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DISCOVERY AND PROCEDURE TECHNIQUES THAT WORK IN CONDEMNATION CASES

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As you are aware, discovery and the rules of procedure can play an important part in shaping and sometimes on winning a condemnation case. Since most states have their own rules of procedure, discovery and substantive condemnation law, the suggestions we make should be "localized" to your particular jurisdiction.

DISCOVERY

As in most civil cases, discovery in condemnation cases contemplates four classic procedures: (1) request for production of documents; (2) interrogatories; (3) depositions; and (4) request for admissions of fact, not necessarily in that order.

1. Request for Production of Documents. In addition to requesting all of the other side's appraisal reports, and the opponent's expert's opinions involving the case, we also request all copies and drafts of those reports, as well as the experts' files. In Maryland, the rules applicable to condemnation actions require a party to produce all appraisals of the property, whether the party intends to call the appraiser to testify, or not. This is often a source of very helpful information and sometimes a cause of concern. You should be aware of the rules in your jurisdiction on this issue. We find that this can be a very valuable area where we often find drafts of reports by the expert which were changed by counsel and have taken on an entirely different point of view. This is powerful information with which to examine the expert at deposition and at trial. In addition, we request the taking plats and any exhibits or documentary evidence which tends to support or oppose the other side's case, plus trial exhibits.

2. Interrogatories. Many practitioners believe that interrogatories are a waste of time. They are drafted by lawyers and answered by lawyers and not much useful or substantive information is obtained. That is often true. However, one of the most salient features of interrogatories is the limitation they put on the other side at trial. Most of our interrogatories are drafted with an eye toward pinning the other side down, particularly in the areas of identifying the other side's lay witnesses, expert witnesses, obtaining copies of expert reports and obtaining their views on highest and best use and whether or not there are any severance damages or diminution in value caused by the taking. Not infrequently, we find that interrogatories are not answered completely by the other side and often they fail to mention facts they wish to elicit, or expert witnesses they wish to call at trial. If the other side fails to identify these people, we routinely and effectively exclude them as witnesses before our courts. Changed facts, of course, are the meat of cross-examination. Consider our initial set of interrogatory forms (attached) which we utilize that have been pre-approved by our Court of Appeals. These four questions get all of the basic information from the other side and you can tailor individual interrogatories in addition to these to address unique features of your case.

3. Depositions. Most of us feel that the depositions of the other side's experts are the most fruitful portion of the discovery process. This is particularly true when you have obtained copies of the expert's reports and drafts through the request for production of documents prior to the deposition. Many of us feel a certain strategic conflict at this stage of discovery -- whether to use information and pose deposition questions which could devastate the expert now and educate him to the problems in the appraisal or whether to wait and spring the information at trial so the expert cannot seek to rehabilitate himself in the interim. n1 Often at the deposition, we seek to tie the expert down as to how he reached his valuation, what the initial date of his valuation was in contrast to the valuation on the date of trial and what data he relied upon in reaching that opinion at those different times. Often, the comparable sales are dramatically different when he first reached a value conclusion than the data he uses at trial, yet his valuation is virtually the same. This inconsistency may be successfully exploited. Explain the "bore down" approach.

n1 Note, we use the masculine gender in this paper regarding appraisers and experts for simplicity only with no intention of ignoring the feminine gender.

4. Request for Admissions of Fact. Like interrogatories, admission of facts are often of no value, since they are answered by lawyers in a way which negates their usefulness. On the other hand, where the other side is trapped in a position previously taken by their employees or experts, requesting them to admit facts, such as the justification for the "take" or the probability of rezoning, or the diminution in value as a result of the taking, can be very dramatic.

Ten Tips to Take (The 10 T's)

Let's talk about ten valuable tips/war stories dealing with discovery and procedure which have paid great dividends in the trial of condemnation cases.

1. Appraiser Inconsistency. In the request for production of documents, we often request the other side's appraiser to produce all of his appraisals in the immediate vicinity of the subject property for purposes of checking on the consistency of the appraiser and his analysis in the case before the court. One of our members just handled a case involving the value of a gaming property in one of the mountain communities in Colorado. In response to the request for documents and prior appraisals, the expert produced appraisals showing that he had regularly valued gaming properties at $ 150/square foot, but he was valuing the gaming property in the subject case at only $ 30/square foot, even though it was essentially comparable to the others. This inconsistency was successfully exploited at trial.

2. Discovery of Embarrassing Appraisers. Under Maryland law, as an exception to the normal discovery rules where you are not required to notify the other side of consulting appraisal experts who will not testify, you are permitted to obtain the names and reports of any appraisers which the other side utilized in valuing the subject property (in anticipation of litigation or in preparation for trial), whether or not they intend to use that appraiser as an expert witness at the time of trial. This means that if you get a "look-see" appraisal from an appraiser which either over-values or under-values your property, and you decide not to use that appraiser, the other side may still obtain that person's appraisal, and may call them as a witness at trial. There is no risk-free appraisal selection process in Maryland. In several cases, we have called "reluctant" appraisers retained by the "other" side, who have valued our client's property at twice the value the condemning authority's trial appraiser and in the range of the property owner's appraisal witnesses. This, again, was most effective in demonstrating that the condemning authority had under-valued our client's property.

3. Accept Gifts. Take what the process gives you. In most condemnation cases, the condemning authority is required to obtain an appraisal prior to any formal legal proceedings being commenced, so a bona fide offer of compensation can be made. Even though this appraiser may ultimately be wrong in his opinion of value, there are times when the appraiser makes certain determinations or assumptions which are very valuable to the property owner. In a case we recently handled, the appraiser, although valuing the property at half its real value, made several critical concessions which we utilized in the case. First, the appraiser acknowledged the reasonable probability of rezoning the property to a better use category and, hence, a higher and better use. Second, the appraiser acknowledged that the four-acre tract which our client owned before the taking was seriously damaged by the taking which took two acres of property and destroyed our client's direct access to a commercial corridor. As a result, the condemnor's appraiser opined that the two acres of remaining property were damaged by approximately 50% of the before taking value. Even though the appraiser's "before value" was less than half of the real fair market value, we were able to take these two concessions -- that the property had a reasonable probability of rezoning, and that the remaining property was damaged by at least 50% of its value -- to the bank. We waited until the deadline for naming new experts had expired and then asked the condemning authority to admit that the property had a reasonable probability of rezoning and that the diminution in value after the taking was equal to at least 50%. We also asked in interrogatories whether or not the State agreed with its appraiser. Because the deadline for naming new witnesses had expired, the condemning authority had no alternative but to acknowledge what their appraiser had said. When we then produced overwhelming evidence that the property was worth twice what the State's appraiser had determined and then utilized the admissions he had made in his earlier appraisal, we were able to add $ 1 million of value to the case

4. The Lawyer's Appraisal. We routinely request that the other side produce their appraiser's file and all copies, drafts and iterations of their expert's appraisals and engineering reports, as well as all correspondence with the opposing counsel. By doing this, we find that the first draft of their appraisal is often dramatically different from the final version you see at trial. The interesting part of this from the discovery standpoint is how the changes got made and "who" made

them. Frequently, the attorney for the other side has talked to their expert and has gotten the expert to change the appraisal to make it "better" or "more defensible" at trial. If these changes were suggested by the lawyer, then the appraisal can become the lawyer's appraisal and not that of the appraiser at trial. This is very unsettling to a jury when you are able to suggest that your appraiser is an expert and he has abided by appraisal principles. You contrast this to the other side who had their lawyer do the appraisal and who has no training in this expertise. This can be quite effective.

5. The Scope of the Appraiser's Expertise. At deposition, limit the other side's experts to their real expertise and don't let them extend that at trial. In many cases, appraisal experts can testify about a variety of things and routinely use the reports and expertise and reports of others in developing their opinions of value. If these reports (although hearsay) are used by them in the ordinary course of their profession, then they are admissible through the appraiser at trial and in this manner, appraisers can become multi-faceted experts, often testifying about land use, subdivision, water and sewer policy, and flood plans/hydrology/wetlands. Where we see this in a case, we ask the appraiser at his deposition if he considers himself to be an expert in engineering, land use, subdivision or hydrology. Most honest appraisers, thinking that you have a series of questions that will embarrass them, readily admit at deposition that they are not experts in those fields. However, when the appraiser gets to trial, and the other side does not have experts in those areas, the appraiser often spreads his testimony to include opinions in those areas where he's not an expert. It is wonderful to be able to object to this testimony and exclude it when you can advise the trial judge that this expert has previously admitted during his deposition that he has no expertise in this area and a proper foundation has not been laid for his extended testimony at trial. The *Browning* trial before the U.S. Tax Court illustrates this situation.

6. Deposition Psychology. The psychological edge at depositions is important. Some of our wise colleagues invite select people to the deposition of the opponent's appraisal expert, who can have a psychologically limiting factor upon their testimony. When the condemning authority is taking the home which your elderly clients have enjoyed for 50 years, and they are being displaced, their presence at the deposition may be very useful. For example, the condemning authority's expert, when sitting across the conference room table from your clients eye-to-eye, has a much more difficult time describing how shabby their home is, or how poor the neighborhood, or how their house is not comparable to the other "better" houses in the neighborhood. Many appraisers, when looking across the table at your elderly clients, back off from this type of criticism and "soften" their testimony because of your client's presence. Another psychological technique which is useful to consider is to contrast the senior appraiser against the junior appraiser, when you are on the better end of the experience equation. If the other side has a young appraiser who has made certain brash statements or assumptions in his appraisal, and may be "pushing the envelope", it is often helpful to invite your appraisal, the senior statesman, to sit in at the deposition. This has a very chilling effect on these exaggerations and underestimations which the other side may have fostered up to that point.

7. Developing Facts for a Later Motion. One of our colleagues, an attorney for a condemning authority in Iowa, sent us a war story which underlines the importance of discovery to support a motion in limine. Iowa does not accept the "unit rule" which, in most jurisdictions, holds that the condemning authority need only value the fee simple interests being condemned and that the multiple parties who have ownership or legal interest in the property (lease or mortgage interests) must carve up that unit value among themselves since the unit value cannot exceed 100% of fair market value of the unencumbered fee simple estate. In the case at hand, the property owner, understanding that condemnation was imminent, leased the property to another entity which he controlled surreptitiously. When condemnation was filed, the property owner insisted that his ownership interest be valued and also the "tenant" insisted that its ownership interest be valued as well. At the time of trial, the trier of fact determined that their collective interests exceeded the fair market value of the property when valued as a unit, giving each of them a compensation bonus. However, counsel for the condemning authority had undertaken exhaustive pre-trial discovery and was able to produce evidence that the purported lease was a "sham" lease which the appellate court recognized and determined that if the lease was a sham, that it could not be separately valued by the trier of fact. The discovery in this case was critical to proving that the last minute lease was in fact a sham.

8. The Appraiser Who Only Testifies for the Condemnor or the Condemnee. Sometimes, it is useful to establish that the condemnor's appraiser always testifies for the condemnor. At deposition, you can develop how many appraisals this appraiser does for the other side and how much, on average, they are paid. With simple multiplication, you can show that the appraiser makes $ 100,000 a year as the condemnor's expert and that his economic interest can prejudice his objectivity in valuing the property owner's property. Often more fruitful cross-examination may be had by eliciting how *little* the condemning authority's appraiser was paid. It is a worn and weak point of cross-examination that experts are paid for the time they spend on a case. Most jurors understand that it is appropriate for experts to be paid and do not hold that fact against them. But often, condemning authorities put appraisal projects out for bid and award the job to the

appraiser who submits the lowest bid for the project. If a proper appraisal requires sophoisticated analysis and detailed information, it is very likely that the condemning authority's appraiser - who got the job by being low bidder and is on a very tight budget - probably did not invest the same amount of time and effort in appraising the property as the owner's appraiser did.

9. Keep Your Procedural Options Open. If you represent the property owner, keep all of your options open for as long as you can. Contest the right to take, whether the right to take was properly exercised, whether the condemning authority is condemning for a public or private use, the date of take, and, of course, the question of valuation -- what is just compensation for your client's property? It is important for you to keep these options open since it keeps the pressure and burden of proof on the other side and these issues may loom large at various points in the litigation process. Many condemning authorities today are much more concerned with the "right to take" for "public use" or "public purpose" in light of the recent case law than at any time in the last 25 years. See *County of Wayne v. Hathcock 684 NW 2d 765 (Mich. 2004)* (reversing *Poletown Neighborhood Council v. Detroit, 410 Mich. 616, 304 NW 2d 455 (1981))* (court prevented condemnation of private property for private gain and economic benefit for the community finding no "public use") and *contra Kelo v. City of New London, 843 A2d 500 (Conn. 2004)*, petition for cert. to U.S. Supreme Court granted, *125 S.Ct. 27, 73 USLW 3178, 3204* (September 28, 2004, Case No. 04-108) (court permitted condemnation of private property to support an economic development plan and permit the expansion of a private use by the Pfizer global research facility). In the *Kelo* case, the Supreme Court of Connecticut permitted New London, Connecticut to condemn property for the benefit of Pfizer Pharmaceuticals, so that it could expand its global research facility in that jurisdiction and generally create economic benefit and redevelopment in the area.. The city condemned property, including a number of private homes and other businesses, to accommodate this private use because it was in the "economic" best interests of the city and, thus, the public. The court in that case relied upon the *Poletown* case, an earlier leading case on this subject from Michigan. However, the Michigan Supreme Court ruled in *Hathcock* in July, 2004, that the *Poletown* case was no longer good law and reversed that precedent. There is a conservative trend protecting private property from being taken for private use or for economic development in several areas of the country. In September, 2004, the Supreme Court of the United States granted certiorari in the *Kelo* case and the matter is now pending before that court. If the Supreme Court reverses the *Kelo* case, then it will be a new day limiting the scope of the condemning authority's right to take for "public use." Many jurisdictions are worried about this and it is wise to challenge the right to take to protect the property owner.

10. Weed Out Collateral Issues Prior to Trial. In the area of procedure and trial technique, we find that it is useful when representing the property owner to weed out collateral issues prior to trial. If the condemning authority is seeking to contest your client's title to the property, or suggests that your client's property is contaminated or attempts to bring in other extraneous information which would have the effect of diminishing just compensation or confusing the trier of fact, then we try to streamline the case by eliminating those issues before trial. We often utilize summary judgments, motions in limine and other procedural techniques. In Maryland, the condemnation cases are essentially in rem proceedings which are limited to determining the right to take and just compensation. As a result, we try to eliminate collateral issues as best we can from being submitted to the trier of fact so that the jury may focus on the issue of just compensation for your client's benefit.

We hope that these modest suggestions and the related war stories will be of use to you.

FORM INTERROGATORIES

(MARYLAND)

Instructions

Pursuant to Rule 2-421, you are required to answer the following interrogatories within 30 days or within the time otherwise required by court order or by the Maryland Rules:

(a) In accordance with Rule 2-421(b), your response shall set forth the interrogatory, and shall set forth the answer to the interrogatory "separately and fully in writing under oath" or "shall state fully the grounds for refusal to answer any interrogatory." The response shall be signed by you. (Standard Instruction (a).)

(b) Also in accordance with Rule 2-421(b), your answers "shall include all information available" to you "directly or through agents, representatives, or attorneys." (Standard Instruction (b).)

(c) Pursuant to Rule 2-401(e), these interrogatories are continuing. If you obtain further material information before trial you are required to supplement your answers promptly. (Standard Instruction (c).)

(d) If pursuant to Rule 2-421(c), you elect to specify and produce business records of yours in answer to any interrogatory, your specification shall be in sufficient detail to enable the interrogating party to locate and identify the records from which the answer may be ascertained. (Standard Instruction (d).)

(e) If you perceive any ambiguities in a question, instruction or definition, set forth the matter deemed ambiguous and the construction used in answering. (Standard Instruction (e).)

Form 2. General definitions.

Definitions

In these interrogatories, the following definitions apply:

(a) **Document** includes a writing, drawing, graph, chart, photograph, recording, and other data compilation from which information can be obtained, translated, if necessary, through detection devices into reasonably usable form. (Standard Definition (a).)

(b) **Identify, identity,** or **identification,** (1) when used in reference to a natural **person,** means that **person's** full name, last known address, home and business telephone numbers, and present occupation or business affiliation; (2) when used in reference to a **person** other than a natural **person,** means that **person's** full name, a description of the nature of the **person** (that is, whether it is a corporation, partnership, etc. under the definition of **person** below), and the **person's** last known address, telephone number and principal place of business; (3) when used in reference to any **person** after the **person** has been properly **identified** previously means the **person's** name; and (4) when used in reference to a **document,** requires you to state the date, the author (or, if different, the signer or signers), the addressee, the **identity** of the present custodian of the **document** and the type of **document** (e.g., letter, memorandum, telegram, or chart) or to attache an accurate copy of the **document** to your answer, appropriately labeled to correspond to the interrogatory. (Standard Definition (b).)

(c) **Person** includes an individual, general or limited partnership, joint stock company, unincorporated association or society, municipal or other corporation, incorporated association, limited liability partnership, limited liability company, the State, an agency or political subdivision of the State, a court, and any other governmental entity. (Standard Definition (c).)

Form 3. General Interrogatories.

Interrogatories

1. **Identify** each **person,** other than a **person** intended to be called as an expert witness at trial, having discoverable information that tends to support a position that you have taken or intend to take in this action, inclu8idng any claim for damages, and state the subject mater of the information possessed by that **person** (Standard General Interrogatory No. 1.)

2. **Identify** each **person** whom you expect to call as an expert witness at trial, state the subject matter on which the expert is expected to testify, state the substance of the findings and opinions to which the expert is expected to testify and a summary of the grounds for each opinion, and, with respect to an expert whose findings and opinions were acquired in anticipation of litigation or for trial, summarize the qualifications of the expert, state the terms of the expert's compensation, and attach to your answers any available list of publications written by the expert and any written report made by the expert concerning the expert's findings and opinions. (Standard General Interrogatory No. 2.)

3. If you intend to rely upon any **documents** or other tangible things to support a position that you have taken or intend to take in the action, including any claim for damages, provide a brief description, by category and location, of all such **documents** and other tangible things, and **identify** all **persons** having possession, custody, or control of them. (Standard General Interrogatory No. 3.)

4. Itemize and show how you calculate any economic damages claimed by you in this action, and describe any noneconomic damages claimed. (Standard General Interrogatory No. 4.)

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