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UNITED STATES DEPARTMENT OF JUSTICE

With this issue we are inaugurating a new section in the Bulletin--"Department Profiles"--which will consist of brief biographical notes and pictures of a United States Attorney and a Division or Section Chief in Washington. This section will attempt to acquaint the United States Attorneys and Assistants with personnel in the Department with whom they are often in communication, as well as acquainting Department personnel with the United States Attorneys in the field.

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NEWS NOTES

FBI Releases UCR

September 20, 1968: The FBI's Uniform Crime Reports disclosed crime in the United States rose 21 per cent during the first six months of 1968 when compared to the corresponding period in 1967, according to figures released today by Attorney General Ramsey Clark. In making those figures available, FBI Director J. Edgar Hoover stated that crime reports which were submitted voluntarily by law enforcement agencies throughout the country reveal violent crimes increased 21 per cent as a group. The FBI Director said the upward trend was consistent throughout the geographic regions of the country. The Northeastern States registered a 27 per cent rise, the Western States 20 per cent, the Southern States 18 per cent, and the North Central States 17 per cent. Mr. Hoover specifically pointed out the significant increase in robbery and other street crimes. He noted a 34 per cent rise in armed robbery and a significant 28 per cent increase in assaults with the use of firearms.

Parke-Davis Charged With Employment Discrimination

September 20, 1968: The Department of Justice has charged Parke, Davis & Company, a major pharmaceutical firm, with employment discrimination against Negroes in plants at Detroit and Ann Arbor, Michigan. Attorney General Ramsey Clark said the civil complaint, filed in United States District Court in Detroit, asserted a violation of the Equal Employment Opportunity section of the 1964 Civil Rights Act.

The suit said Parke, Davis gives hiring preference to persons referred by or related to current employees, most of whom are white, rather than to walk-in applicants, most of whom are Negroes. The firm also makes no effort to recruit and hire Negro clerical and professional employees on the same basis as white applicants, the suit said. The suit asked that the company be forbidden to continue any of the alleged discriminatory practices and be required to recruit and hire Negroes on the same basis as white persons.

Thirty-one employment discrimination suits have now been filed by the Department since passage of the 1964 Act, including 21 this year.

Barefoot Sanders Named to U.S. Court of Appeals

September 25, 1968: President Johnson has nominated Harold Barefoot Sanders, Jr., his personal legislative counsel, to a judgeship on the U.S. Court of Appeals for the District of Columbia. Mr. Sanders, a native of Dallas, is a graduate of the University of Texas where he also received his law degree. After serving in the Navy during World War II he entered

private practice. He was elected to the Texas Legislature in 1953 and served there until 1959. He served as United States Attorney for the Northern District of Texas (Dallas) from 1961 to February of 1965. In 1965 he joined the Justice Department in Washington, D.C. as Assistant Deputy Attorney General and later Assistant Attorney General in charge of the Civil Division.

House Passes Magistrate Bill

September 27, 1968: The House voted on September 27th to abolish the Office of U.S. Commissioner - one of the few remaining judicial officers supported by fees - and establish instead a system of salaried magistrates with wider powers. The bill, which passed 172 to 21, would give magistrates wider jurisdiction in misdemeanor cases and permit United States district judges to assign them certain civil duties.

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DEPARTMENT OF JUSTICE PROFILES

Fred M. Vinson
Assistant Attorney General
Criminal Division

Fred M. Vinson was born in Louisa, Kentucky, April 3, 1925. He graduated from Woodrow Wilson High School in Washington, D. C. in 1942. From 1943-1946 he was in the Army-Air Force. He attended Washington & Lee University, where he was Phi Beta Kappa, President of the Student Body, and winner of 8 varsity letters. After receiving his A. B. degree cum laude in 1948, he attended Washington & Lee Law School, where he received his LL. B. degree in 1951. He received his LL. D. degree from the Law School in 1968. From 1951-1965, Mr. Vinson was engaged in general and trial practice in Washington, D. C., and was a partner in the Washington law firm of Reasoner, Davis & Vinson at the time of his appointment as Assistant Attorney General in April, 1965. As Assistant Attorney General he has organized two new sections in the Criminal Division - Legislation and Special Projects, and Narcotics and Dangerous Drugs. He argued the Hoffa case in the Supreme Court for the Department in 1966. This past year he coordinated Federal efforts to quell the riot in Baltimore in April, and in June he represented the Attorney General in the extradition proceedings of James Earl Ray in London.

Jon O. Newman
United States Attorney
District of Connecticut

Mr. Newman was born May 2, 1932, in New York City, New York. He received his A. B. degree magna cum laude from Princeton University in 1953 and his LL. B. degree from Yale University in 1956. He was admitted to the Bars of the State of Connecticut and the District of Columbia in the same year. He was a law clerk with a law firm in New Haven, to Judge George T. Washington of the District of Columbia Circuit Court, and from 1957 to 1958 to Chief Justice Earl Warren, Supreme Court of the United States. From 1959 to 1960 he was a Graduate School Instructor at Trinity College in Hartford and also an attorney in private practice until 1961 when he was appointed Consultant in the Office of the Secretary, Department of Health, Education and Welfare in Washington, D. C. He served under the Secretary as Assistant and Executive Assistant. From 1963 until his appointment in 1964 as United States Attorney he was Administrative Assistant to Senator Abraham Ribicoff. Mr. Newman's Office has instituted broad discovery procedures in the District of Connecticut, which have been emulated in other Districts. In the near future Jon Newman will travel to Bogata, Columbia as part of a two man consultant team which will advise the Columbian Government on a revision of its prosecution system.

ANTITRUST DIVISION

Assistant Attorney General Edwin M. Zimmerman

DISTRICT COURT

SHERMAN ACT

MOTION TO DISMISS PERJURY INDICTMENT GROWING OUT OF ANTITRUST INVESTIGATION DENIED.

United States v. Lloyd Kent Jones (W. D. Pa., Cr. 68-52; August 30, 1968; D. J. 60-3-160)

On July 5, 1965, the Deputy Attorney General authorized a grand jury investigation in the Western District of Pennsylvania into possible violations of the federal antitrust laws and other federal criminal statutes within the plumbing industry, and on that date designated John C. Fricano, of the Antitrust Division, as a special assistant. The letter stated that Mr. Fricano was directed

> . . . to assist in the investigation and prosecution and in all proceedings growing out of the transactions herein above-mentioned in which the Government is interested.

On October 16, 1967, the grand jury returned an indictment against six corporations, including Sterling Faucet Company, a manufacturer of plumbing brass fittings by whom Jones was employed, charging a price-fixing conspiracy. That case was terminated as to all defendants on February 20, 1968, with judgments of conviction on pleas of nolo contendere.

On March 5, 1968, the grand jury was reconvened. Mr. Fricano appeared before it with Stanley W. Greenfield, First Assistant United States Attorney, Western District of Pennsylvania. Mr. Fricano summarized the evidence relevant to Mr. Jones' testimony and Mr. Greenfield submitted a proposed indictment to the grand jury. The grand jury thereupon returned a true bill charging Jones with perjury committed during his testimony on December 5, 1966.

On April 23, 1968, the defendant moved that the indictment be dismissed. He contended that the letter of authorization to Mr. Fricano dealt only with crimes that had occurred or might be occurring at the time the authorization was made, and thus could not have meant to refer to an act of perjury six months later. Defendant conceded that the Deputy Attorney General could have specifically authorized Mr. Fricano to assist in the return of the perjury indictment, but contended that letters of authorization should

be strictly construed and that his letter, so construed, did not authorize the action taken. Accordingly, argued the defendant, Mr. Fricano was an improper person in the grand jury room and the indictment was invalid.

In reply, Division attorneys and the United States Attorney argued that those few cases suggesting that letters of authorization be narrowly construed were aberrant, and that the majority position favored liberal construction. Secondly, it was argued that whatever the standard of construction, the express language of the letter clearly authorized Mr. Fricano to assist in a perjury indictment arising out of the price-fixing investigation he had been delegated to conduct.

On August 30, 1968, Judge Marsh issued a brief opinion denying the motion to dismiss. He agreed that, "The cases indicate that the authorization of a special assistant attorney is not to be strictly construed." Then he added, "A broad construction is not necessary, however, to find that the special authorization in this case included an authorization to appear as an attorney at the perjury proceeding. The perjury proceeding 'grew out' of the antitrust investigation since it was during the antitrust proceedings that the alleged perjury took place."

A trial date has not yet been set.

Staff: Assistant United States Attorney Stanley W. Greenfield (W. D. Pa.); John C. Fricano, Rodney O. Thorson and Joel Davidow (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General Edwin L. Weisl, Jr.

COURTS OF APPEALS

ADMINISTRATIVE LAW -- AGRICULTURE -- FINALITY OF COUNTY COMMITTEE DETERMINATIONS

DETERMINATION BY COUNTY ASC OFFICE THAT FARMER IS IN COMPLIANCE WITH COTTON ACREAGE ALLOTMENT DOES NOT BAR REDETERMINATION BY AGENCY.

Jones v. Hughes (C. A. 8, No. 19095; September 16, 1968; D. J. 106-9-288); Jones v. Lindsey Bros. (C. A. 8, No. 19,096; September 16, 1968; D. J. 106-9-289)

Under the Agricultural Adjustment Act, 7 U. S. C. 1281, et seq., cotton acreage allotments are established for each farm by a county ASC (Agricultural Stabilization and Conservation) committee. Each farm is then visited by a crop reporter. If the farmer is found to have planted more than his acreage allotment, he is given the opportunity to plow up the excess. If he fails to do so, he is assessed a penalty. In these cases, the farmers allegedly plowed up their excess, after which another crop reporter visited the farms and reported that they were in compliance. The farmers then received notices of compliance from their county committee. Later in the year, however, their farms were visited by other reporters as part of a spot check. It was then discovered that the prior reporters had made mistakes of measurement, and that the farmers had not in fact plowed up the acreage which they claimed to have plowed up. On this basis, penalties were assessed.

Department of Agriculture regulations permit a farmer to rely on an erroneous notice of compliance if it is shown (1) that he relied in good faith on the erroneous notice; (2) that he did not receive actual knowledge of the error in time to adjust his acreage by a plow-up; (3) that the error was the fault of ASCS personnel; (4) that the farmer was not at fault; and (5) that the error was not so great that the farmer should have questioned the notice. 7 C. F. R. 718.10(b). Under this regulation, the ASC review committee held hearings to determine whether the farmers in these cases were entitled to relief. The committee denied relief in the Lindsey case on the grounds that the error was such that the farmer should have noticed it, and that, when the farmer was notified of the results of the spot check, he had sufficient unharvested acreage to comply with his allotment through a plow-up. In the Hughes case, relief was denied on the ground that Hughes did not plow up the excess acreage of which he was originally notified, and that the extent of

the error in the original notice should have caused him to question it.

The district court held that the original notices of compliance were final and binding on the ASC county committee, in reliance on 7 U.S.C. 1385, as interpreted by United States v. Kopf, 379 F.2d 8 (8th Cir. 1967). That statute provides that "the facts constituting the basis for any * * * price support operation * * * when officially determined in conformity with the applicable regulations * * * shall be final and conclusive and shall not be reviewable by any other officer or agency of Government." The Court of Appeals concluded that "an acreage determination by the [ASC] office personnel is intended to be neither official or [sic] final within the meaning of § 1385. The regulations authorized the Secretary to make a redetermination, and the producer can, if he sees fit, ignore an adverse determination or redetermination until the county committee assesses a penalty." The Court held that "an official determination, pursuant to the regulations, is not made until the county committee notifies the producer that it has assessed a penalty." At that point, the farmer has a right to a hearing; earlier determinations are made on an ex parte basis by office personnel. The Court distinguished United States v. Kopf on the ground that there the administrative determination held to be final was made after a full evidentiary hearing. In addition, the initial determination in Kopf, unlike that in the instant case, was final and binding on the farmer, and thus, as a matter of fairness, the Court had held that it should be final and binding on the Government.

The Court of Appeals then reached the question of whether the findings of the review committee on the applicability of the "erroneous notice" regulations were supported by substantial evidence. See 7 U.S.C. 1366. The Court upheld the review committee determinations in part, but reversed in part on the ground that some of the findings were not so supported. The cases were remanded for a determination of penalties.

Staff: Robert V. Zener (Civil Division)

INSURANCE -- UNITED STATES AS AN ADDITIONAL INSURED

RIDER IN GOVERNMENT EMPLOYEE'S LIABILITY INSURANCE POLICY EXCLUDING UNITED STATES FROM COVERAGE AS ADDITIONAL INSURED IS EFFECTIVE TO PREVENT UNITED STATES FROM RECOVERING UNDER THE POLICY THE AMOUNT OF TORT CLAIMS ACT JUDGMENT ON ACCOUNT OF EMPLOYEE'S NEGLIGENCE.

Government Employees Ins. Co. v. United States (C.A. 10, No. 9862; September 16, 1968; D.J. 145-4-1501)

The typical automobile liability policy contains a so-called "omnibus" clause, under which the company is liable to any person or organization responsible for the policyholder's actions. Under this clause, it has been held that the United States may recover from the insurer of a Government employee the amount of a Tort Claims Act judgment for conduct covered by the employee's policy. Government Employees Ins. Co. v. United States, 349 F. 2d 83 (C. A. 10, 1965), certiorari denied, 382 U. S. 1026; United States v. Myers, 363 F. 2d 615 (C. A. 5, 1966). The present case was a Tort Claims Act suit arising out of an automobile accident covered by the Government employee's liability policy. The employee's insurance company, upon the renewal of the policy (shortly before the accident in question), attached a rider which specifically excluded the United States as an additional insured under the omnibus clause. Nevertheless, the Government attempted to implead the insurance company, claiming that the rider was void for lack of consideration since the premium had not been reduced when the rider was added to the policy. The district court agreed, and allowed the Government to recover over under the omnibus clause.

The Court of Appeals reversed. It held that a reduction of premium is not necessary when a restriction in coverage is part of the renewal of a policy, since "each renewal is a separate contract and is to be treated separately." On this basis, the Court distinguished cases holding that consideration in the form of a reduction of premium is necessary to support the modification of an existing insurance policy. The Government also urged on appeal that the insurance company had not put the policyholder on sufficient notice that a rider had been attached to his policy excluding the United States from coverage. The Court of Appeals agreed that "an insurance company is bound by the great coverage in an earlier policy where the renewal contract is issued without calling to the insured's attention a reduction in policy coverage." It also agreed that the statement in the cover letter enclosing the renewal policy, admonishing the policyholder in general terms to read the policy carefully, would not, standing alone, be sufficient to call his attention to the change in coverage. However, the endorsement was attached as a separate addition to the contract, and the Court of Appeals concluded that "even a casual reading of the mailed material would result in informing the insured of the change." Thus, the Court concluded that the policy change had been sufficiently called to the policyholder's attention, although it stated that "a better procedure would be for the insurer to indicate in the cover letter * * * the extent to which the policy has been modified."

Finally, the Court noted that equitable considerations which might operate in a suit by the policyholder, who is entitled to rely on the assumption that the contract provisions remain unchanged upon renewal, do not apply in a suit by the United States, which could not have been misled by any failure of notification of a change in its employee's policy.

Staff: Robert V. Zener (Civil Division)

SURETYSHIP -- DUTY OF OBLIGEE TO DISCLOSE MATERIAL FACTS

FAILURE OF OBLIGEE OF SURETY BOND TO DISCLOSE MATERIAL INFORMATION ABOUT PRINCIPAL TO SURETY DOES NOT BY ITSELF RELEASE SURETY FROM ITS OBLIGATION.

United States v. Ohio Casualty Ins. Co. (C.A. 6, No. 18,035; September 9, 1965; D.J. 120-58-119)

Commodity Credit Corporation (CCC) entered into a Uniform Grain Storage Agreement with a grain storage company. Pursuant to this agreement, the company obtained a surety bond in favor of CCC, guaranteeing performance under the agreement. When a shortage was discovered, CCC sued the surety on the bond. The surety claimed that it was released from its obligation since CCC had failed to disclose: (1) that its Shortage Committee had met to discuss certain missing warehouse receipts; and (2) that the storage company was not keeping all of the records required by the agreement. The surety asserted that, had it known these facts, it would not have issued the bond (or it would have canceled the bond if already issued).

The district court held that the surety was not relieved of its obligation by these circumstances, and the Sixth Circuit affirmed. The Court of Appeals held that the mere existence of a suretyship relationship did not create a duty in CCC to disclose these facts. Rather, some further duty, contractual or otherwise, must be shown by the surety. Since this could not be done, the surety was not released from its obligation under the bond.

Staff: Norman Knopf (Civil Division)

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CRIMINAL DIVISION

Assistant Attorney General Fred M. Vinson, Jr.

COURT OF APPEAL

SELECTIVE SERVICE; CRYSTALIZATION OF CONSCIENTIOUS OBJECTION AFTER RECEIPT OF INDUCTION NOTICE JUSTIFIES RE-OPENING OF CLASSIFICATION

William Ward Ehlert v. United States (C.A. 9, Civil 21,930, decided September 11, 1968)

Appellant was convicted of a violation of 50 U.S.C. App. Sec. 462 for refusing to submit to induction into the armed forces after he sought to reopen his classification in order to establish his status as a conscientious objector subsequent to his receiving his induction notice. Selective Service Regulations, 32 C.F.R. Sec. 1625.2 provide in part:

> The classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction . . . unless the local board first specifically finds that there has been a change in the registrant's status resulting from circumstances over which the registrant had no control.

The question presented to the Ninth Circuit was whether the crystalization of a conscientious objection to war can constitute a circumstance over which the registrant has no control. The Court answered in the affirmative, stating that:

> * * * conscientious objection itself would seem to be a contradiction of control. It is difficult to see how one could in his thinking depart at will from a conviction which honestly is dictated by conscience . . . . Accordingly, crystalization of a conscientious objection occuring after notice of induction can constitute a change over which the registrant had no control, justifying re-opening of classification under §1625.2.

The Ninth Circuit has thus aligned itself with the Second and Tenth Circuits on this issue, whereas the Fourth, Fifth and Seventh Circuit have answered this question in the negative.

Staff: Assistant United States Attorney Paul Sloan (N.D. Calif.)

DISTRICT COURT

FEDERAL FOOD, DRUG AND COSMETIC ACT

INTERSTATE TRANSPORTATION OF DIET PILLS ENJOINED

United States v. Lanpar Co., et al. (N. D. Texas, September 13, 1968; DJ. 21-73-273)

On September 13, 1968, at Dallas, Texas, Judge Sarah Hughes issued a decree enjoining the Lanpar Company and its officers from introducing into interstate commerce certain so-called "diet pills" which it had been distributing to physicians for control of obesity. The decree prohibits (1) the interstate transportation of such drugs until they are manufactured in accordance with current good manufacturing practices; and (2) the use of any statements, representations, reports, bulletins, etc., which suggest that the drugs are safe and effective for the treatment of obesity and other related disorders.

In her findings of fact, Judge Hughes found in favor of the Government on every major issue of fact and law which had been raised. The case represents a significant victory in the effort to correct the improper use of so-called "diet pills" by physicians who prescribe or sell them as a substitute for actual dieting programs. The use of these drugs has been found to be unsafe, since they achieve their effect through the creation of physiological conditions in the body which may have serious adverse consequences. Their use has been promoted by certain drug manufacturers by means of an appeal to the large financial benefits received by physicians who prescribe them.

Staff: United States Attorney Eldon Mahon and Assistant United States Attorney Kenneth Mighell (N. D. Texas)

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LAND AND NATURAL RESOURCES DIVISION

Assistant Attorney General Clyde O. Martz

COURT OF APPEALS

DISCOVERY - CASE REPORT AND INSTRUCTIONS

CONDEMNATION; VALUATION EXPERTS; SCOPE; DISCRETION OF TRIAL COURT; SANCTIONS FOR REFUSAL TO DISCOVER; DISMISSAL OF DECLARATION OF TAKING AND ORDER OF POSSESSION.

United States v. Meyer (C. A. 9, July 19, 1968, modifying and affirming N. D. Cal., D. J. 33-5-2318)

In condemnation proceedings the landowner issued notices for taking depositions under Rule 26, F. R. Civ. P., together with subpoenas duces tecum under Rule 48(b), addressed to three private appraisers hired by the Government. The documentary items listed embraced practically the appraisers' entire private files. The United States moved for a protective order under Rule 30(b) to exclude six broad categories of questions. The motion was denied. At the direction of Government counsel, the appraisers, at the taking of the depositions, refused to answer almost all questions as to their opinions of value and the basis therefor. On motion to impose sanctions, the district court dismissed the action and struck a declaration of taking and an order of possession previously filed.

The case was approached by all parties in the trial court as a test as to the scope of discovery in federal condemnation proceedings. The Court of Appeals refused to allow an interlocutory appeal authorized by the trial court; hence, the refusal to answer and the dismissal were pursued as a means of securing an appellate opinion on the subject.

In many respects, the opinion tends to confuse, rather than clarify, this subject. One reason for this is that the parties had thought that the district court had exercised its discretion in refusing to grant a protective order limiting the examination in any way and in ordering imposition of sanctions without limitation. But the Court of Appeals read the record to show that "the propriety of particular details of the proposed discovery was not presented to nor decided by the trial court." This was the premise of the opinion's discussion.

The Court held:

1. "Without reaching the question of power," where the taking was not challenged, striking the declaration of taking and order of possession "is not

an appropriate sanction under Rule 37." (The failure to reinstate the complaint is apparently inadvertent, since a declaration of taking can be filed only in pending proceedings.)

2. Pleadings in condemnation are wholly uninformative on the only issue to be tried--the amount of compensation. Later (fn. 13), the opinion distinguishes discovery of evidence from pleading the claim of compensation, saying "The government is not bound by the appraiser's deposition testimony as to value."

3. Appraisers' opinions and their foundations are the principal evidence of value, are peculiarly within each appraiser's knowledge, and this "can be obtained in advance of trial only by discovery." Full pretrial disclosure of appraisers' opinions and the details upon which they are based is required if the rules are to accomplish their purpose. The opinion declares that, contrary to the Government's argument, discovery will narrow issues and would serve other purposes.

4. It is no impediment that the information of the appraisers was equally available from other sources because mutual knowledge is essential to proper litigation and because the opinions of these appraisers are only available from them, the Court remarking: "A protective order designed to minimize abuse or unfairness might be proper in some circumstances."

5. Pretrial discovery is proper for the preparation of effective cross-examination.

6. There is no distinction between "fact" and "opinion," contrary to the Government's argument that discovery does not extend to experts' opinions, as distinguished from facts.

7. The "work product" exemption from discovery of Hickman v. Taylor, 329 U.S. 495, does not apply to appraisers. The opinion concluded its discussion on this point, after listing evils against which Hickman was directed, by saying: "If a substantial possibility of these or other adverse consequences, such as undue interference with completion of the apparisers' work, appears to exist in a given case the appropriate reaction is a protective order drawn to prevent the abuse, not a broad foreclosure of discovery."

8. Asserting that cases denying discovery because of unfairness and because it would permit the discoverer to exploit his opponent's preparation are wrong, the opinion emphasized the trial court's "broad authority to control the timing and order of discovery, limit its scope, require the payment of fees and expenses * * *." But it admitted that all risk of abuse could not be eliminated.

9. Recognizing force to the Government's objections as to appraisers who would not be called as witness, the opinion comments unfavorably upon the new Rule 26 now being considered and reverts to its general theme, saying: "It may well be that in this case the trial court would have concluded that discovery from the government's retained appraisers should be deferred until the appraisers had completed their work and the government had determined whether or not to use them as witnesses." The opinion nevertheless indicates that discovery may be had as to experts not to be used.

10. Reading the Government's motion for a protective order as seeking to preclude any discovery, the opinion concluded: "As we read the record the question of the propriety of particular details of the proposed discovery was not presented to nor decided by the trial court. * * * We therefore decline to consider objections to the scope of the inquiry other than those presented by the government's motion. The validity of other possible objections remains open for consideration by the trial court if properly raised on remand."

Certiorari will not be sought because the opinion is not final and does not pose a clear issue on any particular problem.

SUGGESTED PROCEDURE IN VIEW OF THIS DECISION

Any generalization of policy must necessarily give way to the particular problems posed in concrete circumstances. With this in mind, we suggest the approach to be taken in the course of handling condemnation cases, as follows:

1. Within the Ninth Circuit. - Until changed, this opinion constitutes, of course, the law of the Ninth Circuit. It is, however, very difficult to tell exactly what has been decided. On the one hand, it is clear that appraisers' materials, both as to the facts they know and the opinions they hold, may be the subject of discovery. On the other hand, it is also clear that there is a very wide discretion in the trial court and that much of the discovery may be limited by specific motion for protective order. The opinion should be studied carefully for the particulars in which such order may be appropriate. We wish to call your attention especially to the following matters:

a. Discovery should be deferred until the appraisers have been approved for use at the trial.

b. Mutual exchange of information should be demanded. The opinion says: "The burdens of discovery are equal."

c. Information readily available or already known to the discoverer should be excluded.

d. Extended examination of the appraisers should be objected to as abusive and burdensome.

e. Whenever deposition by oral examination is required, payment of the appraiser's fee should be demanded.

2. In Other Circuits. - Since this opinion is not controlling, it should be followed only if its reasoning or citations are persuasive. We believe it is not persuasive because:

a. It does not present guidelines to the trial court but simply indicates that, as to almost every important element, the trial court has discretion.

b. It fails even to mention the latest Supreme Court decision on discovery, which is Schlagenhauf v. Holder, 379 U.S. 104 (1964).

c. It misconceives the meaning of "discovery" as used in the federal rules and consequently ignores the vital distinction between pretrial under Rule 16 and discovery under Rules 26-37. Discovery is essentially the process whereby each party independently secures the materials needed for analysis of his position, assessment of its value, and preparation of his case in all its aspects. Pretrial is the court-supervised narrowing of issues exchange of information and elements of necessary proof and is premised on full discovery having been previously accomplished. See Buffington v. Wood, 351 F. 2d 292 (C.A. 3, 1965), holding that the court at pretrial may order discovery when that has not been previously accomplished.

The Meyer opinion is thus wrong in saying, "The opposing party can obtain this information in advance of trial only by discovery" and that "Which of these premises [of the appraisers] are disputed and which are not can be determined short of trial only by voluntary disclosure or discovery." The process of eliminating nondisputed issues is expressly the function of Rule 16 pretrial. And authorities discussing pretrial exchange of statements of position, etc. (e.g., fn. 5) do not support the Meyers' arguments of need for broad discovery. Normally, discovery is not a mutual matter, each party going his own way.

We believe that pretrial exchange can, with greater ease and fairness, provide the benefits which the Meyer opinion sees in discovery without many of the expenses, annoyances, waste of court and attorneys' time, etc., that attend application of discovery processes to the unique condemnation situation.

d. Primarily because of such misconception and because its failure to appreciate the differences between condemnation cases and other civil

litigation, we disagree as to the existence of facts which the Meyer opinion claims have been established by experience. In this regard, the opinion substantially ignores the overwhelming majority of published opinions of federal district courts on many of the questions discussed.

e. The conflict of the opinion with the preliminary draft of the rules relating to deposition and discovery now under consideration is noteworthy. The opinion asserts, in effect, that the proposed Rule 26(b)(4)(A) will impose a "severe limitation upon discovery of" certain retained experts' opinions. And it then proceeds to attack the validity of the justification for such limitation. This would itself seem sufficient to show that this opinion is controversial.

For these reasons, while we do not oppose all discovery, we think pretrial exchange is sufficient in almost all condemnation cases. We do not believe the Meyer opinion should or will be followed in many of its statements and future cases should be approached in that light.

Staff: Roger P. Marquis (Land and Natural Resources Division)

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