Selecting Eminent Domain Experts

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Anthony F. Della Pelle and John W. Little, III

One of the best investments you can make in your case is the time you spend with your expert.

THE ATTORNEY is the captain (or quarterback) of the team and must be fully familiar with the property and the facts and issues prior to retaining experts. A theme of the case should be developed so that the types of experts (the other players needed on the team) can be identified and assigned their roles. The nature of the case and its theme will guide the attorney and client on determining whether experts other than an appraiser are needed.

The attorney is an advocate of the client, the client's case and position, which includes advocating the expert's opinions. The expert is a member of the team, taking direction from the attorney. The expert is not an advocate of the client and can only advocate the opinion(s) he or she ultimately offers. The expert is an independent, objective and impartial analyst of market values and/or other issue present in the case. The expert's role can include any or all of the following:

- Writing an affirmative expert report and providing testimony in support thereof;
- Writing rebuttal report(s) and providing testimony;
- Providing consulting services (without providing testimony) such as research and other assistance regarding facts and issues in support of the direct case, analysis of market data, to providing fuel for cross-examination of the other side's experts;

- Guiding the attorney and client in the selection of other experts.

It is *critical* that the expert understands his or her role(s). The attorney and client must provide the expert with a defined scope of work, documents and other information required to perform the requested scope of work.

The attorney must provide the expert with any needed legal background or legal instructions where appropriate and must provide the expert with any orders or other pleadings or documents from the case which might affect the scope of the expert's assignment. Types of legal issues requiring guidance or formal legal instruction can involve or include:

- Date of valuation;
- Project influence;
- Zoning and planning laws or considerations;
- Relevant parcel analysis;
- Uneconomic remnants;
- Fixtures, realty vs. personality;
- "Non-compensable" items;
- Evidence issues (hearsay, admissibility, etc.);
- Net opinions and admissibility of the opinions;
- Evidentiary issues arising from *Daubert v. Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 579 (1993) and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

IDENTIFICATION AND SELECTION OF EXPERTS • Consider the theme of the case and issues presented in determining the type(s) of experts needed. In addition to appraisers, cases may present issues which call for experts in planning, zoning, architecture, engineering construction estimating, brokers, and also from specific property uses/industries (e.g., golf course, car wash, automobile dealerships, etc.). The attorney needs to insure that the experts are properly coordinated and that any appraiser relying upon a predicate witness is fully familiar with that witness and his/her opinion.

How many experts do you need? Having more experts not only becomes more costly, but increases the chance that there will be inconsistencies between the experts. Will hiring additional experts simplify the case or make it more complicated or confusing?

Traits and characteristics to consider can include:

- Reputation;
- Experience, both in the expert's field and in providing expert testimony in court and other legal settings;
- Appearance, demeanor and communication skills;
- Age/sex/race;
- Qualifications/licenses/memberships;
- Past experiences, prior inconsistent statements, reports, testimony, or other expert "baggage";
- Where representing the owner and condemnor experts are already known, the attorney must consider the "match up" in selecting the owner's experts.

The venue or forum in which the case is presented may have an impact upon the number of experts used, the types of experts and the personality/style of the experts selected. A jury may not be as receptive to multiple experts with highly technical subject matters or presentations as would be an experienced trial judge or panel of condemnation commissioners or arbitrators.

RETENTION AND WORKING RELATIONSHIP BETWEEN LAWYER AND EXPERTS • Once you have identified the type of experts needed in the case, and the candidates for that particular area of expertise, the next step is the actual retention of the expert. In many cases, the lawyer will have previously worked with the expert. In some instances, however, it will be necessary to interview

one or more possible expert witnesses. Care should be given to what information is shared with the potential expert witness for the reasons discussed below. If practical, an in-person interview should occur particularly if you have not worked with the expert before. Whether the client should attend the interview depends on the particular case and how actively involved the client intends to be during the course of the case. Whether the expert is one you have previously worked with or not, it is always important to determine whether the expert has taken any positions that may be in conflict with the issues the expert is being asked to address.

Once the expert is selected, a decision must be made concerning how that expert will be retained. Distinctions are made in most rules of civil procedure as to what discovery can be taken concerning a testifying and non-testifying witness. Careful consideration should be given at the outset of each expert relationship in deciding whether to retain the expert initially as a testifying or non-testifying expert. A non-testifying expert can later be converted to a testifying expert witness, but the reverse is less likely. Additional considerations arise in jurisdictions where the expert fees and costs are reimbursable as some jurisdictions will only allow recovery of such fees and costs for testifying experts.

After the expert is selected, a determination must also be made as to whether the expert will be retained by the client or the lawyer. Experts are hired because they determine truth through an impartial analysis of the facts and an application of those facts to their area of expertise. Lawyers on the other hand advocate their client's position. Because the clients pay the expert and do not retain them to advocate the attorney's position, most lawyers believe the expert should be hired by the client rather than the lawyer. In those states where fees and costs for expert witnesses are recoverable from the condemning authority, extra care should be given to the nature of the retention to insure the recovery of such fees and costs.

After the expert is retained, the lawyer and expert should work together at the outset of the relationship to determine what information will be provided to the expert by the lawyer and what information will be collected by the expert. In addition, there should be an initial understanding of what work product the expert will provide during the course of the case as well as the timeline for providing that work product. Finally, it is never too early to begin discussing the types of exhibits that will assist the fact finder in understanding the expert's opinion.

With rare exceptions, each expert should visit the subject property sooner rather than later and should document any conditions on the property that may change prior to the date of trial. The types of documentation that may be needed range from simple photographs to wetlands delineations, tree counts, soil samples and the like.

As noted above, the lawyer is the quarterback of the client's team. Accordingly, the lawyer should take the lead in coordinating necessary meetings between members of the expert team, particularly where one or more experts will be providing predicate testimony for the main expert witness (typically the appraiser). The lawyer should also determine the nature of the communications that will occur between the expert and lawyer and between the experts on the team. Consideration should be given to whether the communications will occur through in person meetings, telephone calls, emails or letters.

If the opposing side is conducting tests on the subject property, the lawyer should determine whether members of his or her expert team should be present at the inspection or testing and whether split samples are needed. Often an agreement can be reached in this regard with opposing counsel but if not a motion to the court may be appropriate.

Both the lawyer and the appraiser should physically inspect all of the comparable sales prior to the preparation of the expert report and, if there is a

significant delay, again prior to the trial. Whether these inspections should be done individually or together is a tactical decision for each case. The lawyer should also double check with the appraiser to confirm that he or she, or a reliable member of their staff, has confirmed the sales and data.

DISCOVERY, PRIVILEGE, AND PRACTICAL CONSIDERATIONS • Over three years ago, important amendments to the Federal Rules of Civil Procedure concerning electronically stored information (ESI) took effect. Without a doubt, many of the states will follow suit and amend their rules of procedure. It is fair to say that if these new rules have not yet affected your eminent domain practice, it's only a matter of time. Changes were made to Fed. R. Civ. P. 16 (Pre-trial Conferences), 26 (Interrogatories to Parties), 33 (General Provisions Governing Discovery; Duty of Disclosure), 34 (Production of Documents, ESI and Entry Upon Land), 37 (Sanctions), and 45 (Subpoenas) to address discovery in the electronic age. The rules were amended to specifically provide that the term "document" includes electronically stored information. Other changes require the parties to deal with preservation and production of ESI at the outset of the case, address the manner of ESI production, create a "safe harbor" from claims of spoliation in certain situations, deal with ESI not reasonably accessible, and provide a way to deal with privilege problems in ESI production. Many states will likely follow suit and adopt rules of procedure in the future addressing ESI. As is often the case, state rules will likely track some or all of the new federal rules. One step that has already been taken is that the Conference of Chief Judges of the state courts has issued suggested guidelines for production and preservation of electronic data. *Help Has Arrived — Sort Of: The New E-Discovery Rules,* ABA Section of Litigation Annual Conference, April 11-14, 2007: The Next Frontier — Federal Rules Changes for E-Discovery, Barkett at p. 26-27. The guidelines, en titled Guidelines For State Trial Courts Regarding Discovery of Electronically-Stored Information, were adopted in August 2006 and can be found at http://contentdm.ncsconline.org/cgi-in/showfile.exe?CISOROOT=/civil&CISOPTR=56. *Id.*

Each jurisdiction has its own rules about experts, including what can and cannot be discovered from testifying and non-testifying experts. In the federal context, great care must be given to what is provided to the expert, lest your work-product gets discovered. The issue arises as the courts grapple with the requirement in Rule 26 that the expert report disclose all information "considered" by the expert. *See* Edna Epstein *The Attorney-Client Privilege and the Work-Product Doctrine,* 997-1003, 1064-82 (ABA 5th ed. 2007). Some courts have held that this requirement mandates that all documents provided to an expert, even work-product revealing the mental impressions of the attorney, be produced regardless of whether the expert relied upon that information in forming his/her opinion. *See e.g. Synthes Spine Co. v. Walden,* 232 F.R.D. 460 (E.D. Pa. 2005) (collecting cases); *American Fidelity Assurance Co. v. Boyer,* 225 F.R.D. 520 (D.S.C. 2004); *TV-3, Inc. v. Royal Insurance Company,* 194 F.R.D. 585 (S.D. Miss. 2000) (collecting cases on both sides). Other courts have continued to protect opinion work-product in the hands of the expert. *See e.g. Ladd Furniture, Inc. v. Ernst & Young,* 1998 WL 1093901 (M.D. N.C. Aug. 27, 1998); *Chopper v. R.J. Reynolds Tobacco Co.,* 195 F.R.D. 648 (N.D. Iowa 2000). Given the evolving case law in this area, great care must be given to what an attorney decides to physically provide and orally state to the testifying expert.

Similarly, it is important to understand the law in your jurisdiction concerning the need for experts to preserve drafts of their reports and the discoverability of such documents. Particularly where there is a legal requirement to preserve all drafts, an in

struction should be given to the expert, preferably in writing, to preserve such documents at the outset of the relationship.

Note, however, that a proposed amendment to Rule 26 "would extend work-product protection to draft reports by testifying experts and…would extend that protection to communications between those experts and retaining counsel." *See* Henry L. Hecht, *Proposed Amendments To Federal Rule 26 Offer Protections When Working With Experts*, 21 The Practical Litigator 23 (July 2010).

CONCLUSION • As depositions and trial approach, the amount of time spent with your expert team will increase. Thorough and careful preparation of the experts for their testimony will not only insure that your client's position is fully and effectively presented but will assist the fact finder in determining the truth.

PRACTICE CHECKLIST FOR
Selecting Eminent Domain Experts

- First, determine what role the expert should play in your case. Should it be:

__ Writing an affirmative expert report and providing testimony in support thereof?
__ Writing rebuttal report(s) and providing testimony?
__ Providing consulting services (without providing testimony) such as research and other assistance regarding facts and issues in support of the direct case, analysis of market data, to providing fuel for cross-examination of the other side's experts?
__ Guiding the attorney and client in the selection of other experts?

- Second, consider the following things about the expert:

__ Reputation;
__ Experience, both in the expert's field and in providing expert testimony in court and other legal settings;
__ Appearance, demeanor and communication skills;
__ Age/sex/race;
__ Qualifications/licenses/memberships;
__ Past experiences or "baggage";

- Where representing the owner and condemnor experts are already known, the attorney must consider the "match up" in selecting the owner's experts.

- Third, consider in what capacity you wish to retain the expert. Do you want the expert to be testifying or non-testifying?

- Fourth, think about discovery, privilege and practical issues:

__ Although a proposed amendment to Rule 26 is that would provide work-product protection to draft reports by testifying experts is under review, it is still important to research what would be considered discoverable and to limit the information disclosed to the expert accordingly.