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DRAFTING PLEADINGS THAT MAKE A DIFFERENCE AND AFFECT THE OUTCOME

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Introduction

Pleadings are an integral part of any litigation, regardless of the subject matter. And there are elements of good pleading that are applicable across the board. But, some aspects of a condemnation trial deserve particular attention by counsel, because they may be used to substantially impact the outcome of the case. Counsel should consider the structure of the document and strategic issues, such as the timing and format of a motion, in addition to the subject matter of the particular pleading.

I. Important Considerations of the Document Structure.

It is fundamental that an author should consider his or her audience when drafting any writing. This is no less true with respect to pleadings in a condemnation case. But the unique nature and relative infrequency of condemnation cases increases the importance of this issue.

First, consider the breakdown of cases in the normal State trial court. If our jurisdiction is representative,[1] the cases filed in your local court may be about 30% criminal, 30% domestic, 30% negligence and 10% "other." Of course, condemnation actions are just a fraction of the "other" 10%. In short, condemnation cases do not constitute a staple diet for most State trial judges. A State trial judge probably sees a condemnation case on an infrequent basis and, for that reason, the judge is likely to be unfamiliar with the unique issues presented by such cases – even if those issues are common to condemnation cases generally and counsel who handle them. Indeed, in a criminal, domestic, or negligence case, the trial judge may very well be more versed and experienced with the substantive issues than many counsel who appear before them. They see the same issues time after time. They are well versed in the substantive issues, their

[1] Rockville, Maryland is the County seat of Montgomery County, which is borders Washington, D.C. to the north.

relevance and the applicable appellate court precedent. But, in a condemnation action, it is not unusual for even an experienced trial judge to look to trial counsel for guidance on particular issues. This presents condemnation counsel with a unique opportunity to address a tribunal that has a truly open mind.

Second, regardless of the subject matter of the cases, most trial judges are busy and they have countless cases to process, each with its own pile of pleadings, motions, and issues to resolve. This circumstance brings to the forefront George Bernard Shaw's quip that "[he] wrote a 500-page novel because [he] did not have enough time to write a 250-page one." Many lawyers write long and wandering pleadings that bury the critical issue, because they lack the time to craft a pleading that will focus the court on the issue presented and lead the court to the desired conclusion. Such pleadings depend upon the court spending the time necessary to "figure it out for itself," and, consequently, it is only luck if the court finds its way to the decision counsel desired. There is simply no substitute for taking the time necessary to craft a pleading that is succinct, direct and clear. The goal is to draft a pleading that: (1) makes the court want to rule in your favor, and then (2) gives the court the authority upon which to base its decision.

These two practical issues: (1) courts inexperienced with the unique issues presented in condemnation cases, but (2) overworked and short for time and focus, compel wise counsel to craft pleadings that take these factors into consideration. A pleading should present the issue to be decided and tell the court how counsel believes it should be decided and why, up front in an introduction in as few paragraphs or pages as possible. A personal rule of thumb is to try to summarize the substance of a pleading in two pages or less. The balance of a pleading fleshes out the issue by providing the court the relevant background facts, framing the legal issue presented, and providing the legal authority to support the court's favorable ruling.[2]

A related suggestion is that every pleading should "stand alone." Although most rules of procedure permit counsel to "incorporate by reference" other pleadings and documents, it is persuasively beneficial to provide the court everything it needs to rule in your favor in a single document and not make it hunt through the court jacket for necessary information buried in other pleadings. This rule of practice is equally applicable to opposition or reply pleadings as it is to new pleadings. In short, a court should be able to pick up and read an opposition to a motion and, without reading the motion which it opposes, understand everything necessary to decide the issue, including the motion, the opposing party's argument, your response and why you are correct and the movant is not. Indeed, this practice allows you to "restate" the opposing party's motion in the light most favorable to you, without the excess baggage opposing counsel inserted for persuasive effect.[3]

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[2] An example of such an effort is attached as exhibit 1 at the end of this paper.

[3] An example of an opposition motion applying these principles is attached as exhibit 2 at the end of this paper.

Of course, quality writing, not "legal writing," helps the persuasive effort. There are countless texts and seminars on quality writing.[4] Suffice it to say that good writing is a life-long learning experience. Counsel should seek to continually study and improve their writing skills as a part of their continued professional education and development. Find a "writing partner" and edit and review each other's work. Our particular firm is very collegial and no pleading of substance leaves the office without first being freely circulated to at least one, if not several, other attorneys for review and comment. Even if time is short, minor edits and quick-to-fix drafting errors invariably improve the persuasive impact of a pleading.

II. Affect the Outcome – Use Motions and Pleadings Strategically.

As noted above, judges in condemnation actions are peculiarly amenable to motions that may significantly impact the outcome of the case. Counsel should, in the first instance, consider the key issues in the particular case and then consider how, and when, to present them to the court. Every case will have key disputed issue(s) and there may be several factors impacting the issues such as admissibility of evidence, valuation theories, scope of the property to be considered, highest and best use, competency of witnesses, and the like. The range of issues is endless.

The first order of business is to strategically analyze your case and decide how you would like it to be presented to the jury. What obstacles do you anticipate? What are the key issues in your case? Can you eliminate them, or frame them to your advantage?

But, regardless of the issue, how and when you present it to the court for decision may affect how the court decides it. Will the court be more likely to rule in your favor if you raise the issue in a written motion months before trial, or as an oral objection at trial when opposing counsel asks a question?[5] Do you want to move toward the goal in small steps, possibly via sequential motions for partial summary judgment, or present the issue to the court in an omnibus motion at the conclusion of discovery? Do you want to give opposing counsel time to think about the impact of the issue, or raise it orally and force opposing counsel to "think on his or her feet?"[6]

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[4] One of the best texts and legal seminars of which this author is familiar is *The Winning Brief*, 3rd Ed., by Bryan A. Garner and his Advanced Legal Writing and Drafting seminar. Mr. Garner's legal writing seminars are given across the country and are well worth the time investment. For more information, see www.lawprose.org.

[5] One technique to bolster the persuasive impact of oral motions and objections at trial is to prepare a one to two page "trial memo" on the issue. Trial judges will not, of course, have time to read a lengthy memo in the middle of trial before ruling on a question of evidence. But the court may quickly read a 1-page memo that cites the controlling case on point. And, even if the judge does not read the memo, the fact that you tell the judge that the validity of your objection is so clear that you can present the authority in one page is persuasive in and of itself.

[6] For example, in a case involving the issue of highest and best use, the owner contended that the highest and best use of his property (then undeveloped, but located in a residential neighborhood) was for development with a senior living facility. Owner's counsel was concerned as to what "image" the jurors would have of such a facility in their minds. Owner's counsel was aware that the condemnor was going to argue that such a facility was incompatible

The strategic considerations, and possible motions and pleadings to address them, are endless. Motions may attack the validity of the condemnor's complaint, its right to take, the legal sufficiency of the condemnor's authority, or whether it has complied with all applicable rules and regulations. Motions may attack the opposing party's theory of valuation, or the evidence upon which it is based. The key to drafting a pleading that may affect how the issue is resolved is to, first, consider how the issue may be most effectively presented and when. Then, frame the issue succinctly and persuasively, and give the court everything it needs to rule in your favor.

If you determine that the issue should be resolved before trial, consider whether it is it an issue that should be resolved well in advance of trial, or decided by the trial judge?[7] Motions and pleadings may be used to "educate the court" about the case. If the case is not assigned to a particular judge for its duration, the judge that decides a preliminary issue may not be the trial judge. Any benefit achieved by educating another judge may be lost. It is unlikely that you will be permitted to raise a resolved issue in detail later on.

Different judges have different strengths. If the judges in your jurisdiction rotate assignment, can you determine which judge will be handling motions when your motion is heard? Would it be wise to delay filing your motion until a particular judge will be handling the motions docket at the time your motion is heard?

Do you have a better chance for a favorable ruling early in the case? If so, you may want to frame the issue early and use the inertia of a favorable ruling to prevent a later judge from reconsidering the issue.[8]

III. Some Common Pleadings.

There are some pleadings that are required in every condemnation case and others that are frequently encountered. Let us review just a few.

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with the surrounding residential community. One of the comparable sales used by the appraisers in the case was just such a facility in a residential neighborhood that was located just off the route that would be taken to the subject property for the jury view. Owner's counsel wanted the jury to have that comparable property in their mind as they considered the arguments concerning compatibility. Counsel orally suggested to the court, just before the jury view, that it may be helpful for the jury to see the one comparable that both parties' appraisers had used and requested that the court permit the bus to stop at the comparable property on the way to the subject. The condemnor's counsel did not object. Query whether condemnor's counsel would have objected if that particular request had been raised in a written motion in advance of the trial date?

[7] Of course, if your jurisdiction has a special assignment procedure where the same judge handles the case from filing to disposition this may not be an issue.

[8] "Your Honor, this issue has already been decided. It was ruled upon by Judge Johnson months ago and we have proceeded based upon that ruling in preparing our case. The court should not reconsider that ruling at this late date. Opposing counsel may preserve the issue for appeal if he or she believes Judge Johnson was wrong…."

First, is the complaint or petition for condemnation filed by the condemning authority. This petition must be statutorily correct, include all parties with an interest in the property being condemned, and touch all of the bases required with respect to identifying the property and the condemnor's authority to take in order effect an appropriate and effective taking of property. Generally, local statutes will itemize the necessary elements of a condemnation petition. These requirements generally include that the petition reference the taking authority and legislative resolution and indicate that the taking is necessary and for a public use. If it is a quick-take petition, it should demonstrate immediate need to take the property. Further, the petition should identify and name all parties having an interest in the property, including all of the owners, any mortgage or lien holders, as well as any persons having an easement in the property. The petition should be reviewed against the applicable statutory requirements to insure that it complies with these mandates. If it does not, the defendant may be able to stop the condemnation in its tracks.[9] At a minimum, if an action proceeds upon a defective petition the condemnor may not obtain good title.[10]

Second, consider whether you have grounds to challenge the condemnor's authority to take the property or move to dismiss the petition on other grounds. Generally, such motions must be made initially or the rights may be waived. If the petition is to be answered, the answer should preserve whatever defenses are available, including a contest to the right to take, as well as contest the just compensation tendered by the condemning authority. Practices may vary from jurisdiction to jurisdiction. In some jurisdictions a request for a jury trial is required and in others a jury is not permitted. The applicable jurisdictional rules and requirements should be consulted to insure completeness of the responsive pleading. Be aware of the timing requirements. In Baltimore City an owner must contest the right to take within 10 days, otherwise both possession and title vest in Baltimore City. This is in contrast to the Maryland State Highway Administration's statutory quick-take procedures where only possession, not title, vests in the condemning authority before full compensation is determined and paid.

Nearly every condemnation case that proceeds to trial includes motions in limine to address the specific issues raised in the particular case. As discussed above, it is important to consider not only the substance and subject matter of these motions, but when and how to raise them to maximize the likelihood they will be favorably considered. Motions in limine may be effectively used to limit evidence and issues and frame the case in your favor. In addition to motions in limine, which are addressed to evidentiary matters, motions for partial summary judgment may be effectively used to resolve issues in their entirety, as opposed to the evidence to be introduced for consideration.

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[9] This, of course, may or may not be desired by the owner. Often an owner wants only to be paid the maximum compensation possible as quickly as possible. But, raising the issue may provide some leverage to the owner in negotiations.

[10] See e.g., *WSSC v. Frankel*, 57 Md. App. 419, 470 A.2d 813 (1984) (holding that owners of negative easements over the property being condemned have compensable interests in the property and are entitled to compensation).

One of the most effective, and infrequently used, pleadings in trial practice is the trial memo. A trial memo that summarizes the facts and issues for the court is a powerful way to educate the court about the case and get the court looking at the case from your perspective before the judge even takes the bench. A trial memo should not only explain what the case is about and identify the property and parties, it should identify the main issues or facts in dispute and what each party's position is on those issues. Again, this vehicle gives you an opportunity to frame the opposing party's position in the light most favorable to you. A trial memo should give the trial judge a "heads up" as to important evidentiary issues that may arise, so the judge will not be ruling "cold" or from the "seat of its pants" in the heat of trial. A judge is generally much more receptive to arguments when it is anticipating them and already viewing them from your perspective before you begin to speak.

Finally, consideration should be given to discovery papers as well. Often the opposing party may make concessions that may be made binding through discovery, either interrogatories or requests for admission. For example, if the condemnor's appraiser opines that damages are a small amount because the land value is low, but in the process he opines that the taking will depreciate the value of the remainder by 50%, consider an interrogatory, or request for admission, to the condemnor asking it to agree with its appraiser's opinion as to the 50% damage to the remainder. Then, with that admission in hand, the owner need only contest the underlying value in the "before" condition – a greater "before value" equates to greater severance damages calculated at the admitted 50% rate.[11]

Conclusion

The persuasive techniques and considerations applicable to all cases are equally applicable to condemnation cases. But, because of the limited number and frequency of condemnation cases handled by the normal trial court judge, the opportunity and importance of quality lawyering in the pre-trial phase is increased. Counsel may be writing "on a blank slate" when they present an "eminent domain issue" to the trial court for determination. Wise counsel will use the opportunity to strategically consider the innumerable factors that impact the decision making process.

[11] For additional discussion of discovery techniques see *Discovery and Procedure Techniques That Work in Condemnation Actions*, James L. Thompson and Joseph P. Suntum, ALI-ABA Course of Study, Eminent Domain and Land Valuation Litigation, January 2005.