



When Questioning Crosses the Line

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The right witness can make all the difference

Condemnation litigation is a complex process. In addition to the right of way agents and property owners, most cases involve attorneys, paralegals, appraisers, planners and engineers. The specific public project and its associated public use must be described, analyzed and approved. For each property that is needed for a project, there are environmental analyses conducted and traffic surveys performed. Legal descriptions, survey maps and underground utilities are identified and noted. There are many steps that precede condemnation litigation.

In preparing for a condemnation trial, there are countless litigation tasks required. The first step is sorting through the myriad of files and facts and deciding what applies to a specific property. As we know, there are always two sides to a story. In condemnation cases, the stories are found in the information provided by the witnesses. There are two general categories of witnesses—percipient and expert.

Percipient Witnesses

Percipient witnesses are those who have personally perceived or experienced something. For example, a percipient witness standing in a building may recall an experience of seeing, hearing or feeling vibrations of a train passing by. This type of witness may also recall a conversation they had with a bystander, what was stated and the person's demeanor.

In California, this type of testimony is defined as follows: “If a witness is not testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is permitted by law, including but not limited to an opinion that is: a) rationally based on the perception of the witness; and b) helpful to a clear understanding of his testimony.”

In condemnation cases, percipient witnesses may be called on to testify about project planning, approvals, construction funding and community outreach efforts. Perhaps the most important percipient witness will be the person designated to present the facts pertaining to the need for the public project and the reasons for the specific location and property to be acquired.

Expert Witnesses

An expert witness is qualified to offer their opinion of fact in the form of testimony. Appraisers are the most common expert witness used in condemnation cases. However, it is not uncommon for relocation, acquisition and even utility right of way agents to offer expert testimony concerning the proper implementation of right of way processes and claims. Surveyors are often used to offer opinions on post-construction building improvement and parking lot reconfigurations on remainder parcels.

An expert witness is subject to legal rules such as those found under California Evidence Code § 801:

If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is:

- (a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and
- (b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type

that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.

The Discovery Process

The formal legal process for exchanging facts with opposing sides in condemnation cases is called discovery. Discovery is the opportunity for each party to learn facts from other side. Parties can pose questions through court-approved written forms and specially drafted written requests. A party can request documents, a property inspection and soil testing, for example. The most utilized discovery method is a deposition.

Depositions allow parties to ask questions directly of witnesses. Questions posed will be immediately answered, and the body language and demeanor of the witness can also be noted for the record. Technology has made it efficient and affordable to videotape a deponent's responses to capture non-verbal body cues, which can be just as telling as their verbal

answers. Depositions are not without the occasional drama. The face-to-face interaction can often create tension between the parties or attorneys.

Benefits of Preparation

Early in my legal career, I was assisting some senior attorneys with obtaining discovery from an opposing party. It was a large private utility company with a \$200 million claim for inverse condemnation against the state for the taking of company property without paying just compensation. At the deposition, I was representing a state right of way agent. The utility company was represented by a very prominent and highly skilled condemnation lawyer, who was well known for his fierce advocacy on behalf of his clients.

On this occasion, it was clear that the opposing attorney had a prepared line of questioning for my witness hoping to elicit certain answers. But when he realized that he was not getting the answers that he anticipated, he became increasingly and visibly frustrated. Leaning in the direction of the witness, he continued his questioning as his voice and tone became louder and more irate.

His outrageous behavior left me no choice but to place my objection on the record with the court reporter, saying, "I want to note for the record that opposing counsel is standing up and leaning across the table shouting questions at my client in a loud and aggressive tone, and I'm concerned about her personal safety."

Fortunately, my witness was unruffled. Not only had she come fully prepared for the deposition, she was a highly skilled expert witness who had prepared for every conceivable scenario. Because of her ability to remain focused on the facts while keeping a calm and professional demeanor, we were able to complete the deposition without incident. This experience reinforced for me early on the importance of hiring the right expert witnesses and adequately preparing the percipient ones. ☘



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