by the courts when good cause was not shown (*90*). Production of documents from a party under rule 45 was denied when the moving party failed to satisfy the good cause requirement of rule 34. The court pointed out that the rules were to be construed *in pari materia* (*91*). This requirement, however, is not to be construed as a *fishing expedition*, the newer theory is that, it is more desirable to allow discovery of some immaterial facts than to deny discovery, which may bring to light facts that are material to the issue (*92*).

The question of privilege as it arises in land acquisition cases is usually related to the question of whether the documents sought are part of the attorney's work product. If the documents or papers sought are a part of the work product, they are considered privileged and not subject to discovery. If material sought to be discovered is in direct preparation for trial, and this material is essential to the litigation or the determination of the truth, and otherwise unobtainable, the courts may permit discovery (*93*). Where the production of transmittal letters was not apparently essential to the proper presentation of a taxpayer's suit, the court denied discovery, but cited Moore, on Federal Practice, as stating that: "It is a recognized general principle that in actions involving the administration of Federal law to which the Government is a party, production of government documents should be permitted unless 'the Court is satisfied that it would be against public policy to do so.' Moore, Federal Practice, 2d Ed., § 26.25(b), p. 1176" (*94*).

The courts have made it clear that discovery will be denied if unusual circumstances cannot be shown or if the material is otherwise available (*95*).

In summary, whether the documents or papers sought are fact or opinion relates directly to the problem of discoverability of expert testimony; and discovery of opinion material will be permitted only in special circumstances (*96*). The determination of special circumstances rests upon the judicial discretion of the courts.

Expert Testimony

In judicial proceedings conducted under the Federal rules the discovery of expert testimony arises from the provisions of rules 30, 31, and 33 as read in conjunction with rules 26 (a) and (b). Depositions may be filed to take the testimony of any person or party upon oral examination or written interrogatories for the purpose of discovery or for use as evidence, or for both purposes. With the exception of rule 33, all the rules provisions cited here provide for a party to take the deposition of any person. Rule 33, however, restricts written interrogatories to any adverse party. Although this provision limits the taking of depositions in a litigation, the process is less expensive and quicker than the provisions made by rules 30 and 31, and this provision has been more frequently used in cases involving land acquisition.

According to a 1962 Louisiana U.S. District Court decision (*97*), generally experts are immune from discovery (*98*); but many District Court case decisions have held that an expert's deposition may be taken and that a copy of his report is subject to discovery (*99*). When the taking of oral depositions of officers or agents of the United States who had knowledge of the value of the property involved was questioned, the court held that the owners were entitled to take the oral depositions with respect to facts but not with respect to opinions, and that a liberal approach was required to be adopted in determining what is fact and what is opinion (*100*). The U.S. District Court carefully distinguished its holding from that of *United States* v. *50.34 Acres of Land*, in which the same court 10 years earlier had permitted discovery of appraisal reports containing opinions within certain limitations; these limitations had been based primarily upon a showing of necessity.

The District Court of Rhode Island has held that a plaintiff was entitled to liberal discovery in attempting to ascertain facts surrounding methods employed by the defendant in production of its blood plasma, and the fact that the deponents possessed expert knowledge did not immunize them from examination (*101*). The court distinguished this case from the older case of *Lewis* v. *United Airlines Transport Corp.* (*102*), in that the plaintiff case was not taking the deposition of experts engaged by the defendant to make a study of the controversey. In the *Lewis* case an engineering expert had been employed by the defendant's attorney to assist in preparation for trial, and the court held that the expert was not required to disclose communications with his client nor answer questions calling for his expert opinion. In addition, a recent State case (*103*) discounts the validity of the *Lewis* case and all condemnation cases prior to Aug. 1, 1951, when the Federal rules were made applicable to condemnation proceedings (*104*). And in other Federal cases in which discovery of expert testimony has been denied, in both condemnation and noncondemnation proceedings, the courts based their holdings on some distinction between fact and opinion material, the work product privilege, the necessity of production, and whether the material was otherwise available (*105*).

Answers for which expressions of opinion were required that might later be used against a United States agency were not permitted. Other information not permitted was the names of witnesses and persons, which was part of the work product of the agency's attorney and otherwise available, *United States ex rel. TVA* v. *Bennett*, 14 F.R.D. 166

(E.D. Tenn. 1953). Despite the burden that a landowner has to establish the market value at the time the condemnor took the land, discovery of the expert's opinions or reports was denied. The majority view of the Federal courts with regard to condemnation cases is that the movant must be able to show some special circumstances that, in the interest of justice, require discovery and lift the material out of the privileged categories (*106*). The State courts generally adhere to the requirement of a showing of special circumstances to justify discovery, but they have been more liberal in permitting discovery than have the Federal courts, and they have adopted additional tests that place a great deal of discretionary power in the courts.

Procedural Innovations

Effective Sept. 1, 1963, New York adopted new procedural rules (*107*) that differ from the proposals of the Federal Rules Advisory Committee and from the existing rules in many respects. The new rules in New York, however, do not expand the scope or methods of discovery or provide for pretrial conferences in New York. Yet in a 1954 condemnation proceeding by a gas company, the court held that pretrial examinations in condemnation proceedings were consistent with the existing Practice Act on the grounds that a condemnation proceeding is a special proceeding within the meaning of article 29 of the Civil Practice Act, and that pretrial examination of the adverse party should be permitted (*108*).

Generally speaking New York courts have permitted discovery of pertinent information in condemnation proceedings when the issue was one of determining fair market value or just compensation (*109*). In a condemnation proceeding in which the claimant sought to examine the State's land and claim adjusters upon their appraisal of property (*110*), however, the court denied discovery and ruled that the materials sought were confidential, of an investigatory nature, and an essential part of the work product prepared in anticipation of litigation. Although the new rules establish the work product test and the anticipation of litigation test to deny discovery, the determination as to whether specified materials fall within these categories remains in the discretion of the court.

Discovery in California

California has had its own system of code pleading and practice for more than a century. The influence of the Federal rules on the California code has been reciprocal. In 1957 California added a new section to its code on depositions and discovery (*111*). The condemnation cases that have been litigated since then have reflected a continuing liberalization in permitting more discovery. In 1959, the California District Court of Appeals (*112*) held that an interrogatory seeking facts relevant to the issues and resting within the knowledge of the State, such as what acreage the State had already acquired in the same general area for similar purposes, would be permitted. Interrogatories calling for the names and addresses of the condemnor's appraisers and the contents of the appraiser's reports were ruled to be within the attorney-client privilege, an absolute bar, and were denied. This decision was broadened in 1962 by distinguishing between the appraiser's reports and contents and the appraiser's opinions and conclusions regarding the value of certain lands and severance damages. The court held that the attorney-client privilege did not extend to preclude questioning of the appraiser as to (1) his opinions and conclusions regarding the value of the lands and interest therein condemned, (2) severance damages, (3) special benefits, (4) and the reasons for his opinions. Permission was also given to test the worth of the appraiser's opinions by inquiry on cross-examination relevant to the subject matter (*113*). In July 1962, the Supreme Court of California went a step further in, *Oceanside Union School Dist.* v. *Superior Court* (*114*), holding that even the appraiser's reports were not within the attorney-client privilege and that their divulgence could be directed. The court based its reasoning upon the dominant purpose test (*115*) and whether the material sought emanated from the client. Thus the attorney-client privilege became qualified and no longer absolutely protected in California.

Florida

New rules were adopted in Florida in 1954, based primarily on the Federal rules. In this context, Florida endorsed the work product immunity of *Hickman* v. *Taylor* in *State Road Dept.* v. *Cline* (*116*), a 1960 case, in which the taking of depositions of three of the condemnor's appraisers was denied on the ground that the information sought was the work product of the condemnor and not subject to discovery. In 1961, however, the State Supreme Court reversed the 1960 District Court (*117*) in *Shell* v. *State Road Dept.* (*118*), and permitted the condemnees to inspect the appraiser's work sheets of the State Road Department. This case has particular significance because appraisal work sheets were involved. The court was very careful in distinguishing this condemnation case from an ordinary case. In the ordinary situation, the court said that the appraiser's work sheets would constitute a part of the work product but because one party was a government unit, it ruled otherwise. Unlike litigation between private parties, condemnation by any government authority, the court ruled, would place the condemnee at a disadvantage because the government has unlimited resources to which the condemnee contributes as a taxpayer (*119*).

Louisiana

Louisiana, traditionally a code State, adopted a new code effective Jan. 1, 1961, which exhibited an effort to consolidate and retain the basic Louisiana procedure of the older codes (1870) and to draw upon the Federal rules. The *State Department of Highway* v. *Buckman* case (*120*), involving highway condemnation, was litigated in 1960 prior to the effective date of the new rules. The court held that to require the State to produce certain written contracts and instructions concerning their appraisers was an error in the absence of any showing of undue hardship or injustice in the denial of production. Yet under the new rules, the court has permitted discovery by requiring plaintiff's experts to answer interrogatories regarding facts on which the appraisal of property was based and to have written memoranda available to help answer questions (*121*). This case under the new rules was distinguished from the 1960 case, in that the court did not require production or inspection of memoranda or written contracts but did require questions as to facts on which the appraisals were based. In 1963, the Court of Appeals carried the distinction between fact questions, opinions, and the written report or document a step further in *State* v. *Riverside Realty Co.* (*122*). It held that witnesses for the State would be required to answer all questions of fact asked in regard to their appraisal of the property and the method and manner used in making their appraisal, and that they would not be excused from answering such questions on the basis that they had to refer to written memoranda.

Virginia and other States

The Virginia Supreme Court of Appeals approached the problem somewhat differently and used an agency principle to permit discovery of the opinion of the condemnor's appraiser (*123*). Discovery was permitted as the appraiser was not the exclusive agent of the condemnor in the case, and the court pointed out that some distinction is made between fact and opinion evidence.

Wisconsin courts have also permitted discovery of the expert's relevant opinions and observations on the value of property upon the theory that such information was neither a part of the work product of the attorney general nor within the attorney-client privilege, but that a direct communication between the expert and his client or staff in connection with the condemnation of the property could be privileged (*124*).

In other States, such as Idaho, Illinois, Missouri, and Pennsylvania, courts have denied discovery following the reasoning of the Federal courts (*125*) and by emphasizing modified versions of Federal tests (*126*).

Proposed 1946 Amendment to Federal Rules and State Adoption

In 1944, the Advisory Committee to the Supreme Court began deliberations on possible amendments to the *Federal Rules of Civil Procedure*. Just before the Committee was to make its recommendations, the Supreme Court of the United States granted a writ of certiorari in the *Hickman* v. *Taylor* case. In that opinion, the Supreme Court adopted some of the Advisory Committee's proposals but rejected the proposal to amend rule 26(b) to include the discovery of data prepared for trial, and the conclusions of an attorney or expert. Appendix V includes examples of

ypical amendments. Instead, the decision n Hickman was handed down to accomplish similar result. Many States, however, have dopted the amendment in one form or another, ffixing it either to their comparable rules 6(b), 30(b), 34, or as in one State, making t a separate rule in itself.

As proposed to the Supreme Court, the mendment has been adopted in substantially he same form by Idaho, Iowa, Kentucky, ouisiana, Nevada, New Jersey, Utah, and West Virginia. The effect has been to clothe ny writing prepared in anticipation of itigation or in preparation for trial with a qualified privilege from discovery. In other words, the States extend the rationale in *Hickman* v. *Taylor* and grant a qualified mmunization from discovery. Only upon a showing of undue hardship or injustice, ttributable to the denial of discovery of uch material, will discovery be permitted. A second effect of this rule is to grant an bsolute immunity from discovery to any writing that reflects either an attorney's or an expert's conclusions. Under no circumstances is any written matter containing such an opinion subject to discovery.

In the jurisdictions that have adopted the rule, opinion is by statute eliminated from he proper scope of examination, although no clear differentiation has been made between fact and opinion. But inasmuch as an appraisal report, if prepared in anticipation of litigation, is qualifiedly protected, even the factual material is not per se subject to discovery. The result in these jurisdictions is a substantial degree of immunity from discovery for both the appraiser and the appraisal report.

In the case in Idaho, condemnees tried to get the appraisal reports and were unsuccessful because the appraisers were experts within the rule thus making conclusions of experts exempt from pretrial discovery (*127*). Similarly, an Iowa court observed that a writing containing the conclusion of an expert need not be produced for an adversary (*128*). Some State law is not so clear. For example, Louisiana has both permitted and denied discovery of appraisal reports by statutory interpretation of their comparable provision (*129*). A New Jersey court, in a personal injury action, expressly immunized from production or inspection the conclusions of an expert (*130*).

Several other States extend even greater protection to the expert and his work. Minnesota and Missouri, for example, have enacted the amendment with the exception of the qualification placed on the discovery of any writing prepared in anticipation of litigation (*131*). Consequently, the work product of an attorney is given the same absolute immunity from discovery as the conclusion of an attorney or expert. In a Missouri court, however, letters, memoranda, or notes prepared by appraisers for the highway department were exempted from discovery as a work product prepared in anticipation of litigation (*132*).

Illinois courts have likewise granted absolute immunity to reports or documents made in preparation for trial, although its new rule does not follow the proposed Federal amendment or the essentiality test of *Hickman* v. *Taylor* (*133*). The Pennsylvania Rules of Court also grant absolute immunity to both the reports prepared in anticipation of litigation (*134*), and to the opinions of expert witnesses, rules 4011 (d), (f).

In Texas, rule 167 of Rules of Civil Procedure grants absolute immunity to the communications involving the parties to the suit when it is "made in connection with the prosecution, investigation or defense" of a claim or the circumstances out of which the claim arose. No mention is made in the statute, however, of protection for the opinions and conclusions of either an attorney or an expert.

The language of the Washington rule 26(b) is unclear as to the type of protection given to the writing prepared in anticipation of litigation. Absolute immunity from discovery is accorded the conclusions of an attorney or an expert; but for the work product, instead of conditioning discovery on the showing of an injustice or undue hardship, the rule merely says, "The court need not order the production or inspection of any writing obtained or prepared . . ."

Maryland has enacted a rule, described in appendix V, with provisions similar to those of the proposed Federal rule. The result in Maryland, however, has been exactly opposite to that in the other 14 States. Instead of protecting the deponent from discovery, the Maryland rules offer him little or no opportunity to avoid disclosing all that he knows concerning the pending action. An appraiser's report is not protected even though it may have been obtained in anticipation of litigation. Only the mental impressions, conclusions, opinions, or legal theories of an attorney contained in a written report are protected. If no report has been written by the expert, he may then be examined by either oral or written deposition as to both his findings of fact and his opinions based thereon. To further emphasize the liberality of the discovery procedures, rule 406(b) states: "The policy of these Rules is to require full disclosure as specified in Rule 410 (Scope of Examination) and the powers conferred by section (a) of this Rule [providing for Orders to Protect Party and Deponent] shall be used only to prevent genuine oppression or abuse."

New York has enacted a modified version of the amendment, effective Sept. 1, 1963. Under the new Civil Practice Law and Rules, the work product of an attorney is not obtainable at all, according to § 3101(c). With regard to the material prepared for litigation, part (d) of the rule reads: "The following shall not be obtainable unless the court finds that the material can no longer be duplicated because of a change in conditions and that withholding it will result in injustice or undue hardship: (1) any opinion of an expert prepared for litigation; and (2) any writing or anything created by or for a party or his agent in preparation for litigation." Hence, the writing and opinion of an appraiser will be only qualifiedly protected from discovery; whereas, the work product of an attorney will enjoy an absolute protection. Consequently, New York has established another method of dealing with this problem, one that gives the appraiser less immunity from discovery than in most of the other States.

Thus, the proposed 1946 Amendment to Federal rules has had greatly different effects in the States. These effects varied from no protection at all for the reports and opinions of an appraiser, as in Maryland, to absolute immunity from discovery of both, as in Minnesota and Missouri. These differences follow the usual development of the law in which similar rules may be interpreted differently because of the historical development of the particular State and its legal needs.

Implications of Discovery in Land Acquisition Proceedings

Research findings indicate a tendency toward liberalizing discovery procedures in eminent domain proceedings. The influence of Federal and State rules on each other has resulted in more open procedures; consequently, the adversary content of a trial will be minimized by the exchange of information permitted under the rules. The Federal courts, especially, have made distinctions between the discovery of facts as opposed to the discovery of opinions. State courts, however, have been permitting the discovery of opinionative material in some recent cases, although there are qualifications as to how and under what circumstances discovery may be accomplished. Discovery of opinionative material, in many cases, is dependent upon the courts' discretion in weighing the private necessities against the public interest for justice, a philosophical basis that has had the result of making the discovery procedure applicable to new kinds of information.

In recent legislation several States have distinguished fact and opinion matter from the attorney's work product. In some States, fact as well as opinion material has been specifically excluded from discovery, but other States have included both types of information as being discoverable. A fair balance between the interests involved has been sought in the process of judicial construction—a balance between the individual and the sovereign. Although there have been a few cases in which it has been stated that, when a government unit is involved greater discovery against such a unit should be allowed. The courts have generally tended to treat litigants alike; as though both were private parties.

In eminent domain proceedings, public authorities can draw certain implications from the Federal and State trends based upon case and statute law. There is a trend toward discovery of appraisal work sheets; interrogatories concerning factual information regarding individual appraisals; and witnesses' names, including expert witnesses. Both public and private litigants no doubt produce preliminary papers of various sorts, which are in an incompleted stage. The courts, to avoid unnecessary interference with ordinary delib-

erations on the part of the experts involved, need to draw a distinction between reliable factual materials, which can be relied on by the movant in a case, and between different preliminary data that are not yet reliable information and are in the early stages of preparation. Although it would appear to be sensible to have expert opinion available to both sides prior to trial (to facilitate adequate trial preparation), many States and Federal Courts have regarded discovery of expert opinion as an invasion of the work efforts of the attorney.

Any efforts to reduce the adversary content of a trial and to arrive at a more factual approach to determination of issue would appear to be commendable. On the other hand, every effort should be made to eliminate a *fishing expedition* because of inadequate trial preparation on the part of the litigants, especially where the materials are readily available to both parties through the use of effort and imagination.

Federal, State, and private litigants must make certain that expert materials developed in anticipation of trial are well-prepared, well-documented, well-reasoned; that the factual materials are substantial; and that, if the data are discoverable, they are technically sound. With such efforts there need be less concern for discovery even where opinionative matter may be permitted. Appendixes furnish State citations for such items as (1) adoption of Federal rules by the State, and differences where they occur; (2) the adoption of the proposed 1946 Amendment to the Federal Rules by each State; and (3) the case and statute law on whether reports, conclusions, or work product are discoverable.

Wise application of the discovery rules to individual cases by the courts will provide the means whereby adequate information is made accessible to both parties and settlement of land acquisition cases is expedited. It may appear on the surface that the courts are moving with great haste toward use of discovery procedures, especially against experts, but examination in depth of the case law indicates that the courts offer considerable restraints against such indiscriminate use. Where such indiscriminate application has occurred, the legislatures have specified restraints. The development of discovery doctrines has a long history and has only recently affected the field of right-of-way litigation to any great extent. As other substantive fields of law have learned to adapt new procedures, so a compatibility of discovery procedures with eminent domain law will be developed. The greatest defense against inordinate use of the discovery process is well-prepared documents, papers, and other materials by the litigants involved. When careful preparation has been made use of the discovery process will permit the court to determine fair compensation to the condemnee based upon the adequacy of the information available to both parties.

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(*3*) *Economic Evidence in Right-of-Way Litigation*, by Sidney Goldstein, PUBLIC ROADS, vol. 32, No. 2, June 1962, pp. 21-39.

(*4*) 27 C.J.S. §1, 1959.

(*5*) *Nashville, Chattanooga & St. Louis R. R.* v. *T. S. Jenkins & Son*, 276 S.W. 1, 53 A.L.R. 814 (1927).

(*6*) *Discovery of Trial Preparations in the Federal Courts*, by C. R. Taine, 50 Colum. L. Rev. 1041 (1950).

(*7*) South Dakota is an exception. *Bean* v. *Best*, 76 S.D. 462, 80 N.W. 2d 565 (1957), each part of the discovery rules interpreted separately and the scope determined accordingly.

(*8*) Fed. R. Civ. P., Rule 16 (1951).

(*9*) 1 Barron & Holtzoff, Federal Practice & Procedure, §9.33 (1962 Pocket Part).

(*10*) *Pretrial Practices in Condemnation Cases*, by D. R. Levin, Legal Affairs Committee annual meeting, AASHO, Dec. 1960, and *The New Rules in Arizona*, by L. R. Allen, 16 F.R.D. 191 (1955).

(*11*) *Lester* v. *People*, 150 Ill. 408, 23 N.E. 388 (1890). As to the contemporary problem of crowded court dockets see *The Crises in the Court*, by L. Banks, Fortune Magazine Dec. 1961, p. 86.

(*12*) *Crystallization of Issues by Pre-Trial: A Judge's View*, by L. R. Yankwich, 58 Colum. L. Rev. 470 (1958).

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(*15*) *Use of Pre-Trial Discovery Rules in Eminent Domain*, by J. P. Holloway, 1962 annual proceedings of the Western Association of State Highway Officials.

(*16*) 3 Barron & Holtzoff, Federal Practice & Procedure §1516 (1958).

(*17*) *United States* v. *1278.83 Acres of Land, More or Less*, 12 F.R.D. 320 (E.D. Va. 1952).

(*18*) *State ex rel. Willey* v. *Whitman*, 91 Ariz. 120, 370 P. 2d 273 (Sup. Ct. 1962).

(*19*) Alaska R. Ct. P. & Admin. 72(a) (1963); Calif. R. P. §1262; Del. Code A., Sup. Ct. R. Civil, 71A (Cum. P.P. 1962); K.R.S. §177.081 (4) (effective June 19, 1952); Md. R. Civ. P., Rule U12 (unannotated ed. 1963); and 4 Mo. R. S. 1959, Sup. Ct. R. 86.01.

(*20*) *Discovery Practice—Documents. Tangible Articles Real Estate*, by P. H. Corboy, 3 U. Ill. L.F. 797 (1959).

(*21*) *Arkansas State Hwy. Comm'n* v. *Stanley*, 353 S.W. 2d 173 (1962); *Shell* v. *State Road Dept.*, 135 So. 2d 857 (Fla. 1961); *State ex rel. Reynolds* v. *Circuit Court*, 15 Wis. 2d 311, 112 N.W. 2d 686 (1961); and *Power Authority* v. *Kochan*, 216 N.Y.S. 2d 8 (Sup. Ct. 1961).

(*22*) *Aktiebalaget Vargas* v. *Clark*, 8 F.R.D. 635 (D.D.C. 1949); *Fidelis Fisheries* v. *Thorden*, 12 F.R.D. 179 (S.D. N.Y. 1952); and *Frankel* v. *Sussex Poultry Co.*, 71 A. 2d 754 (Super. Ct. Del. 1950).

(*23*) *Aktiebalaget Vargas* v. *Clark*, 8 F.R.D. 635 (D.D.C. 1949).

(*24*) *Fidelis Fisheries* v. *Thorden*, 12 F.R.D. 179 (S.D. N.Y. 1952); *United States ex rel. TVA* v. *Bennett*, 14 F.R.D. 166 (E.D. Tenn. 1953); Ex Parte Wood, 253 Ala. 375, 44 So. 2d 560 (1950); *Frankel* v. *Sussex Poultry Co.*, 71 A. 2d 754 (Super. Ct. Del. 1950); Ex Parte Driver, 255 Ala. 118, 50 So. 2d 413 (1951); and *Huntress* v. *Tucker*, 104 N.H. 270, 184 A. 2d 562 (1962).

(*25*) *Wilson* v. *Kanyon*, 120 N.Y.S. 2d 638 (Suffolk County Ct. 1953).

(*26*) *Reynolds* v. *Boston & Maine Transp. Co.*, 98 N.H. 251, 98 A. 2d 157 (1953), and *Unger* v. *Los Angeles Transit Lines*, 4 Cal. Rptr. 370 (Dist. Ct. App. 1960).

(*27*) *Reynolds* v. *Boston & Maine Transp. Co.*, 98 N.H. 251, 98 A. 2d 157 (1953).

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(*29*) *Kusner* v. *Howard S. Stainton Co.*, 59 N.J. Super. 93, 157 A. 2d 154 (1960).

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(*31*) *United States* v. *Certain Parcels of Land*, 25 F.R.D. 192 (N.D. Cal. 1959).

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(*33*) *Smith* v. *American Employers' Ins. Co.*, 102 N.J. 530, 163 A. 2d 40 (1957)

(*34*) *City of Chicago* v. *Harrison-Halsted Bldg. Corp.*, 11 Ill. 2d 431, 143 N.E. 2d 40 (1957).

(*35*) *Hickman* v. *Taylor*, 329 U.S. 495 (1947).

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(*39*) *Kaiser-Frazer Corp.* v. *Otis & Co.* 11 F.R.D. 50 (S.D.N.Y. 1951); *Rediker* v. *Warfield*, 11 F.R.D. 125 (S.D.N.Y. 1951); and *Broadway & Ninety-Sixth St. Realty Co.* v. *Loew's Inc.*, 21 F.R.D. 347 (S.D.N.Y. 1958).

(*40*) *Territory of Alaska* v. *The Arctic Maid*, 135 F. Supp. 164 (D. Alaska 1955) and *American Oil Co.* v. *Pennsylvania Petroleum Products Co.*, 23 F.R.D. 683 (D.R.I. 1959).

(*41*) *United Airlines Inc.* v. *United States*, 26 F.R.D. 213 (D. Del. 1960).

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(*43*) *United States* v. *19.897 Acres of Land*, 27 F.R.D. 420 (E.D.N.Y. 1961); *In re Cross-Bronx Expressway*, 82 N.Y.S 2d 55, 195 Misc. 842 (Sup. Ct. Bronx County 1948); and *Hewitt* v. *State*, 216 N.Y.S. 2d 615, 27 Misc. 2d 930 (Ct. of Claims 1960).

(*44*) 4 F.R.D. 479 (E.D. Pa. 1945).

(*45*) Reference *6* at p. 1033.

(*46*) Reference *6* at p. 1032.

(*47*) *Hickman* v. *Taylor*, 329 U.S. 495 (1947).

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(*49*) Reference *35* at pp. 511, 512.

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(*54*) *Snyder* v. *United States*, 20 F.R.D. 7 (E.DN.Y. 1956), and *Thompson* v. *Hoitsma*, 19 F.R.D. 112 (D.N.J. 1956).

(*55*) Permitted: *U.S.* v. *Certain Parcels of Land*, Etc., 1 F.R.D. 224 (S.D. Cal. 1954). Limited to factual materials *State ex rel. Willey* v. *Whitman*, 91 Ariz. 120, 370 P. 2d 27 (1962), pre-trial discovery of opinion included; *Shell* v. *Stat Road Dept.*, 135 So. 2d 857 (Fla. 1961); *State* v. *Riverside Realty Co.*, 152 So. 2d 345 (Ct. App. La. 1963), all questions of fact denied: *U.S. ex. rel. TVA* v. *Bennett*, 14 F.R.D. 166 (E.D Tenn. 1953); *State Road Dept.* v. *Shell*, 122 So. 2d 215 (Ct App. Fla. 1960). *State Road Dept.* v. *Cline*, 122 So. 2d 82 (Ct. App. Fla. 1960); *State* v. *Bair*, 83 Ida. 478, 365 P. 2d 21 (1961); *State ex rel. State Hwy. Comm'n* v. *Jensen*, 362 S.W 2d 568 (Mo. Sup. Ct. 1962); *Valley Stream Lawns, Inc.* v *State*, 164 N.Y.S. 2d 482, 6 Misc. 2d 607 (N.Y. Ct. of Claim 1957).

(*56*) *United States* v. *Certain Parcels of Land*, 15 F.R.D 224 (S.D. Cal. 1954).

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(*59*) *United States* v. *284,392 Square Feet of Floor Spac* 203 F. Supp. 75 (E.D.N.Y. 1962).

(*60*) *United States* v. *50.34 Acres of Land*, 13 F.R.D. 1 (E.D.N.Y. 1952).

(*61*) In *United States* v. *Certain Parcels of Land*, 25 F.R.D.1 (N.D. Cal. 1959), the court decided that discovery of opinio had been permitted because of a showing of "compellin reasons." In *United States* v. *900.57 Acres of Land*, 30 F.R.I 512 (W.D. Ark. 1962), the court decided that discovery opinion had been permitted on the basis of the "extr ordinary facts" of the case.

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(*63*) In *United States* v. *284,392 Square Feet of Floor Spac* 203 F. Supp. 75 (E.D.N.Y. 1962), decided by the same cour it was held that the decision in *United States* v. *50.34 Acr of Land* was "not in accordance with the most accepte authorities."

(*64*) *United States ex rel. TVA* v. *Bennett*, 14 F.R.D. 1 (F.D. Tenn. 1953); *Hickey* v. *United States*, 18 F.R.D. (E.D. Pa. 1952); *United States* v. *900.57 Acres of Land*, F.R.D. 512 (W.D. Ark. 1962).

(*65*) *Bryan* v. *Iowa State Hwy. Comm'n*, 251 Iowa 1093, 1 N.W. 2d 562 (1960); Code of Iowa 1962, R. Civ. P., 141 (a).

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(*70*) *State ex rel. Reynolds* v. *Circuit Court*, 15 Wis. 2d 311, 12 N.W. 2d 686 (1961).

(*71*) Reference *18*.

(*72*) *Straub* v. *Silver*, 22 D. & C. 2d 36 (1961), permitted unlimited examination of the opposing party's expert witness on the ground that the unamended rule permitted examination of "any matter, not privileged." *Wright* v. *P.T.C.*, 24 D. & C. 2d 334 (1961), arrived at the opposite decision.

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(*74*) *The April 1962, Amendments to the Pennsylvania Rules of Civil Procedure*, by R. W. Amram and S. Schulman, 33 Pa. B.A.Q. (1962).

(*75*) Reference *74*.

(*76*) *United States* v. *Renault, Inc.*, 27 F.R.D. 23 (S.D.N.Y. 1960).

(*77*) *Hickey* v. *United States*, 18 F.R.D. 88 (E.D. Pa. 1952); *United States ex rel. TVA* v. *Bennett*, 14 F.R.D. 166 (E.D. Tenn. 1953); *United States* v. *7534.04 Acres of Land*, 18 F.R.D. 146(N.D. Ga. 1954); *United States* v. *6.82 Acres of Land*, 18 F.R.D. 195 (D.N.M. 1955); *United States* v. *19.897 Acres of Land*, 27 F.R.D. 420 (E.D.N.Y. 1961); *United States* v. *900.57 Acres of Land*, 30 F.R.D. 512 (W.D. Ark. 1962).

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(*83*) *Reynolds* v. *United States*, 192 F. 2d 987,995 (1951), reversed on other grounds, 345 U.S. 1, 73 Sup. Ct. 528 (1953); and *United States* v. *Certain Parcels of Land Etc.*, 15 F.R.D. 224 (S.D. Cal. 1954).

(*84*) *Discovery Under the Federal Rules: Production of Documents and the Work Product of the Lawyer*, by L. L. Tolman, 58 Colum. D. Rev. 498, 503 (1958).

(*85*) *United States* v. *900.57 Acres of Land, More or Less*, 30 F.R.D. 512 (W.D. Ark. 1962).

(*86*) *United States* v. *50.34 Acres of Land, More or Less*, 13 F.R.D. 19 (E.D.N.Y. 1952).

(*87*) Reference 8, at p. 21.

(*88*) *United States* v. *62.50 Acres of Land, Etc.*, 23 F.R.D. 287 (M.D. Ohio 1959).

(*89*) *United States* v. *Swift & Co.*, 24 F.R.D. 282 (N.D. Ill. 1959).

(*90*) *Carpenter-Trant Drilling Co.* v. *Magnolia Petroleum Corp.*, 23, F.R.D. 257 (D. Neb. 1959); *Michel* v. *Meier*, 8 F.R.D. 464 (W.D. Pa. 1948), "In allowing plaintiff's motion under Rule 34, the court lays down the following showing plaintiff must make: (1) that there is "good cause" for the production and inspection of the desired material, (2) material requested must be "designated" with reasonable definiteness and particularity, (3) that the material must not be privileged, (4) material must constitute or contain evidence relating to matters within the scope of the examination permitted by Rule 26(b), i.e., it must be "relevant to the subject matter involved in the pending action," (5) the material must be within the possession, custody or control of the party upon whom demand is made; *Snyder* v. *United States*, 20 F.R.D. 7 (E.D.N.Y. 1956); *United States* v. *6.82 Acres of Land*, 18 F.R.D. 195 (D.N.M. 1955); *United States* v. *Certain Acres of Land*, 18 F.R.D. 98 (M.D. Ga. 1955); *United States* v. *19.897 Acres of Land Etc.*, 27 F.R.D. 420 (E.D.N.Y. 1961).

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(*95*) *United States* v. *Deere & Company*, 9 F.R.D. 523 (D. Minn. 1949); *United States* v. *7534.04 Acres of Land Etc.*, 18 F.R.D. 146 (N.D. Ga. 1954); and *United States* v. *6.82 Acres of Land, More or Less*, 18 F.R.D. 195 (D.N.M. 1955).

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(*98*) *Lewis* v. *United Airlines Transport*, 32 F. Supp. 21 (W.D. Pa. 1940), engineering consultants' report on barrell of aircraft cylinder; *Boynton* v. *R. J. Reynolds Tobacco Co.*, 36 F. Supp. 593 (Mass. 1941), physician; *United States* v. *88 Cases, Etc.*, 5 F.R.D. 503 (D.N.J. 1946), chemists' analysis of orange beverage; *United States* v. *720 Bottles, Etc.*, 3 F.R.D. 466 (E.D.N.Y. 1946), chemists' analysis of vanilla extract; *Moran* v. *Pittsburgh-Des Moines Steele Co.*, 6 F.R.D. 594 (W.D. Pa. 1947), civil engineer's design on cylindrical liquefied gas tank, no expert involved, but in dicta held that experts may not be deposed; *Cold Metal Process Co.* v. *Aluminum Co.*, 7 F.R.D. 684 (Mass. 1947), metallurgist; *Roberson* v, *Graham Corp.*, 14 F.R.D. 83 (Mass. 1952), experts on antiques; *United States* v. *Certain Acres of Land, Etc.*, 18 F.R.D. 98 (M.D. Ga. 1955), expert land appraisers; *Colonial Airlines Inc.* v. *Jonas*, 13 F.R.D. 199 (S.D.N.Y. 1952), public accounts; *United States* v. *7534.04 Acres of Land, Etc.*, 18 F.R.D. 146 (N.D. Ga. 1954), expert land appraisers.

(*99*) *Bergstrom Paper Co.* v. *Continental Bus Co.*, 7 F.R.D. 548 (E.D. Wis. 1947), engineer's report on situs of explosion; *Cold Metal Process Co.* v. *Aluminum Co.*, 7 F.R.D. 425 (N.D. Ohio 1947), metallurgist report; *Sachs* v. *Aluminum Co.*, 167 F. 2d 570 (6 Cir. 1948), metallurgist; *Broadway & Ninety-Sixth St., Realty Co.* v. *Loew's Inc.*, 21 F.R.D. 347 (S.D.N.Y. 1958), expert in field of motion picture exhibition; *United States* v. *50.34 Acres of Land, Etc.*, 13 F.R.D. 19 (E.D.N.Y. 1952), expert land appraisers; *United States* v. *Certain Parcels of Land*, 15 F.R.D. 224 (S.D. Cal. 1953), expert land appraisers; *Walsh* v. *Reynolds Metals Co.*, 15 F.R.D. 376 (D.N.J. 1954), heating experts report; *Russo* v. *Merck & Co.*, 21 F.R.D. 237 (D.R.I. 1957), experts on production of blood plasma; *Colden* v. *R. J. Schofield Motors*, 14 F.R.D. 521 (N.D. Ohio 1952), automotive expert's report.

(*100*) *United States* v. *284,392 Square Feet of Floor Space, Etc.*, 203 F. Supp. 75 (E.D.N.Y. 1962).

(*101*) *Russo* v. *Merck & Company*, 21 F.R.D. 237 (D.R.I. 1957).

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(*103*) See reference *18*.

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(*105*) *Hickey* v. *United States*, 18 F.R.D. 88 (E.D. Pa. 1952). *United States ex rel. TVA* v. *Bennett*, 14 F.R.D. 166 (E.D. Tenn. 1953); *United States* v. *6.8 Acres of Land, More or Less*, 18 F.R.D. 195 (D.N.M. 1955); *United States* v. *900.57 Acres of Land, More or Less*, 30 F.R.D. 512 (W.D. Ark. 1962).

(*106*) See reference *85*.

(*107*) N.Y. Civil Practice Laws & Rules, 185th Sess. 1962, C. 308, effective Sept. 1, 1963.

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(*112*) *Rust* v. *Roberts*, 341 P. 2d 46 (Dist. Ct. App. Cal. 1954).

(*113*) *Mowry* v. *Superior Court*, 20 Cal. Rptr. 698 (Dist. Ct. App. 1962).

(*114*) 23 Cal. Rptr. 375, 373 P. 2d 439 (Sup. Ct. 1962).

(*115*) The "dominant purpose" test was first laid down in *Holm* v. *Superior Court*, 42 Calif. 2d 500, 267 P. 2d 1025, 268 P. 2d 722 (1954).

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(*118*) 135 So. 2d 857 (1961).

(*119*) *Shell* v. *State Road Dept.*, 135 So. 2d 857 (Fla. 1961).

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(*121*) *State Department of Highways* v. *Spruell*, 243 La. 202, 142 So. 2d 396 (Sup. Ct. La. 1962).

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(*128*) *Bryan* v. *Iowa State Hwy. Comm'n.*, 251 Iowa 1043, 104 N.W. 2d 562 (1960).

(*129*) *State Department of Highways* v. *Spruell*, 243 La. 202, 142 So. 2d 396 (1962); and *State Department of Highways* v. *Buckman*, 239 La. 872, 120 So. 2d 461 (1960).

(*130*) *Cermak* v. *Hertz Corp.*, 53 N.J. Super. 455, 147 A. 2d 800 (1958).

(*131*) Minn. R. Civ. P., Rule 26.02; Mo. Sup. Ct. Rule 57.01(b).

(*132*) *State ex rel. State Hwy. Comm'n.* v. *Jensen*, 362 S.W. 2d 568 (Mo. 1962).

(*133*) Ill. Sup. Ct. Rule 19-5; Ill. Annot. Stat., § 101.19-5 (Supp. 1962).

(*134*) *Musulin* v. *Redevelopment Authority*, 25 D. & C. 2d 267 (Pa. 1961).

APPENDIX I

Federal Rules Pertinent to the Discovery Process

(Federal Rules of Civil Procedure, Title 28 U.S.C., as amended 1961)

Rule 16—Pretrial Procedure; Formulating Issues

In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider: (1) The simplification of the issues; (2) the necessity or desirability of amendments to the pleadings; (3) the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof; (4) the limitation of the number of expert witnesses; (5) the advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury; (6) such other matters as may aid in the disposition of the action.

The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pretrial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to nonjury actions or extend it to all actions.

Rule 26—Depositions Pending Action

(b) Scope of Examination. Unless otherwise ordered by the court as provided by rule 30 (b) or (d), the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action whether it relates to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts. It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence.

Rule 30—Depositions Upon Oral Examination

(b) Orders for the Protection of Parties and Deponents. After notice is served for taking a deposition by oral examination, upon motion seasonably made by any party or by the person to be examined and upon notice and for good cause shown, the court in which the action is pending may make an order that the deposition shall not be taken, or that it may be taken only at some designated place other than that stated in the notice, or that it may be taken only on written interrogatories, or that certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain matters, or that the examination shall be held with no one present except the parties to the action and their officers or counsel, or that after being sealed the deposition shall be opened only by order of the court, or that secret processes, developments, or research need not be disclosed, or that the parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression.

(d) Motion to Terminate or Limit Examination. At any time during the taking of the deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in subdivision (b). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. In granting or refusing such order the court may impose upon either party or upon the witness the requirement to pay such costs or expenses as the court may deem reasonable.

Rule 31—Depositions of Witnesses Upon Written Interrogatories

(d) Orders for the Protection of Parties and Deponents. After the service of interrogatories and prior to the taking of the testimony of the deponent, the court in which the action is pending, on motion promptly made by a party or a deponent upon notice and good cause shown, may make any order specified in rule 30 which is appropriate and just or an order that the deposition shall not be taken before the officer designated in the notice o that it shall not be taken except upon ora examination.

Rule 33—Interrogatories to Partie

Any party may serve upon any advers party written interrogatories to be answere by the party served or, if the party served i a public or private corporation or a partner ship or association, by any officer or agent who shall furnish such information as is avai able to the party. Interrogatories may b served after commencement of the action an without leave of court, except that, if servic is made by the plaintiff within 10 days afte such commencement, leave granted with o without notice must first be obtained. Th interrogatories shall be answered separatel and fully in writing under oath. The answer shall be signed by the person making them and the party upon whom the interrogatorie have been served shall serve a copy of th answers on the party submitting the inter rogatories within 15 days after the service o the interrogatories, unless the court, on mo tion and notice and for good cause show enlarges or shortens the time. Within 1 days after service of interrogatories a part may serve written objections thereto togethe with a notice of hearing the objections at th earliest practicable time. Answers to inter rogatories to which objection is made shall b deferred until the objections are determine

Interrogatories may relate to any matter which can be inquired into under rule 26(b) and the answers may be used to the sam extent as provided in rule 26(d) for the use o the deposition of a party. Interrogatorie may be served after a deposition has bee taken, and a deposition may be sought afte interrogatories have been answered, but th court, on motion of the deponent or the part interrogated, may make such protective orde as justice may require. The number o interrogatories or of sets of interrogatories t be served is not limited except as justice re quires to protect the party from annoyanc expense, embarrassment, or oppression. Th provisions of rule 30(b) are applicable for th protection of the party from whom answer to interrogatories are sought under this rul

Rule 34—Discovery and Productio of Documents and Things for In spection, Copying, or Photograph ing

Upon motion of any party showing goo cause therefor and upon notice to all othe parties, and subject to the provisions of rul

0(b), the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by rule 26(b) and which are in his possession, custody, or control; or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated object or operation thereon within the scope of the examination permitted by rule 26(b). The order shall specify the time, place and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just.

Rule 45—Subpoena

(b) For Production of Documentary Evidence. A subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein; but the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable and oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things.

(d) Subpoena for Taking Depositions; Place of Examination. (1) Proof of service of a notice to take a deposition as provided in rules 30(a) and 31(a) constitutes a sufficient authorization for the issuance by the clerk of the district court for the district in which the deposition is to be taken of subpoenas for the persons named or described therein. The subpoena may command the person to whom it is directed to produce designated books, papers, documents, or tangible things which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by rule 26(b), but in that event the subpoena will be subject to the provisions of subdivision (b) of rule 30 and subdivision (b) of this rule 45.

Rule 71A—Condemnation of Property

(a) Applicability of Other Rules. The Rules of Civil Procedure for the United States District Courts govern the procedure for the condemnation of real and personal property under the power of eminent domain, except as otherwise provided in this rule.

APPENDIX II

Expanded Version of Federal Pretrial Conference Provision

Code of Iowa 1962

Code of Iowa 1962, vol. II, Rules of Civil Procedure, § 136, Pretrial conference. After issues are joined, the court may in its discretion and shall on written request of any attorney in the case direct all attorneys in the action to appear before it for a conference to consider, so far as applicable to the particular case:

a. The necessity or desirability of amending pleadings by formal amendment or pretrial order.

b. Agreeing to admissions of fact, documents or records not really controverted, to avoid unnecessary proof.

c. Limiting the number of expert witnesses.

d. Settling any facts of which the court is to be asked to take judicial notice.

e. Stating and simplifying the factual and legal issues to be litigated.

f. Specifying all damage claims in detail as of the date of the conference.

g. All proposed exhibits and mortality tables and proof thereof.

h. Consolidation, separation for trial, and determination of points of law.

i. Questions relating to *voir dire* examination of jurors and selection of alternate jurors, to serve if a juror becomes incapacitated.

j. Possibility of settlement.

k. Filing of advance briefs when required.

l. Any other matter which may aid, expedite, or simplify the trial of any issue.

The pretrial judge may direct the parties to the action to be present or immediately available at the time of conference. (Report 1943, amendment 1961.)

APPENDIX III

Adoption of Federal Discovery Rules by States

The following table reflects a comparison of the various discovery and pretrial provisions of each state and the District of Columbia. An explanation of the symbols follows the table.

The table for Maine was compiled from the statutes available to the researcher. Maine, however, repealed these provisions by a 1959 statute and adopted new rules similar to the Federal Rules, effective Dec. 1, 1959.

Michigan, by order of the Michigan Supreme Court, adopted new rules effective Jan. 1, 1963. *Procedural Changes in Michigan*, by J. L. Honigman, 31 F.R.D. 113 (1962). Discovery provisions in the new rules have been changed to conform substantially to the Federal practice, excepting, however, that only evidence admissible at the trial may be taken in discovery proceedings. A copy of these rules was not available for an accurate comparison.

Those States which have few or no discovery provisions have been designated code States, in that their provisions show little or no Federal influence.

Statutory References by States

Alabama: Ala. Code, Recompiled 1958, Title 7 (1960).

Alaska: Alaska R. Ct. Proc. & Adm'n (1963).

Arizona: 16 Ariz. Rev. Stat. Ann., R. Civ. P. (1956).

Arkansas: 3A Ark. Stat. Ann. 1947, Title 28 (1962 Replacement).

California: 23 Wests' Ann. Code Div. P. (Cum. P.P. 1962).

Colorado: 1 Colo. Rev. Stats, Ch. 4 (1953).

Connecticut: Conn. Practice Book of 1951 (Cum. Supp. 1960).

Delaware: 13 Del. Code Ann., Super. Ct. R.—Civil (1953).

District of Columbia: Munic. Ct. R. (1961).

Florida: 30 Fla. Stat. Ann. (1954).

Georgia: 38 Ga. Code Ann. (1959) (Cum. P.P. 1961).

Hawaii: Hawaii R. Civ. P. (1954).

Idaho: 2 Idaho Code, R. Civ. P. (Cum. P. Supp. 1961).

Illinois: 110 Smith-Hurd Ill. Ann. Stat., Sup. Ct. R. (1956).

Indiana: 2 Burns Ind. Stat. Ann.; I.L..E Depositions and Discovery § 1 (Cum. P.P. 1962).

Iowa: 2 Iowa Code 1962, R. Civ. P.

Kansas: Gen. Stat. Kan. Ann. § 60 (1949).

Kentucky: Ky. Rev. Stat., R. Civ. P. (1953).

Louisiana: 3,4 La. Stat. Ann. (1961).

Maine: Me. Rev. Stat. 1959 (Cum. Supp. 1961).

Maryland: Md. R. Civ. P. (1961 ed.), (unannot. ed. 1963).

Massachusetts: 38 Mass. Gen. L. Ann. (1960).

Michigan: Gen. Ct. R. of 1963.

Minnesota: 27A Minn. Stat. Ann., R. Civ. Dist. Ct. (1958).

Mississippi: 2 Miss. Code 1942 § 1699 (1957).

Missouri: 4 Mo. Rev. Stat., Sup. Ct. R. (1957).

Montana: Mont. Laws, 37th Sess. Ch. 13 (1961).

Nebraska: Neb. Sess. Laws 1951, §§ 25–1267.01–25.1269 (1952).

Nevada: 1 Nev. Rev. Stat., R. Civ. P. (1953).

New Hampshire: 5 N.H. Rev. Stat. Ann. §516 (1955).

New Jersey: N.J. Practice, Part IV, Ch. 4 (1953).

New Mexico: 4 N.M. Stat. Ann. 1953, Ch. 21 (1954).

New York: N.Y. Laws, Civ. Prac. L. & R., Ch. 308 (1962).

North Carolina: 1A N.C. Gen. Stat., Recompiled 1953.

North Dakota: 5 N.D. Cent. Code Ann., R. Civ. P. (1957).

Ohio: Ohio Rev. Code Ann., Ch. 2317 (1958) (1962 Supp.).

Oklahoma: Okla. Stat. Ann., Title 12, Ch. 10 (1960).

Oregon: 1 Ore. Rev. Stat., Ch. 45 (Ch. Replaced 1961–1962).

Pennsylvania: Pa. R. of Ct. 1962.

Rhode Island: 2 Gen. Laws R.I., Title 9, Ch. 18 (1962).

South Carolina: 6 Code Laws S.C., Ch. 7 (1962).

South Dakota: 2 S.D. Code, Title 36, Ch. 36 (1960 Supp.).

Tennessee: 5 Tenn. Code Ann., Title 24 (1955) (Supp. 1962).

Texas: Tex. R. Civ. P. (1955).

Utah: 9 Utah Code Ann., R. Civ. P. (1953).

Vermont: 3 Vt. Stat. Ann., Title 12 (1961 Supp.).

Virginia: 2 Va. Code, Title 8, R. Sup. Ct. App. (1950).

Table 1.—Adoption of Federal discovery rules by States

States	Rules citations									
	16	26(b)	30(b)	30(d)	31(d)	33	34	45(b)	45(d)	71A(a)
Alabama	N	F	F	N	N	I	N	I	N	N
Alaska	F	F	F	F	F	F	F	F	F	F
Arizona	F	F	F	F	F	F	F	F	F	N
Arkansas	F	F	F	F	S	F	F	S	S	N
California	FE	FA	FA	F	F	FC	F	S	S	S
Colorado	F	F	FA	F	F	F	F	F	F	N
Connecticut	I	I	S	N	S	S	I	I	N	N
Delaware	F	F	F	F	F	S	F	F	IF	IF
District of Columbia	S	F	F	F	F	F	F	F	N	N
Florida	S	F	F	F	S	S	F	F	F	N
Georgia	F	F	F	F	F	F	FA	I	F	N
Hawaii	F	F	F	F	F	F	F	F	F	N
Idaho	F	FA	F	F	F	FA	F	F	FE	N
Illinois	F	I	S	S	S	S	I	I	I	N
Indiana	S	S	I	I	I	I	I	I	N	N
Iowa	FE	S	FA	F	I	I	S	S	I	N
Kansas	F	I	N	N	N	N	I	N	I	N
Kentucky	F	F	FA	F	F	F	F	F	S	S
Louisiana	S	F	FA	F	F	S	F	S	S	N
Maine [2]	N	I	N	N	N	N	N	N	N	N
Maryland	FA	FA	FA	I	I	I	FA	S	F	IF
Massachusetts [1]	F	I				I	I			N
Michigan [3]										
Minnesota	F	FA	FA	F	F	FA	F	F	F	N
Mississippi [1]	N	I					I	N	N	N
Missouri	F	FA	S	S	F	FA	S	I	I	
Montana	F	F	F	F	F	F	F	F	S	N
Nebraska	N	S	F	F	F	FA	F	I	I	N
Nevada	F	F	F	F	F	F	F	F	F	N
New Hampshire [1]										
New Jersey	FE	FA	F	F	F	FE	F	I	N	N
New Mexico	F	F	FA	F	F	F	F	F	F	N
New York	N	I	I	N	I	N	I	I	N	N
North Carolina	IF	I	I	N	I	N	I	I	N	N
North Dakota	F	F	F	F	F	FA	FA	F	F	N
Ohio [1]	N	I					I	I	N	N
Oklahoma [1]							I			N
Oregon [1]	N		IF	S						N
Pennsylvania	S	I	I	I	N	S	I	I	N	N
Rhode Island [1]	N	I								N
South Carolina	N	I	I	N	I	N	I	I	N	N
South Dakota	F	I	F	F	F	I	I	F	F	N
Tennessee	N	S	FA	I	I	N	N	N	N	N
Texas	S	I	N	N	N	I	FA	I	N	N
Utah	F	F	FA	F	F	F	F	F	F	N
Vermont	S	F	F	F	S	I	S	N	F	N
Virginia	S	I					I	I	N	N
Washington	S	FA	F	F	F	F	F	N	N	N
West Virginia	F	IF	F	S	F	F	FA	F	F	N
Wisconsin	F	IF	S	N	S	N	I	N	N	IF
Wyoming	F	F	F	F	F	F	FA	F	F	N

Meaning of symbols is as follows:

F, Same as Federal rule.
FC, Federal rule changed.
FE, Federal rule expanded.
FA, Federal rule plus an additional paragraph.
I, Individual State rule.
IF, Individual State rule showing Federal influence.
N, No comparable rule.
S, Substantially the same as the Federal Rule.

[1] States showing little Federal influence.

[2] Data for Maine reflect the rules in effect before their 1959 repealing statute. More recent material was unavailable

[3] Michigan adopted new rules substantially the same as the Federal rules, effective Jan. 1, 1963, but a copy of the rules was not available for this study.

Washington: 0 Rev. Code Wash., R. Pleading, Prac. & P. (1960).

West Virginia: 3 W. Va. Code Ann., R. Civ. P. (1961).

Wisconsin: 30, 38 Wis. Stat. Ann. (195

Wyoming: 2 Wyo. Stat. 1957, R. Civ. (1959).

APPENDIX IV

Status of State Laws as to Privileged Matter

The following States have adopted the proposed 1946 amendment to the Federal rules garding experts and attorney's work product: Idaho, Illinois, Iowa, Kentucky, Louiana, Maryland, Minnesota, Nevada, New rsey, New York, Pennsylvania, Texas, ah, Washington, and West Virginia.

Expert Reports

The following States provide absolute protion to expert reports from the discovery ocedures: Illinois, Minnesota, Missouri, io, Pennsylvania, and Texas.

The following States provide no protection expert reports from the discovery proceres: Arizona, California, Florida, Maryd, and Wisconsin.

The following States provide qualified protion to expert reports from the discovery ocedures: Delaware, Idaho, Iowa, Kenky, Louisiana, Mississippi, Nevada, New ampshire, New Jersey, New York, Utah, d West Virginia.

Expert Conclusion

The following States provide absolute protion to expert conclusion from the discovery ocedures: Idaho, Illinois, Iowa, Kentucky, innesota, Missouri, Nevada, New Jersey, nnsylvania, Utah, Washington, and West rginia.

Maryland provides no protection to expert nclusion from the discovery procedures.

The following States provide qualified protion to expert conclusion from the discovery ocedure: Arkansas, Colorado, Florida, Louiana, New York, Ohio, Virginia, and Wisnsin.

Work Product

The following States provide absolute protion to work products from the discovery ocedures: Connecticut, Georgia, Idaho, Illiis, Iowa, Kentucky, Louisiana, Minnesota, evada, New Jersey, New York, Ohio, Pennlvania, Texas, Utah, Washington, and West rginia.

The following States provide qualified protion to work products from the discovery rocedures: Arizona, California, Delaware, lorida, Maryland, Michigan, Missouri, Ne Hampshire, and Wisconsin.

Summary Explanation by State

Alabama

No cases on point, Code of Ala., Recompiled 1958, Title 7, §474–489. Provisions are based on the Federal provisions for iscovery, but no provision is made for production of documents, requests for admissions, written interrogatories or the ther discovery devices available under the Federal rules. tules similar to the Federal rules were proposed in 1957 but ejected in the Senate.

Alaska

No cases on point. Alaska R. of Ct. Proc. & Admin. 1963, Fed. R. Civ. P. made effective in Alaska on July 18, 1949; 63 Stat. 445, 48 U.S.C.A. §103a (1952).

Arizona

Rules virtually identical to Federal rules were adopted, effective Jan. 1, 1940. Latest revision effective Jan. 1, 1956. *Dean* v. *Superior Court*, 84 Ariz. 104, 324 P. 2d 764(1958), denying discovery of work product; *State ex rel. Willey* v. *Whitman*, 91 Ariz. 120, 370 P. 2d 273 (1962), condemnation case permitting discovery of reports and conclusions.

Arkansas

No cases on point. Procedure is regulated entirely by the legislature. 3A Ark. Stat. Ann. 1947, Title 28 (1962 Replacement). In 1949, provisions similar to Fed. R. 16 were adopted, Ark. Stat. §27–2401 (Supp. 1947). In 1953 legislature adopted provisions similar to Fed. Rules 26–37, Ark. Stat. §§28–347 to 28–361 (Supp. 1957). As to liberal construction of rules see, *Arkansas State Hwy. Comm'n* v. *Stanley*, 353 S. W. 2d 173 (1962).

California

Adopted code pleading in 1851. Judicial Council adopted rules similar to Federal pretrial and discovery provisions in 1957 and 1958, Cal. Stat. 1957 §3, c. 1904 p. 3322, operative Jan. 1, 1958. *Oceanside Union School Dist.* v. *Superior Court*, 23 Cal. Rptr. 375, 373 P. 2d 439 (1962), condemnation case permitting discovery of expert reports; *Greyhound Corp.* v. *Superior Court*, 56 C. 2d 355, 364 P. 2d 266 (1961), permitting discovery of work product; for recent discussion of scope of discoverability of expert reports, conclusions, and work product, see *Brown* v. *Superior Court*, 30 Cal. Rptr. 338 (Dist. Ct. App. 1963).

Colorado

No cases on point. Procedural rules have been similar in text and interpretation to Federal provisions since April 6, 1941. 1 Col. Rev. Stat., Ch. 4 (1953). Keely, *How Colorado Conformed State To Federal Civil Procedure*, 16 F.R.D. 291 (1955).

Connecticut

Adopted a code in 1879 based on the Field Code. In 1957 the Conn. Sup. Ct. adopted rules providing for limited disclosure and pretrial practice. Conn. Practice Book of 1951 (Cum. Supp. 1960). *Prizio* v. *Penachio*, 19 Conn. Sup. 381, 115 A. 2d 340 (Conn. Super. 1955), indicating a trend toward Federal interpretation but protecting written statements as work product.

Delaware

Adopted rules similar to Federal provisions, Effective Jan. 1, 1948, 13 Del. Code Ann., Super. Ct. R.—Civil (1953). *Empire Box Corp.* v. *Illinios Cereal Mills*, 90 A. 2d 672 (Super Ct. 1952), denying discovery and qualifying protection to expert reports and work product.

Florida

Rules adopted March 15, 1954, based primarily on the Federal rules. 30 Fla. Stat. Ann. (1954). *Shell* v. *State Road Dept.*, 155 So. 2d 857 (Fla. 1961), condemnation case permitting discovery of appraiser's work sheets; *Shawmut Van Lines Inc.* v. *Small*, 148 So. 2d 556 (Dist. Ct. App. Fla. 1963), noncondemnation case qualifying discovery of work product.

Georgia

As of March 25, 1959, the code of Georgia stands amended following for the most part the Federal discovery provisions. 38 Ga. Code Ann. (1959) (Cum. P.P. 1961). *Setzers Super Stores* v. *Higgins*, 104 Ga. App. 116, 121 S.E. 2d 305 (Ga. App. Ct. 1961), noncondemnation case denying discovery of work product.

Hawaii

No cases on point. Rules were adopted effective June 14, 1954, substantially the same as the Federal Rules. Hawaii R. Civ. P. 1954.

Idaho

Rules that follow closely the Federal rules were adopted effective Nov. 1, 1958. 2 Idaho Code, R. Civ. P. (Cum. P. Supp. 1961). *State* v. *Bair*, 83 Idaho 478, 365 P. 2d 216 (1961), condemnation case denying discovery of experts' conclusions.

Illinois

A new Civil Practice Act, influenced by Federal rules, was adopted, effective Jan. 1, 1956, 110 Smith—Hurd Ill. Ann. Stat., Sup. Ct. R. (1956). *City of Chicago* v. *Harrison-Halsted Bldg. Corp.*, 11 Ill. 2d 431, 143 N.E. 2d 40 (Sup. Ct. 1957), condemnation case denying discovery of experts' statements. *Kemeny* v. *Skorch*, 159 N.E. 2d 489, 490 (Ill. 1959), as to documents exempt from disclosure.

Indiana

No cases on point. Indiana has rules provisions similar to Federal provisions rules 16 and 26(b), but has its own limited provisions for depositions and discovery. 2 Burns Ind. Stat. Ann. (1947); I.L.E., Depositions & Discovery § 1 (Cum. P.P. 1962).

Iowa

Rules adopted effective July 4, 1943 are less liberal than the corresponding Federal provisions. 2 Iowa Code 1962, R. Civ. P., *Bryan* v. *Iowa State Hwy. Comm'n*, 251 Iowa 1093, 104 N.W. 2d 562 (1960), condemnation case in which discovery of experts' conclusions were denied; *Hanke* v. *Iowa Home Mut. Gas Co.*, 87 N.W. 2d 920 (1958), a noncondemnation case qualifying discovery of attorney's work product.

Kansas

No cases on point. Procedure to a great extent remains unchanged since 1859. Pretrial procedure corresponding to Fed. R. 16 was adopted effective June 30, 1949. Gen. Stat. Kan. Ann. § 60 (1949). *Pyramid Life Ins. Co.* v. *Gleason Hospital, Inc.*, 188 Kan. 95, 360 P. 2d 858 (1961), as to general interpretation of discovery statute.

Kentucky

Rules similar to the Federal rules were adopted effective July 1, 1953, Ky. Rev. Stat., R. Civ. P. (1953). *Bender* v. *Eaton*, 343 S.W. 2d 799 (Ky. 1961), a noncondemnation case denying discovery of work product.

Louisiana

Code revision became effective Jan. 1, 1961; 3, 4 La. Stat. Ann. (1961); *State Department of Hwys.* v. *Buckman*, 239 La. 872, 120 So. 2d 461 (1960), condemnation case denying discovery of certain contracts and instructions; *State* v. *Riverside Realty Co.*, 152 So. 2d 345 (Ct. App. La. 1963), condemnation case permitting discovery of expert factual questions without violating work product.

Maine

No cases on point. Rules similar to Federal rules were adopted effective Dec. 1, 1959. Me. Rev. Stat. 1959 (Cum. Supp. 1961).

Maryland

No cases on point. A complete revision of the rules was promulgated in 1956 and revised rules became effective Jan. 1, 1957. Md. R. Civ. P. (1961 ed.) and as amended through Sept. 1, 1963 (unannotated ed. 1963). *Baltimore Transit Co.* v. *Mezzanotti*, 227 Md. 8, 174 A. 2d 768 (Ct. App. 1961), as to liberal construction of the rules.

Massachusetts

No cases on point. Procedure continues to follow a practice act first adopted in 1852. 38 Mass. Gen. L. Ann. (1960).

Michigan

A complete procedural change designated the Revised Judicature Act. of 1961, and rules substantially similar to the

Federal rules to take effect Jan. 1, 1963. Mich. Gen. Ct. R. of 1963. *Hallett* v. *Michigan Consol. Gas Co.*, 298 Mich. 582, 299 N.W. 723 (1941), qualified protection of experts' reports; *Wilson* v. *Borchard*, 122 N.W. 2d 57 (Mich. 1963), qualified protection of work product.

Minnesota

Adopted rules virtually identical to the Federal rules, effective Jan. 1, 1952. 27A Minn. Stat. Ann., R. Civ. P. Dist. Ct. (1958). *In re Sandstrom's Estate*, 89 N.W. 2d 19 (Minn. 1958), production of documents denied for failure to show good cause; *Brown* v. *Saint Paul City Ry.*, 241 Minn. 15, 62 N.W. 2d 688 (1954), discovery of work product denied.

Mississippi

Limited discovery provisions, unlike the Federal rules. 2 Miss. Code 1942 §§ 1659, 1699 (1957). *Garraway* v. *Retail Credit Co.*, 141 So. 2d. 727 (Miss. 1962), qualified protection of experts' reports.

Missouri

Mo. Sup. Ct. adopted rules in 1959 similar to Federal rules effective Oct., 1960. 4 Mo. Rev. Stat., Sup. Ct. R. (1959). *State ex rel. State Hwy. Comm'n* v. *Jensen*, 362 S.W. 2d 568 (Sup. Ct. Mo. 1962), condemnation case protecting appraisers notes from discovery as work product; *State ex rel. St. Louis County Transit Co.* v. *Walsh*, 327 S.W. 2d 713 (Ct. App. Mo. 1959), photographs not privileged, per se, qualifies work product.

Montana

No cases on point. Mont. adopted the Federal rules almost verbatim, effective Feb. 9, 1961. Mont. Laws, 37th Sess., Ch. 13 (1961). As to extent of discovery under previous rules see, *State ex rel. Pitcher* v. *District Court*, 114 Mont. 128, 133 P. 2d 350 (1943).

Nebraska

No cases on point. As of 1951 Neb. has had discovery provisions similar to the Federal rules. Neb. Sess. Laws 1951, §§ 25.1267.01–25.1269 (1952).

Nevada

No cases on point. Nev. Sup. Ct. adopted rules similar to Federal rules, effective Jan. 1, 1953. 1 Nev. Rev. Stat., R. Civ. P. (1953).

New Hampshire

No provisions similar to Federal rules. 5 N.H. Rev. Stat. Ann., § 516 (1955). *McDuffey* v. *Boston & Maine R.R.*, 102 N.H. 179, 152 A. 2d 606 (Sup. Ct. 1959), permitting discovery of experts' reports; *Smith* v. *American Employer's Ins. Co.*, 102 N.H. 530, 163 A. 2d 564 (Sup. Ct. 1960), denying discovery of work product.

New Jersey

Rules substantially similar to the Federal rules became effective Sept. 15, 1948, and were revised in 1953. N.J. Practice, Part IV, Ch. 4 (1953). *Cermak* v. *Hertz Corp.*, 53 N.J. Super. 455, 147 A. 2d 800 (1958), discovery of experts' conclusions denied; *Kaplan* v. *Jones*, 77 N.J. Super. 31, 185 A. 2d 248 (Super. Ct. 1962), denying discovery of work product.

New Mexico

No cases on point. As of 1949 New Mexico has had rules similar to the Federal rules. 4 N.M. Stat. Ann. 1953, Ch. 21 (1954). *Salitan* v. *Carrillo*, 69 N.M. 476, 368 P. 2d 149 (1961), as to scope of discovery.

New York

In 1962 the N.Y. Civ. Prac. Laws and Rules were adopted to be effective Sep. 1, 1963. The rules do not expand the scope or methods of discovery nor make provision for pretrial conferences. N.Y. Laws, Civ. Prac. L. and R., Ch. 308 (1962). *Murphy* v. *City Products Corp.*, 188 N.Y.S. 2d 247, 17 Misc. 2d 1026 (Sup. Ct. Erie County 1959), denying discovery of experts' conclusions; *Hewitt* v. *State*, 216 N.Y.S. 2d 615, 27 Misc. 2d 930 (Ct. of Claims N.Y. 1960), condemnation case permitting discovery of experts' conclusions; *Pfaudler Permutit, Inc.* v. *Stanley Steel Service Corp.*, 212 N.Y.S. 2d 106, 28 Misc 2d 388 (Sup. Ct. Monroe County 1961), denying discovery of experts' conclusions; *Salzo* v. *Vi-She Bottling Corp.* 235 N.Y.S. 2d 585, 37 Misc. 2d 357 (Supp. Ct. Queens County 1962), qualified admission of experts' reports; *Cataldo* v. *Monroe County*, 238 N.Y.S. 2d 855, 38 Misc. 2d 768 (Supp. Ct. Monroe County 1963), qualified denial of insurance reports.

North Carolina

No cases on point. Limited discovery and deposition procedures. 1A N.C. Gen. Stat., recompiled 1953.

North Dakota

No cases on point. Rules similar to the Federal rules were adopted, effective July 1, 1957. 5 N.D. Cent. Code Ann., R. Civ. P. (1957).

Ohio

Procedure is under a legislative code first adopted in 1853. Ohio Rev. Code Ann., Ch. 2317 (1958) (1962 Supp.). *Neff* v. *Hall*, 170 N.E. 2d 77 (Ct. App. Ohio 1959). Condemnation case denying discovery of experts' reports; *Nomina* v. *Eggeman*, 188 N.E. 2d 440 (Ct. C.P. Ohio 1962), qualifying discovery of experts' conclusions; *In re Bates*, 167 Ohio St. 46, 146 N.E. 2d 306 (Sup. Ct. 1957), denying discovery of work product.

Oklahoma

No cases on point. Procedure is regulated by a code first adopted in 1870. Okla. Stat. Ann., Title 12, Ch. 10 (1960). *Application of Umbach*, 350 P. 2d 299 (Okla, 1960) Federal income tax returns held privileged.

Oregon

No cases on point. Code provisions regulate procedure and are much more limited than the Federal rules. 1 Ore. Rev. Stat., Ch. 45 (Ch. replaced 1961–1962). See 40 Ore. L. Rev. 94 (1960) as to work product.

Pennsylvania

Discovery procedures are not as liberal as comparable Federal provisions. Pa. R. of Ct. 1962. *Musulin* v. *Redevelopment Authority*, 25 D. & C. 2d 267 (Pa. 1961), condemnation cases denying discovery of appraisals and valuations; *Wright* v. *Philadelphia Transp. Co.*, 24 D. & C. 2d 334 (Pa. 1961), denying discovery of experts' reports and conclusions.

Rhode Island

No cases on point. Trend since 1956 to adopt procedure similar to Federal system, 10 R.I.B.J. 7 (Nov. 1961); 2 Gen. L. R.I., Title 9, Ch. 18 (1956). *De Courey* v. *American Emery Wheel Works*, 153 A. 2d 130 (R.I. 1959), as to court appointed experts.

South Carolina

No cases on point. Procedure still substantially the sam as under the Field Code first adopted in 1870. 6 Code Law S.C., Ch. 7 (1962). As to general provisions see, *Peagler* v *Atlantic Coast Line R.R.*, 101 S.E. 2d 821 (S.C. 1958).

South Dakota

No cases on point. Rules have been adopted that ar similar to Federal discovery provisions. 2 S.D. Code, Titl 36, Ch. 36 (1960 Supp.).

Tennessee

No cases on point. Code provisions limited followin some of the Federal provisions. 5 Tenn. Code Ann., Title 2 (1955) (Supp. 1962).

Texas

A detailed set of rules following the Federal provision became effective Sept. 1, 1941. A series of amendments i 1957 substantially broadened the discovery procedure Tex. R. Civ. P. (1955). *Harrell* v. *Atlantic Refining Co* 339 S.W. 2d 548 (Ct. Civ. App. Tex. 1960), discovery of wor product denied.

Utah

Rules were adopted in 1950 which are very similar to th Federal rules. 9 Utah Code Ann., R. Civ. P. (1953). *Mow* v. *McCarthy*, 122 Utah 1, 245 P. 2d 224 (Sup. Ct. 1952), deny ing discovery of expert conclusions and work product.

Vermont

No cases on point. Discovery procedure similar to Federa procedure was adopted by statute in 1957 and substantiall amended in 1959. 3 Vt. Stat. Ann., Title 12 (1961 Supp.)

Virginia

Sup. Ct. adopted a set of rules effective Feb. 1, 1950, wit limited discovery procedure. 2 Va. Code, Title 8, R. Sup Ct. App. (1950). *Cooper* v. *Norfolk Redevelopment & Hou ing Authority*, 197 Va. 653, 90 S.E. 2d 788 Sup. Ct. App. 1956 a condemnation case permitting discovery of experts' con clusions on agency principles.

Washington

No cases on point. Has adopted the Federal rules o discovery and pretrial conference. O Rev. Code Wash., I Pleading, Prac. & P. (1960).

West Virginia

No cases on point. The W. Va. Sup. Ct. adopted rul similar to the Federal rules, effective July 1, 1960.

Wisconsin

Discovery statutes were amended in 1961 to harmoni with the liberal interpretation of the Federal provision 30, 38 Wis. Stat. Ann. (1958). *State ex rel. Reynolds* v. *Circu Court*, 15 Wis. 2d 311, 112 N.W. 2d 686 (1961), condemnatio case permitting discovery of appraisers' reports and opinion *Walsh* v. *Northland Greyhound Lines*, 224 Wis. 281, 12 N.W 2d 20 (1943), permitting discovery of experts' reports.

Wyoming

No cases on point. Wyo. Sup. Ct. adopted new rul similar to Federal rules in 1957. 2 Wyo. Stat. 1957, R. Ci P. (1959). See, *Lake De Smet Reservoir Co.* v. *Kaufman*, 2 P. 2d 482 (Wyo. 1956) as to liberal interpretation of cour discretion in permitting discovery of books, documents, ar papers.

APPENDIX V

Illustrative Statutory Provisions Regarding Expert Protection From Discovery

Absolute Protection

Absolute protection for the expert's report, ıe expert's conclusions, and the attorney's ork product is illustrated by:

mith-Hurd Ill. Ann. Stat. § 101.19–5 (Sup. t. R. 19–5)

§.101.19–5(1). *All matters* which are privileged against disclosure upon the trial are rivileged against disclosure through any iscovery procedure. Disclosure of memoıanda, reports, or documents made by or for party in preparation for trial or any privi:ged communications between any party or is agent and the attorney for the party shall ot be required through any discovery rocedure. (Emphasis added.)

a. R. of Ct. 1962

Rule 4011. Limitation of Scope of Dis›overy and Inspection. No discovery or ıspection shall be permitted which: (a) is ›ught in bad faith; (b) causes unreasonable nnoyance, embarrassment, expense, or appreension to the deponent or any person or arty; (c) relates to matter which is privi:ged or would require the disclosure of any ecret process, development, or research; l) would disclose the existence or location of eports, memoranda, statements, information, r other things made or secured by any person r party in anticipation of litigation or in reparation for trial or would obtain any ıch thing from a party or his insurer, or ıe attorney or agent of either of them, other ıan information as to the identity or wherebouts of witnesses; (e) would require the ıaking of an unreasonable investigation by the deponent or any party or witness; (Items (a) through (e) were adopted November 20, 1950, effective June 1, 1951, amended April 12, 1954, effective July 1, 1954.) (f) would require a deponent, whether or not a party, to give an opinion as an expert witness, over his objection (Amend., March 1962, effective, April 1962.).

No Protection

No statutory protection for the expert's report or his conclusions and only qualified protection of the attorney's work product is provided by the following listed statutes:

Maryland Rules of Procedure, Rule 410.

§ 410(c). Writings Obtainable. Except as otherwise provided in rule 406 (similar to Federal rule 30(b) providing for protective orders), a party may by written interrogatory or by deposition require that an opposing party produce or submit for inspection:

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

§ 410(d). Writings Not Obtainable. Except as otherwise provided in rule 406, a party or deponent shall not be required to produce or submit for inspection:

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

(b) Reflecting Attorney's Conclusions. A writing which reflects an attorney's mental impressions, conclusions, opinions or legal theories. (In this case the attorney's work product appears to include only the results of the mental processes of the attorney.)

Qualified Protection

Qualifying protection of the expert's report upon the condition that it was prepared in preparation for trial and protecting any part is illustrated by the following listed statute.

Kentucky Revised Statutes, Rule 37.02.

Limitations on the Production of Writings. The deponent shall not be required and the court shall not order a deponent or party to produce or submit for inspection any writing obtained or prepared by the adverse party, his attorney, surety, indemnitor, or agent, *in anticipation of litigation or in preparation for trial unless satisfied that denial of production or inspection will result in an injustice or undue hardship;* nor shall the deponent be required or the court order a deponent or party to produce or submit for inspection *any part* of a writing which reflects an attorney's mental impressions, conclusions, opinions, or legal theories, or except as provided in rule 35, the conclusions of an expert. (Emphasis added.)

An Evaluation of Partial Taking of Property for Right-of-Way

BY THE
ECONOMIC RESEARCH DIVISION
BUREAU OF PUBLIC ROADS

Reported[1] by GEORGE V. BRODERICK, Economic Statistician, and FLOYD I. THIEL, Economist

Contrary to general public opinion, the partial taking of property for highway right-of-way usually has beneficial effects on the remaining property, according to the findings of the study of severance case records in the Bureau of Public Roads' files (bank). The information on the effects of the partial takings presented in this article is expected to be helpful to those concerned with the acquisition of right-of-way for highways—appraisers, negotiators, courts, and affected property owners.

As much background information as possible is needed to provide the basis for establishing a fair price for the purchase of right-of-way. To obtain this information, most State highway departments are conducting severance study programs and publishing the findings. Studies available and the effects of many partial takings reported to Public Roads by the States have been analyzed by the authors. From this analysis, it has been concluded that most property owners benefit from their encounter with highway departments.

Introduction

A MAJOR job facing builders of modern highways today is the equitable and timely acquisition of right-of-way. For several reasons, this task may be growing even more complex.[2] Controlled-access features of modern highways are placing more limits on abutters' rights. There is increasing competition for space, particularly in urban areas. And the problem is intensified by modern highway facilities needing wider rights-of-way.

Whether the task of acquiring right-of-way for highways is growing more difficult, there can be no doubt about the magnitude of this task. For the National System of Interstate and Defense Highways alone, a million and a half acres of land costing about $6.5 billion will be required by the completion date in 1972. Right-of-way acquisition in which the Federal Government participates is currently costing about $750 million a year—proposed State right-of-way programs for 1963, $685 million; for 1964, $757 million; for 1965, $870 million.

Severance Studies

To help assure that this money is being spent wisely, increasing use is being made of severance studies—case study analyses of the effect of taking part of a property for highway right-of-way. Such studies have been completed or are underway in 46 States, of which two-thirds have supplied information for inclusion in a central file or bank of cases that was established about 2 years ago (1961) in Public Roads. The States have supplied more than 1,200 case studies for this central file. The States have issued more than 1,500 individual case study reports, many of these are narrative reports or were made on State forms rather than on Public Roads forms.

Severance studies are intended to provide the information that will permit equitable payments to be made for property taken. By recording and analyzing the effect of partial taking of property for right-of-way in the past, severance studies make it possible to determine with more certainty the present and future effect of partial taking of properties for right-of-way. As more is learned about what happens to properties after part is taken for right-of-way, especially factors or characteristics that affect value, considerable savings in costs are expected to be realized. But severance studies obviously are not intended simply to reduce costs of right-of-way acquisition. Inadequate payments for right-of-way are fully as alarming to conscientious highway builders as excessive payments.

Summary

The findings presented in this article are tentative; they are only typical of the cases analyzed and are not representative of all cases. The tentative findings may change when more cases become available for analysis.

The high cost of right-of-way, more than a billion dollars a year, and the need at the same time to provide just compensation when acquiring right-of-way, provide a strong momentum for examining past experience to learn what general truths might be useful in right-of-way acquisition in the future. In organizing and making available in useful form the experience gained in highway acquisition, severance studies offer a way of correcting certain overpayments as well as the relatively few underpayments for highway right-of-way. Many State highway departments are now enjoying this benefit as the result of their own severance studies. In addition to this use of severance studies, which must be regarded as their primary purpose, findings from analyzing a collection of cases can be expected to provide some guidelines for right-of-way acquisition in the future. Although information in the Public Roads' bank of cases does not now permit formulas to be developed to predict the experience owners will have with their remainder parcels, some tentative observations can be made, as follow:

(1) The recovery rate for cases in the Public Roads' bank tends to be more than 100 percent, the median is 138 percent.

(2) Certain characteristics tend to be associated with a higher-than-average recovery rate. These include: nearness to an interchange, a sale after some period of time (e.g., more than a year) after the taking, a vacant rather than a residential land use before the acquisition, and full visibility of the highway from the remainder.

(3) When the simultaneous effect of several factors acting in combination was analyzed by multiple regression, the most influential factors were: a change in land use, time elapsing from acquisition to sale, travel distance to new highway, type of remainder, and nearness to an interchange.

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[1] Presented at the 43d annual meeting of the Highway Research Board, Washington, D.C., January 1964, under the title of *Highway Severance Damage Studies—Some General Findings.*

[2] For a brief discussion of the growing complexity of right-of-way acquisition, see *An Editorial.* Right-of-Way, vol. 10, No. 5, October 1963, p. 5.

(4) The owner is being made whole in four
t of five cases.
(5) Property owners who lost generally had
st very little. Gains ranged from small
nounts to fantastically large gains.
(6) Owners of residential properties are
ore likely to experience losses than owners
land in other uses. Gains are often asso-
ated with vacant remainders.
(7) Damage payments made to owners of
cant parcels often are unrealistically high.
perience suggests that high damage pay-
nts for vacant properties partially taken
ould receive close scrutiny in the future.

Benefits of Severance Studies

Many of the benefits to be derived from
verance studies are already being realized.
ese studies help assure the proper spending
tax money for right-of-way purposes;
ey make available information relevant to
e takings. This information is needed
appraisers and negotiators, the courts,
d affected property owners, if the State's
rpose to buy right-of-way property at a
r price is to be accomplished.
Analysis to supply experience in similar
uations—the purpose of individual sever-
ce studies—is the traditional approach
ploying data for comparable situations,
hich has been used successfully by
praisers. Ordinarily, the best sources for
mparable information in taking situations
e studies completed within the State, and
st States do rely on data obtained from
ch cases. For unusual situations—takings
volving special purpose properties—the
blic Roads' bank can be searched for
mparable takings. The procedure for re-
esting a search is described on page 93
the *Manual for Highway Severance Damage*
udies, and the type of data that can be
tained is shown in table 1.
A fairly common result of severance in-
stigations shows that (1) after a partial
king for right-of-way, the adverse effect
remaining land parcels is often much
s drastic than feared or (2) the remainder
rcel receives a significant benefit. Thus,
ese studies can be useful in keeping af-
ted individuals and the general public
rmed.

llection of cases

Collecting severance cases offers op-
rtunities for analyzing these cases. Al-
ough the data reflected in the bank of
ses cannot be considered typical for all
ghway takings, the data that can be as-
mbled permit some interesting and perhaps
luable comparisons. Although there are
w about 1,250 cases in the bank, cases
e not usable for analysis until they have
en edited and checked. The number of
able cases for different comparisons varies.
r example, more than 900 cases can be
ed to compare the per acre value at the
ne of the highway taking with the per
re value of the remainder that is sold, and
e 650 cases in the bank for which the entire
mainder has been sold provide a good in-
dication of the extent to which the *owner was made whole* or, in a very general way, whether just compensation was provided.

Recovery Rate Experience

The recovery rate for a highway-severed parcel is obtained by dividing the value per acre (or per square foot) of part or all of the remainder that has been sold by its value at the time of the taking. A recovery rate of more than 100 percent means that the remainder has increased in value. As the recovery rate can be determined when any part of a remainder is sold, this type of comparison ordinarily can be made for a case as soon as any portion of the remainder has been sold.

Because of the extremely high recovery rates for some remainder parcels, simple arithmetic averages may not be a satisfactory summary measure of the typical recovery rate for severed parcels in the bank at the present time (1963). Median values provide another way of summarizing the overall recovery rate. As a median is a middle value with half of the cases above and half of them below, those remainder parcels having extremely high recovery rates do not have such a noticeable effect on median values as on average values. The median recovery rate for cases in the bank at the end of 1963 was 138 percent. About 75 percent of all cases showed a recovery rate of more than 100 percent, as shown in figure 1. Some 7 percent of the cases showed a recovery rate of more than 1,000 percent, and 25 percent of the cases showed a recovery rate of less than 100 percent.

In addition to considering recovery rates reported for all cases in the bank, rates have been compared according to (1) time of the sale, (2) land use before the taking, (3) type of highway involved, (4) visibility from remainder parcel, and (5) location of the parcel in relation to an interchange.

Table 1.—Comparison of principal characteristics of property and comparable property

Item	Subject parcel	Comparable sale
Land use before	School	Elementary school.
Land use after (expected)	(School)	Retail.[1]
Size before	10 acres	11 acres.
Size after	8 acres	8 acres.
Highway characteristics	Interstate	Interstate.
Value before	$70,000	$69,000.
Value of portion acquired	$20,000	$18,000.
Estimated benefit (+) or damage (−).		−$15,000.
Estimated remainder value.		$36,000.
Sales price of remainder		$89,000.
Effect of taking		+$38,000.

[1] Although the elementary school was expected to continue as a school, the use changed to retail soon after the taking. In this case, which is recorded in the Bureau's bank, dollar amounts have been rounded to the nearest hundred.

Time of sale

Whether the time at which a remainder parcel sells has any effect on the recovery rate has been the subject of considerable speculation. The effect of time is of interest because it has a bearing on the validity of the comparison between before values and after values. If a sale occurs soon enough after the taking, the highway effect is revealed by simply comparing the before value with the value shown by the sale.

The effect of time on recovery rates of cases in the bank is very noticeable. Remainder parcels that are sold a year or more after the time of the taking tend to have higher recovery rates. As can be seen in figure 2, parcels that were sold within a year's time had a lower rate of recovery. A third of the parcels that were sold within the first year had a recovery rate of less than 100 percent. For parcels sold more than 3 years after the highway taking, only 12 percent had a recovery rate of less than 100 percent. Nearly 60 percent of the land parcels that were sold more than 3 years

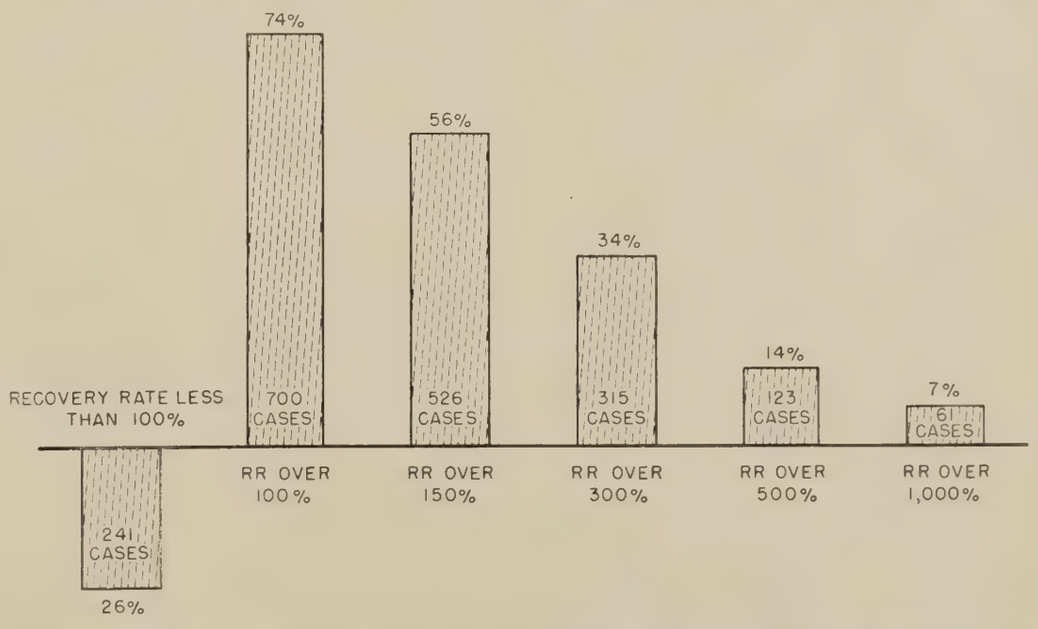


Figure 1.—Land value recovery rates—overall recovery rates by number and percentage of cases.

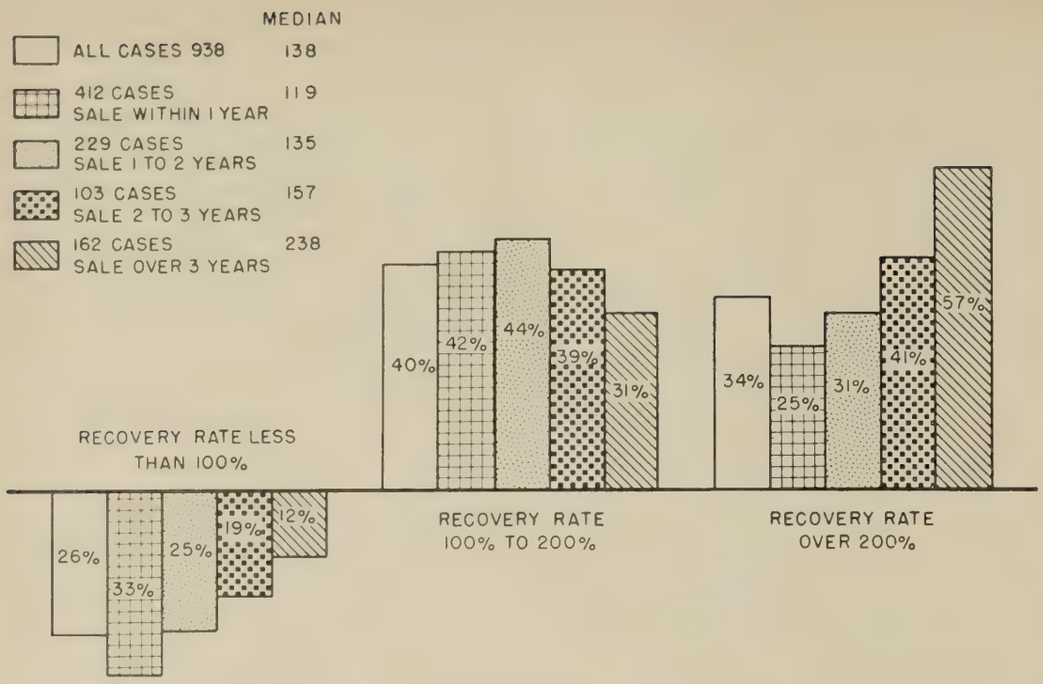


Figure 2.—Land value recovery rates by time from acquisition to sale—unadjusted for general land value changes.

after the highway taking had a recovery rate of more than 200 percent, and about 15 percent had a recovery rate of 1,000 percent or more. In contrast, only about 25 percent of the land parcels that were sold within the year of the taking had a recovery rate of more than 200 percent; 4 percent had a recovery rate of 1,000 percent or more.

The median recovery rates for parcels sold at different lengths of time after the highway taking emphasize the effect of time. The median recovery rate for property sold within 1 year was 119 percent; for property sold between 1 and 2 years after the taking, 135 percent; for property sold between 2 and 3 years after the taking, 157 percent; and for property sold more than 3 years after the taking, 238 percent. This is shown in figure 2. These median recovery rates adjusted for general land value increases (an average annual increase of 7 percent was used) are still spectacular: 115 percent, 121 percent, 129 percent, and 155 percent, respectively. Thus, it appears that land values of affected parcels tend to appreciate in value considerably faster than is true for land values generally. Eventually, when enough cases are available for analysis, it may be possible to limit the comparison to cases where the remainder is sold very soon after the acquisition. Such a comparison would generally exclude the general land value increase occurring over a period of time and leave only the highway effect. With such a simple before and after comparison, the effect of characteristics other than time (e.g., type of land use, type of highway system) should become more easily distinguished.

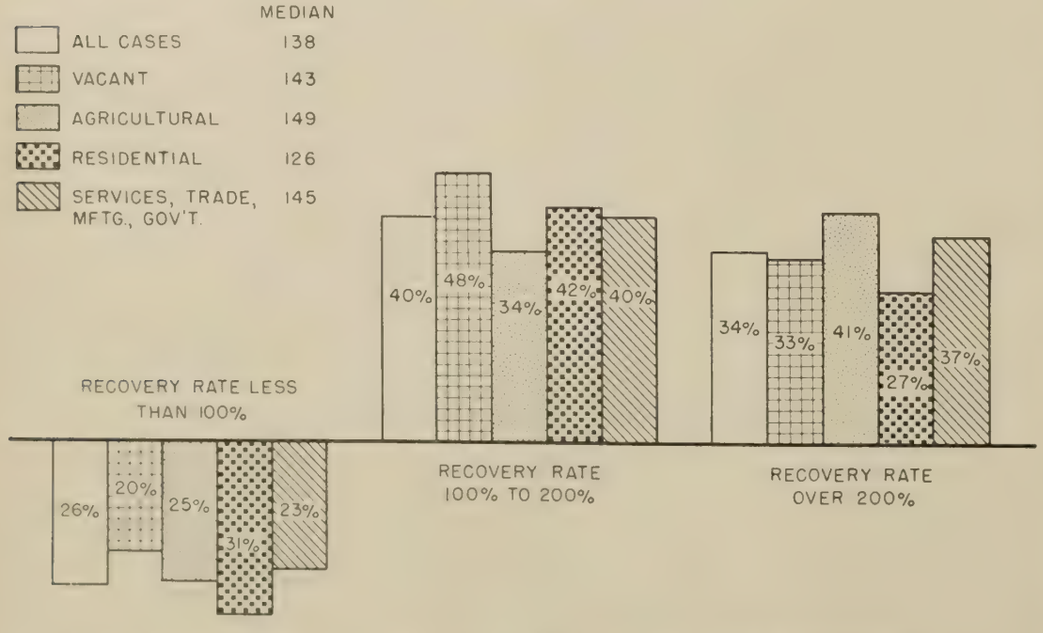


Figure 3.—Land value recovery rates by land use at the time of acquisition.

Land use

Another characteristic that appears to ha an effect on the recovery rate is the use th the land was put to at the time of the highwa taking (fig. 3). The median recovery ra for residential property, for example, is abo 126 percent compared with a median recove rate for all cases of 138 percent. The oth land uses—vacant, agricultural, and a co bination of services, trade, manufacturi and government—had recovery rates of 1 percent, 149 percent, and 145 percent, respe tively. The relatively poorer recovery ra for residential property is highlighted by t bar charts in figure 3. For example, only percent of the residential property remaind had a recovery rate of 200 percent or mo and 31 percent of the residential property h a recovery rate of less than 100 percent.

Type of highway system

Another comparison, by type of highw system, shows some differences that may attributable to whether the remainder par was located on an Interstate highway, Federal-aid primary highway, or a Federal-secondary road. The median recovery r for remainder parcels along Interstate rou is about 140 percent, slightly higher than median recovery rate (138 percent) for cases in the bank. The recovery rate is ab 132 percent along Federal-aid primary hi ways, and about 135 percent along Fede aid secondary roads.

In addition to somewhat higher recov rates, for remainder parcels along the In state System more large gains and more lo have been experienced than for parcels al other highway systems. As shown in fig 4, about 35 percent of the remainder par located along Interstate Highway Syst have had recovery rates of more than percent. This is a slightly larger portio parcels than the remainder parcels loc along Federal-aid primary systems and I eral-aid secondary systems. At the s time, about 30 percent of the remainder cels located along the Interstate System h had recovery rates of less than 100 perc compared with about 24 percent of the mainders along the Federal-aid prim system and 26 percent of the remainders al Federal-aid secondary systems, which recovery rates of less than 100 perc Whether the recovery rates along Inters routes will continue at the same level w more cases are available to analyze is clear. Perhaps the overall recovery rate remainder parcels along Interstate routes be more spectacular than for remainder cels located along other types of high systems.

The higher-than-normal recovery r along Interstate routes might be expec but it may be that recovery rates for n parcels located along the Interstate route be lower than for parcels located on c types of highway systems because of the of direct access to the Interstate Sys However, the contrast between Inter and non-Interstate recovery rates is sha

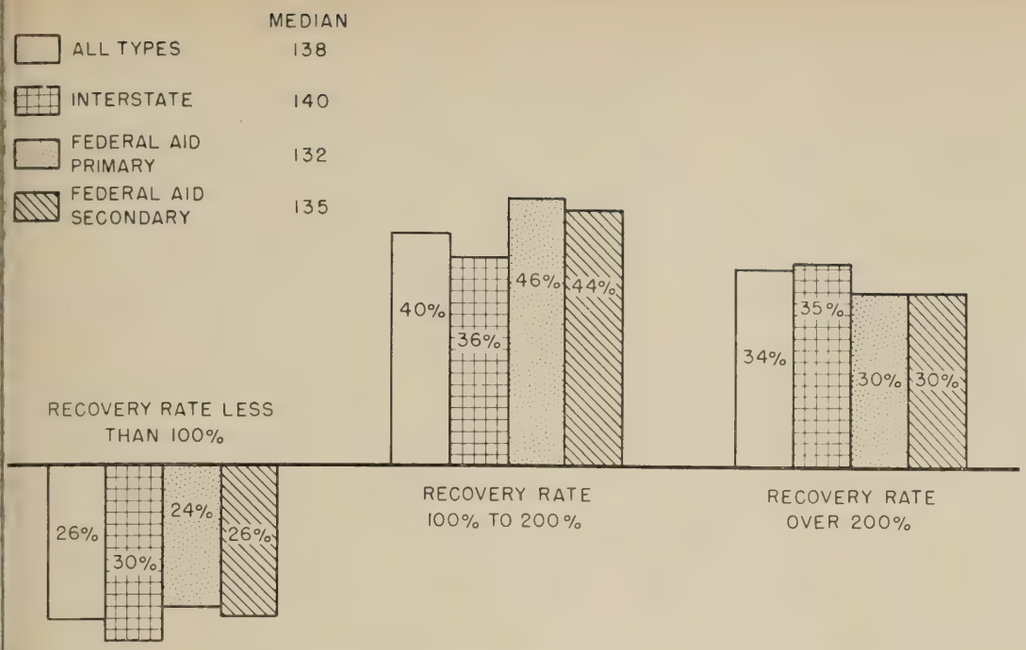


Figure 4.—Land value recovery rates by type of highway system.

the upper range of recovery rates than is at the lower end. Thus, the recovery tes along the Interstate System are dis-guished from those for other highways imarily by the high recovery rates; when covery rates are low along the Interstate stem, the rates are only slightly different m those along other types of roads.

sibility from the remainder

The States that are sending severance cases the Public Roads' bank are providing formation as to whether the highway is sible from the remainder parcel. Most of e time full visibility means that the property also visible from the highway. Tentative alysis of the recovery rates by visibility ows some interesting differences, though it is not now possible to tell just how significant these differences are. The median recovery rate for parcels from which the highway is fully visible, for example, is 145 percent, compared with a recovery rate of 133 percent for parcels from which the highway was partially visible, and 117 percent for parcels from which the highway could not be seen. This is shown in figure 5, along with the median recovery rate for all cases—138 percent. Also, 37 percent of those remainder parcels from which the highway could be seen fully had a recovery rate of more than 200 percent, but only about 21 percent of the remainder parcels from which the highway could not be seen had such a high recovery rate.

As noted earlier, the significance of the recovery rates cannot be fully discerned at this time; however, the claims that are often made about the undesirable appearances and effects of modern highway improvements have seldom been substantiated. Apparently the market does not discount the value of property from which the highway can be seen. On the contrary, property from which the highway can be seen appears to fare better in the market place than property from which the highway is not visible.

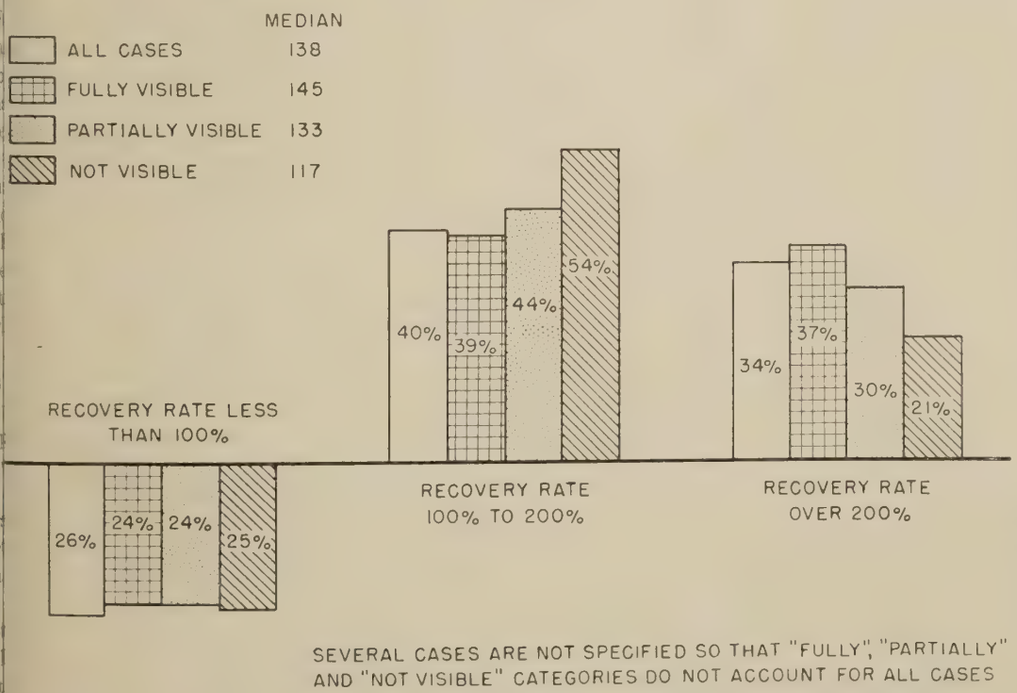


Figure 5.—Land value recovery rates by visibility of highway from remainder.

Interchange effects

What happens around interchanges is depicted in figure 6. Approximately one-fourth of the 900 plus cases used in this analysis were located within a half mile of an interchange, a distance often used to distinguish between interchange and noninterchange areas. The recovery rate of parcels located within a half mile of an interchange is generally better than the recovery rate for parcels located farther away from an interchange. For example, the median recovery rate for parcels located near interchanges was about 164 percent compared with 131 percent for parcels located away from the interchange. Also, more of the interchange properties had high recovery rates than was true for parcels located away from the interchange. Nearly half of the parcels located within a half mile of an interchange had recovery rates of more than 200 percent.

Multiple Regression Analysis

In analysis of the recovery rates of highway-severed remainders, an examination of the influence of several factors taken one at a time generally has been relied upon. In the investigation described here, a start has been made to determine the simultaneous effect on the recovery rate of several factors, acting in combination, and to measure the relative strength of each of the factors. For this analysis, the technique of multiple regression has been used.

When the simultaneous effect on the recovery rate of several factors acting in combination was studied, the most influential factors were (1) change in land use, (2) time elapsing from acquisition to sale, (3) travel distance to the new highway, (4) type of remainder (landlocked, isolated, or separated), and (5) nearness to interchange. For one of the groups of cases studied, a coefficient of multiple correlation of 0.86 was obtained, indicating that 73 percent of the total variation in the recovery rate was explained by the combined effect of the several independent factors used in the analysis. Additional and more refined analysis of this kind is planned for the future.

Are Public Roads' Cases Typical

As many of the States supplying information about remainder parcels do not report on all remainder parcels in the State or on a representative sample of them, some question may exist as to whether the cases in the Public Roads' bank are typical of partial taking in general. Although there appears to be no definitive test that would answer this question, a check can be made to compare the findings from the bank as a whole with the

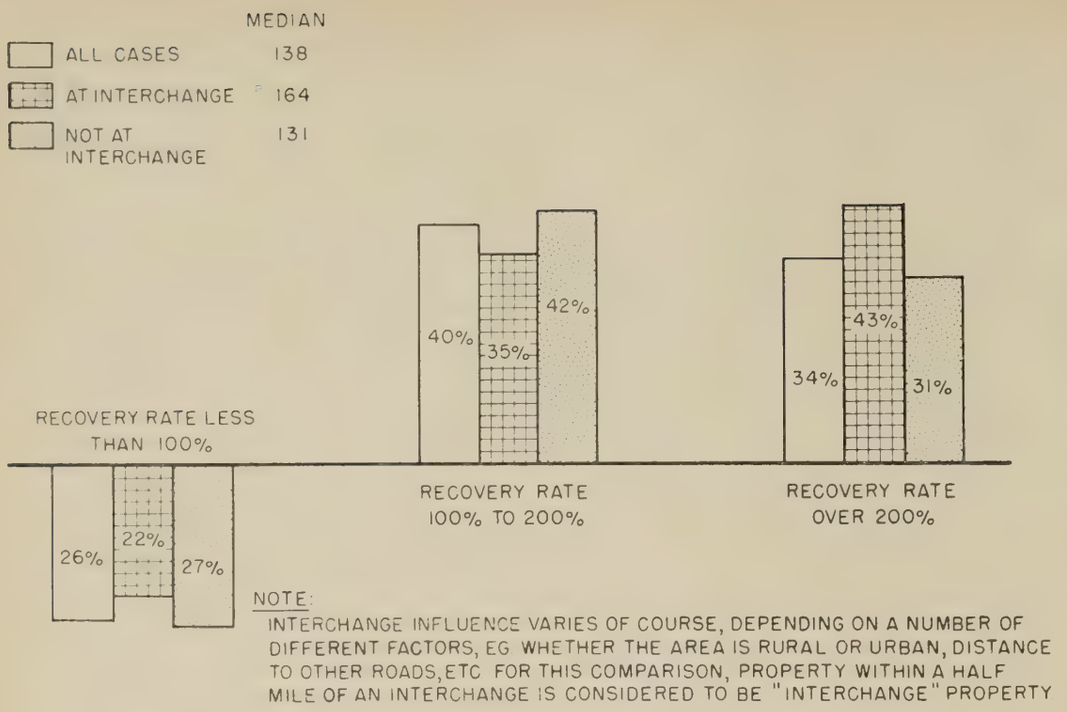


Figure 6.—Overall land value recovery rates by nearness to interchange.

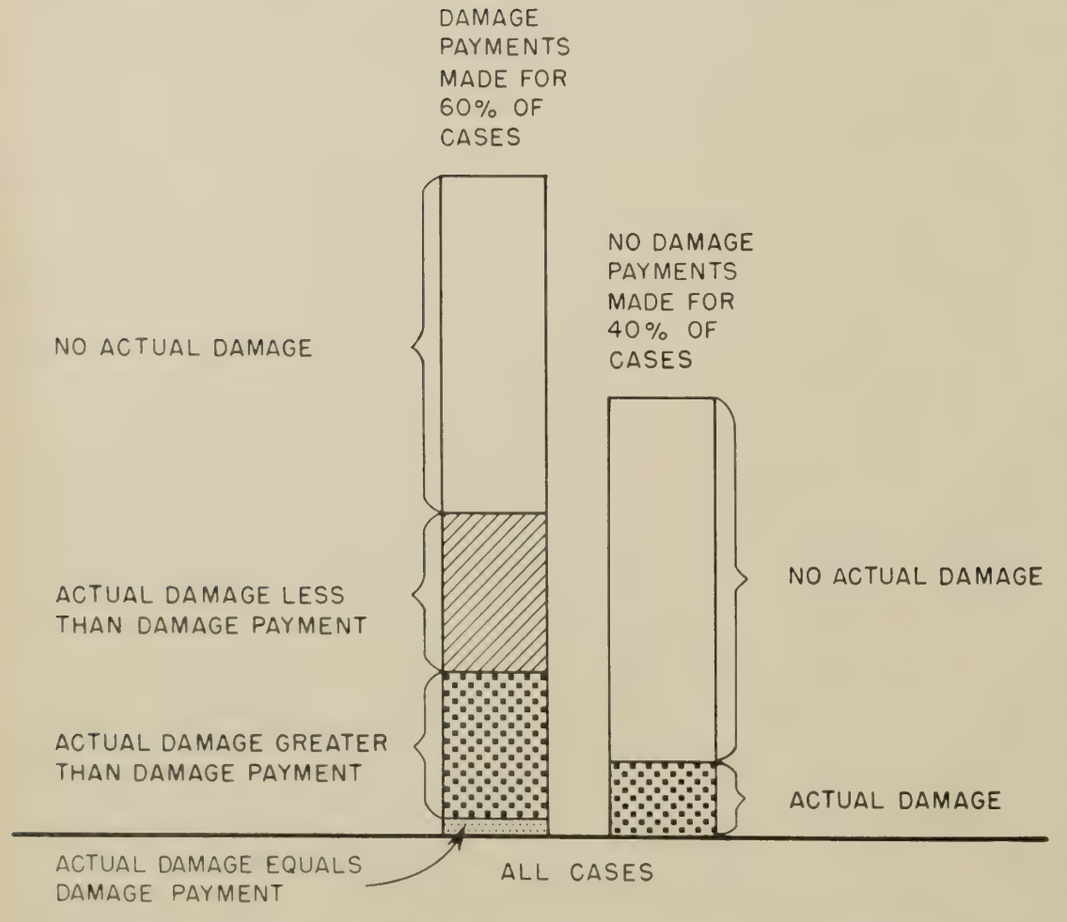


Figure 7.—Comparison of damage payments with actual damages.

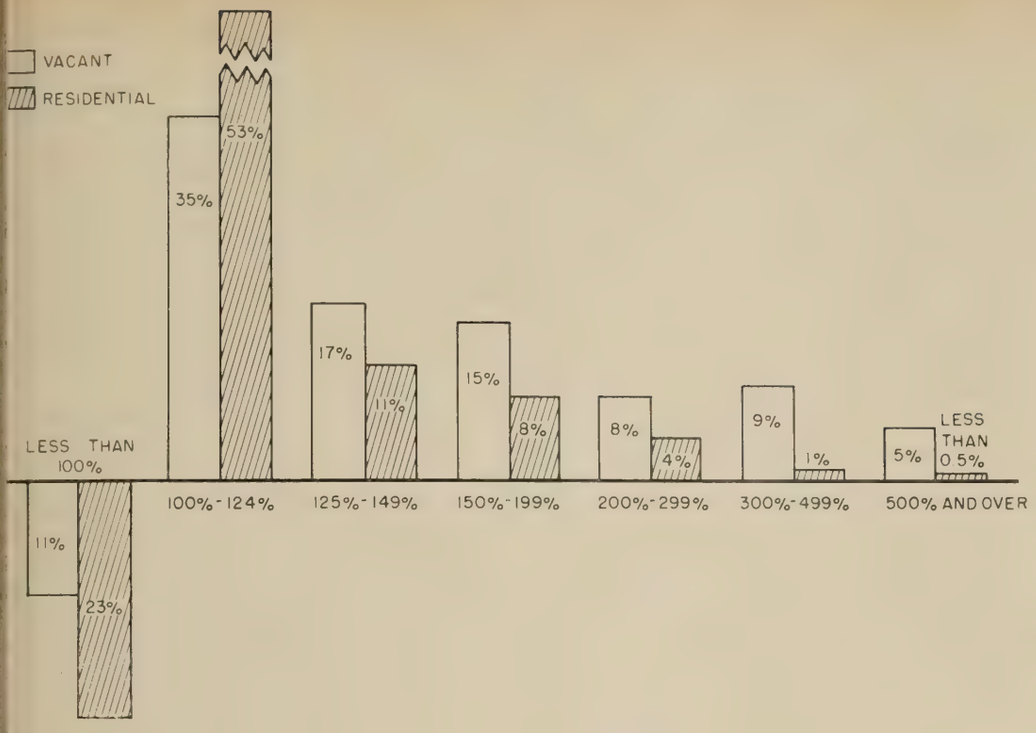
findings from a State that is supplying infor mation about all remainder parcels that hav been sold. This has been done. Findings fo all cases in the bank have been compare with those of the approximately 400 Californi cases, which are in the bank.

The findings for all cases compare fairl closely with those based solely on Californi cases. For example, the median recover rate reported for California cases is about 14 percent compared with 138 percent for th entire bank. The comparison was made be tween findings from California cases and a cases, rather than between findings from Cali fornia cases and all non-California cases primarily for convenience. It seems fairl obvious that the differences between data i California and non-California cases would b slightly greater than those between Californi cases and all cases. Properties located withi a half mile of an interchange had a media recovery rate in California of 166 percent compared with a recovery rate of 164 percen for the bank as a whole. The percentage o cases reported by California for which th property was located within a half mile of a interchange—about 25 percent—agrees ger erally with the percentage of all bank case in which the property was near an interchang —about 29 percent. Thus, it appears tha there are similarities in the effects reflected b the California cases and the total effects re flected by those in the bank, except that th recovery rates in California are slightly highe than the recovery rates in other States.

Extent to which the Owner is Mad Whole

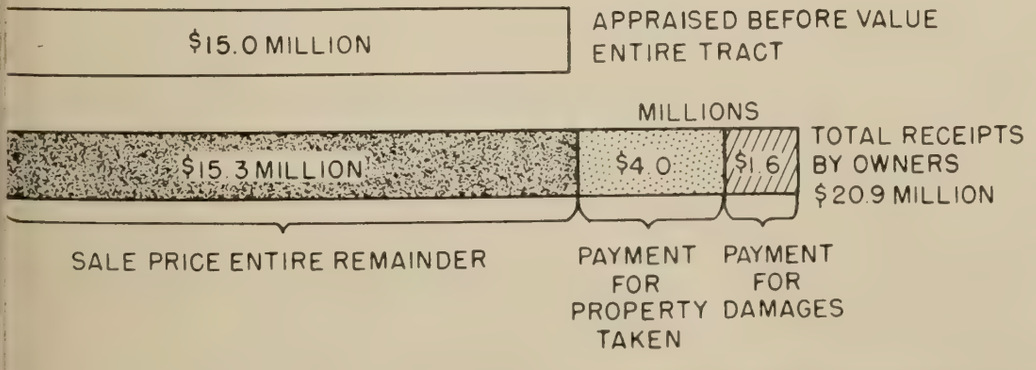
Whether the owner is made whole can b determined by comparing before and aft property values. When a State takes part o an owner's property for highway right-of-wa and then after a period of time the owner sel the entire remainder, it can be said that all th results are in for that owner and for tha property. The appraised value of the enti tract before the taking is known; the pa ments made by the State to the owner for th property taken, as well as for any expecte damages to the remainder, are known; an the sale price of the entire remaider is know It is then possible to determine whether th owner was damaged or benefited, and th extent of the damage or benefit can b determined.

A before and after examination of the 6 cases in the Public Roads' bank in which th entire remainder was sold reveals the exte to which owners of property partially take for highway right-of-way were made whole- that is, whether affected property owners we placed in as good a financial position as the would have been had their property not bee taken. To measure the effects of the parti taking of property for each of the 650 cas selected, the value of the entire proper (including improvements) before the takin was compared with the total amount the own received from the property; that is, for th property taken, for damages to the remainde and from the sale of the entire remainder.



igure 8.—Percentage distribution of value received as percent of value by before land use, vacant and residential.

PPRAISED BEFORE VALUE ENTIRE TRACT (INCLUDING IMPROVEMENTS)	$14,977,800
PAYMENT FOR PROPERTY TAKEN (EXCLUDING DAMAGES)	4,011,600
PAYMENT FOR DAMAGE TO REMAINDER	1,563,600
TOTAL PAYMENTS BY STATE	5,575,200
SALE PRICE OF ENTIRE REMAINDER	15,311,500
TOTAL RECEIPTS OF PROPERTY OWNERS	$20,886,700



igure 9.—Comparison of total appraised value before with total payments received by owners.

For the cases analyzed, four out of five property owners received either adequate compensation or more. The remaining 20 percent of the property owners ended up with less money after the highway taking than they had in property before the highway improvement. The median value that the entire group of 650 property owners received was 112 percent of the before value of their property.

Damages—Estimated and Actual

For the 650 cases analyzed, damage payments were made to the owners of 60 percent of these properties; the remaining 40 percent received no payments. Examination of the experience of owners receiving damage payments revealed that half of the recipients actually sustained no damage at all, and one-fourth of the recipients of damage payments suffered less actual damage than they were paid for. A fifth of all recipients of damage payments received less in damage payments than the cost of damage they actually sustained. Of the owners who received no damage payments, more than four-fifths experienced no actual damage and the remaining fifth suffered actual damage. Thus, for both groups, about one owner in five suffered a loss as the result of an under payment of damages or the nonpayment of damages. Highway officials are, of course, just as concerned about property owners receiving inadequate compensation as they are about apparent overpayment of damages: The goal is to make the owner whole. A comparison of these findings is presented in figure 7.

Damage Payments Compared to Total Payments

It is of interest to compare the proportion of total State payments accounted for by damage payments for selected categories of partial taking cases with total combined payments for all cases. Using total combined payment figures, damage payments accounted for 28 percent of total payments made by the States for right-of-way acquisition. However, for vacant land nearly half the cost of acquisition was accounted for by damage payments.

Why damage payments are so high for vacant land remainders in contrast to the higher-than-average recovery rates for vacant property is somewhat perplexing. The result is that owners of vacant land have been treated better than owners of other types of property. For example, owners of vacant land had receipts amounting to 129 percent of the before value of their property compared with 107 percent for owners of residential properties. This contrast in value received as a percent of before value as between vacant parcels and residential parcels is highlighted by figure 8. Owners of vacant parcels had fewer losses than residential property owners (11 percent versus 23 percent). And, a much higher proportion of owners of residential than of vacant properties experienced relatively small gains over the before value. It

is clear that owners of vacant properties generally fared better than residential land owners.

At least a partial explanation of the more favorable after-taking experience of owners of vacant land is given by still another finding from the bank. A comparison of the uses of remainder parcels at the time they were sold, with their uses at the time of the taking, revealed that nearly a third of those parcels vacant at the time of taking had shifted to higher uses by the time the parcel was sold. By contrast, less than a tenth of residential parcels had shifted to higher uses by the time they were sold. In view of these findings, it appears that the acquisition of vacant land offers a good chance for improvement in the pursuit of the goal of making the owner whole.

Total Values Compared

The experience of individual owners following the partial taking of their property for highway right-of-way has been examined and presented in the form of frequency distributions, percentage distributions, and medians. Now, the total experience of affected owners, obtained from examination of the entire bank of partial taking cases in which the entire remainder was sold, and the experience of different groupings of these owners is discussed. The total of the appraised before values of the properties of the 647 owners was $15 million. The owners of these properties were paid a total of $4 million for property taken (exclusive of damage payments) and $1.6 million in damage payments. Finally, these owners sold their remaining property for a total of $15.3 million (fig. 9).

If these figures are adjusted for the general increases occurring in land values, the expected total market value is $10.2 million. A comparison of this very rough estimate of the expected total market value of the remainders at the time of sale with the actual total sale price gives a rough idea of the extent of land value increases and/or overpayments for damages. Remainders that might have been expected to sell for $10.2 million were sold for $15.3 million. This is an oversimplification because some State laws do not permit t use of benefits to offset the cost of taking against damages to the remainder. Thu even after considering a general increase land values, the total receipts of affect owners were considerably higher than the tot before value of their property.

This finding of large total receipts, of cours should in no way be understood to imply th severance damages should not be paid. T out of five affected owners did actually suf damage. One of these received either insu cient payments or no damage payments. fact, the only purpose served by this kind total analysis is to indicate the outside theor ical limits of the improvement that might made in the awarding of damages to own of highway-severed properties. However, appears that very careful consideration shou be given to the offsetting of benefits agai damage payments where appropriate, and the offsetting of benefits against payments property taken where appropriate and wh State law permits.

NEW PUBLICATIONS

Highway Progress, 1963

Annual Report of the Bureau of Public Roads, Fiscal Year 1963

A review of the accomplishments of the Bureau of Public Roads, U.S. Department of Commerce, during the fiscal year 1963, particularly those related to the Federal-aid highway program, is presented in the annual report, *Highway Progress, 1963.* The 109-page illustrated publication contains a descriptive account of the progress made during fiscal year 1963 on construction of the National System of Interstate and Defense Highways, and information on the improvement of primary highways, secondary roads, and urban arterials under the regular Federal-aid program.

Also described in the annual report is the highway construction work undertaken directly by the Bureau of Public Roads in national forests and parks and on other Federal lands, as well as Public Roads activities in providing technical assistance to foreign countries to further their programs of highway development.

Reported on at length are the activities a accomplishments of Public Roads in mana ment, highway planning and design, urb transportation planning, safety, and in extensive and varied research and devel ment program. Statistical information the progress and activities of the Federal- program during the fiscal year 1963 is p sented in 19 statistical tables included as appendix to the report.

Highway Progress, 1963, may be purcha from the Superintendent of Documents, U Government Printing Office, Washingt D.C., 20402, for 35 cents a copy.

U.S. GOVERNMENT PRINTING OFFICE: 1964

PUBLICATIONS of the Bureau of Public Roads

A list of the more important articles in PUBLIC ROADS *and title sheets for volumes 24–32 are available upon request addressed to Bureau of Public Roads, Washington, D.C., 20235.*

The following publications are sold by the Superintendent of Documents, Government Printing Office, Washington, D.C., 20402. Orders should be sent direct to the Superintendent of Documents. Prepayment is required.

ANNUAL REPORTS

Annual Reports of the Bureau of Public Roads:

1951, 35 cents. 1955, 25 cents. 1958, 30 cents. 1959, 40 cents. 1960, 35 cents. 1962, 35 cents. 1963, 35 cents. (Other years are now out of print.)

REPORTS TO CONGRESS

Actual Discussion of Motortruck Operation, Regulation and Taxation (1951). 30 cents.

Federal Role in Highway Safety, House Document No. 93 (1959). 30 cents.

Highway Cost Allocation Study:

First Progress Report, House Document No. 106 (1957). 35 cents.

Final Report, Parts I–V, House Document No. 54 (1961). 70 cents.

Final Report, Part VI: Economic and Social Effects of Highway Improvement, House Document No. 72 (1961). 25 cents.

The 1961 Interstate System Cost Estimate, House Document No. 49 (1961). 20 cents.

U.S. HIGHWAY MAP

Map of U.S. showing routes of National System of Interstate and Defense Highways, Federal-Aid Primary Highway System, and U.S. Numbered Highway System. Scale 1 inch equals 80 miles. 25 cents.

PUBLICATIONS

Aggregate Gradation for Highways: Simplification, Standardization, and Uniform Application, and A New Graphical Evaluation Chart (1962). 25 cents.

America's Lifelines—Federal Aid for Highways (1962). 15 cents.

Calibrating and Testing a Gravity Model With a Small Computer (1964). $2.50.

Classification of Motor Vehicles, 1956–57 (1960). 75 cents.

Design Charts for Open-Channel Flow (1961). 70 cents.

PUBLICATIONS—Continued

Federal Laws, Regulations, and Other Material Relating to Highways (1960). $1.00.

Financing of Highways by Counties and Local Rural Governments: 1942–51 (1955). 75 cents.

Highway Bond Calculations (1936). 10 cents.

Highway Bond Financing . . . An Analysis, 1950–1962. 35 cents.

Highway Capacity Manual (1950). $1.00.

Highway Planning Technical Reports—Creating, Organizing, and Reporting Highway Needs Studies (1964). 15 cents.

Highway Statistics (published annually since 1945):
1955, $1.00. 1956, $1.00. 1957, $1.25. 1958, $1.00. 1959, $1.00. 1960, $1.25. 1961, $1.00. 1962 $1.00.

Highway Statistics, Summary to 1955. $1.00.

Highway Transportation Criteria in Zoning Law *and* Police Power and Planning Controls for Arterial Streets (1960). 35 cents.

Hydraulics of Bridge Waterways (1960). 40 cents.

Increasing the Traffic-Carrying Capability of Urban Arterial Streets: The Wisconsin Avenue Study (1962). 40 cents. Appendix, 70 cents.

Interstate System Route Log and Finder List. 10 cents.

Landslide Investigations (1961). 30 cents.

Manual for Highway Severance Damage Studies (1961). $1.00.

Manual on Uniform Traffic Control Devices for Streets and Highways (1961). $2.00.

Part V—Traffic Controls for Highway Construction and Maintenance Operations (1963). 25 cents.

Parking Guide for Cities (1956). Out of print.

Peak Rates of Runoff From Small Watersheds (1961). 30 cents.

Reinforced Concrete Pipe Culverts—Criteria for Structural Design and Installation (1963). 30 cents.

Road-User and Property Taxes on Selected Motor Vehicles, 1964. 45 cents.

Selected Bibliography on Highway Finance (1951). 60 cents.

Specifications for Aerial Surveys and Mapping by Photogrammetric Methods for Highways, 1958: a reference guide outline. 75 cents.

Standard Specifications for Construction of Roads and Bridges on Federal Highway Projects, FP–61 (1961). $2.25.

Standard Plans for Highway Bridges (1962):

Vol. I—Concrete Superstructures. $1.00.
Vol. II—Structural Steel Superstructures. $1.00.
Vol. III—Timber Bridges. $1.00.
Vol. IV—Typical Continuous Bridges. $1.00.

The Identification of Rock Types (revised edition, 1960). 20 cents.

The Role of Aerial Surveys in Highway Engineering (1960). 40 cents.

Traffic Safety Services, Directory of National Organizations (1963). 15 cents.

Transition Curves for Highways (1940). $1.75.