

COUNSELING IN EMINENT DOMAIN LITIGATION

by A. C. Schwethelm, CRE

Whether it is medicine, automobile design, construction or real estate appraisal, a legal practitioner who specializes in a particular area must have a working knowledge of it, e.g., a familiarity with the terminology. However, it is usually rare to find a lawyer who is also an expert in the specialized field. How, then, does the trial attorney assemble the expert witnesses, exhibits, depositions, etc. in an expeditious manner? More and more frequently this is being accomplished with the assistance of specialized consultants. Just a few months ago the State of Texas Attorney General's office asked for a memo which outlined the services that could be provided by a real estate counselor for a trial attorney in the preparation of an eminent domain case. The following is an expansion of that memo.

A Counselor's Skills In Advocacy

The counselor must be experienced in eminent domain appraisal and expert testimony. He must be familiar with eminent domain law and the requirements in the local jurisdiction, especially regarding admissibility, discovery, trial procedure deposition procedure, and other matters which vary from case to case. The ability to think and react quickly and confidently under pressure is important. Above average analytical and math skills, the ability to articulate complex matters in understandable terms and a pleasing personality are key attributes. He must have credibility with the attorney and the client, whether property owner or condemnor, as well as a standing within the profession. Understand that the consultant is not a potential expert witness, but acts in an advocacy position for the client.

The counselor's scope of involvement will vary from case to case, depending upon a number of factors including its complexity and size, the attorneys, appraisers and other witnesses involved, the case-load of the attorney, etc. Perhaps the easiest method for exploring the matter is to start with the assumption that it is a large, complex case warranting the counselor's involvement in a comprehensive manner from the onset.

The Process

The hypothetical jurisdiction is one where the matter is first heard by a special commission of three disinterested citizens appointed by a judge who hear the evidence and render an award to be deposited with the court. Upon such deposit, the condemning authority can take possession of the property and either side can appeal. The discovery process begins only after the hearing. Discovery is the procedure by

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which each side is allowed to obtain evidence the other side is prepared to present. It includes taking depositions (sworn testimony) from the prospective witnesses and obtaining copies of documents.

The condemnor attorney (C.A.) is advised by his client, the condemnor, that an offer has been made and rejected. C.A. recommends employment of a real estate counselor, who after accepting the case meets with the C.A. Together they review the basics of the case—the rights to be taken, the ownership of the property, the proposed pleadings, route map, property plat, memos of meetings between the condemnor's representatives and the owner and/or owner representatives. Many questions will be posed: Has the owner employed legal counsel, an appraiser, other potential witnesses, etc.? What is the area reaction to the project? Who supports and who opposes? What is the settlement record so far?

Commissioners Appointed

Often the judge asks the attorneys for suggested commissioners to be appointed. The counselor may have experience with individuals who have served previously. Which of the commissioners would best serve our interest? Are there any potential commissioners who may have a bias against the condemnor? The counselor may investigate and provide information which enables the C.A. to successfully object to a commissioner's appointment.

Real Estate Appraisal Reviewed

The counselor then carefully examines the real estate appraisal prepared for the condemnor. Is it consistent with other information—rights taken, route and area taken, assumptions as to purpose of the taking and possible remedial actions to be taken by the condemnor? Is the highest and best use reasonable and well supported, the sale appropriate, properly adjusted and fully described? Is the part taken properly and completely described and the value supported? Is the effect on the remaining property considered, described and addressed economically? In short, is the appraisal reasonable and convincing? The real estate counselor conveys his findings to the C.A. and suggests corrective action if necessary.

The counselor and the C.A. then meet with the appraiser for hearing preparation. The C.A. develops his line of direct examination and, with the counselor's assistance, prepares the appraiser for expected cross examination. The counselor's role will be to play devil's advocate, and he will develop likely questions for the appraiser to answer.

Discovery

Joint decisions involving the C.A., real estate counselor, appraiser, and condemnor's staff are made concerning what exhibits are to be used (maps, photos, plats, etc.) and who will prepare them. The counselor also meets with the C.A. to assist in developing cross examination questions of the condemnee's appraiser, probably by exploring various possible scenarios. This is an important step because it is the first opportunity for discovery. Also, if one of the

explored scenarios is on target the cross examination may catch the witness unprepared for probing questions. The counselor may attend the hearing, providing observations to the C.A., and possible additional lines of questioning and preparation for the next step, if necessary. After the hearing, a post-mortem is often helpful to assess the strengths and weaknesses of both sides of the case while the information is fresh on everyone's mind.

Hearing Review And Case Preparation

Assume that the hearing is over, the award deposited and an appeal filed. C.A. and the real estate counselor meet again to assess their present position, probably with the condemnor's representatives. Should consideration be given to employ additional and/or substitute witnesses? Are there changes to be made in the pleadings? What went right and what went wrong in the hearing? Is the landowner likely to change or add witnesses? How can cross examination be improved? The counselor would follow much the same preparation procedure as before, except now it would be directed toward a trial before a judge or jury. In addition, the counselor would assist in preparing discovery requests. This can be as crucial an area as discovery, even more detailed and exacting. Conversely, the discovery request must be broad enough to secure the information, yet not so broad as to allow the court to deny the request. The counselor may obtain information on other work the appraiser has done in the geographic area and also look for inconsistencies. Possibly copies of those real estate appraisals and the supporting sales should be requested. If the appraiser used the income approach, income and expense records on the subject property may be requested. The counselor will have a good insight by this time as to the theory the other side is using. The meeting with the witness (or witnesses) is repeated. Even more emphasis is placed on the proposed testimony, both direct and expected cross. The counselor will assist the witness to frame his answers to mean what is intended. In no respect does a counselor change the testimony of the witness; however, witnesses frequently express themselves in a manner which conveys other than what is meant. The jargon of the industry must be set aside and rephrased with words that are meaningful to the judge or jury.

After the discovery documents are received, the counselor examines them before meeting again with the C.A. and conveying the findings. Perhaps they reveal a new tactic. Every calculation is verified, every adjustment to a sale is carefully examined. Frequently math errors are found, as well as adjustments made upward when they should have been downward, or vice versa. This procedure should be performed on the work product of witnesses for both sides. Surprises are fun only when the other side makes the mistake. The counselor carefully compares the proposed testimony, obtained through depositions and requests for production, of the witnesses for the other side. Are the opinions consistent? Does one of their appraisers find a highest and best use? Are the property descriptions consistent,

both legal and physical? If other witnesses (engineers, negotiators, surveyors, or other experts) are to be used, does their testimony support the findings of the appraisers? Exactly the same procedure is followed on witnesses for "our side."

A final pretrial meeting is usually held to be sure everything is ready, including exhibits and witnesses.

The Trial

During the trial, the real estate counselor attends and carefully monitors the proceedings. Notes are made of any misstatements, errors, inconsistencies, etc., by any witness. The C.A. is made aware of these observations at the appropriate time, at break or immediately if necessary. Sometimes matters arise during the trial which must be investigated immediately. Witnesses occasionally testify to sales without having complete information, or they make other blunders. A quick inquiry by or directed by the real estate counselor may reveal conflicting data or someone to testify thereto. A rebuttal witness can be devastating. Although the jury argument is entirely the responsibility of the C.A., occasionally a review by the counselor of the testimony can be helpful in deciding on the emphasis desired.

After the trial, a post-trial conference is usually held especially if an appeal by either side is likely. Although the legal questions are entirely the domain of the C.A., certain fact questions can be addressed by the counselor which can be of great assistance in preparing a brief.

The Offer

If the same case is addressed from the condemnee's point of view, almost the identical comments would apply. Perhaps the most significant difference is that the condemnor's offer is clearly submitted before much work needs to begin. The counselor may be involved in assessing the pros and cons of accepting the offer or in seeking to negotiate upward before employing an appraiser. Sometimes the condemnor will make the real estate appraisal available during the negotiations. A careful analysis may reveal serious errors or a lack of understanding the problem. With this information, the attorney may be able to negotiate a much higher offer without the expense of litigation.

Although illustrative of the possibilities, this narrative merely touches the surface. The use of a real estate counselor can be a wise choice when litigation involves eminent domain. The very nature of the topic requires careful planning and the utilization of all available expertise to achieve a successful outcome. In cases which justify the expense, the use of an experienced, knowledgeable real estate counselor can pay big dividends and enable the attorney to be much more effective.

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