

The Pretrial Process

■ COMMISSIONER HERBERT M. KLEIN

The purpose of the pretrial conference, which involves the exchange of appraisal reports and other appraisal data, is to provide satisfaction of the discovery requirement for civil cases. In eminent domain cases outside of Los Angeles County, discovery is affected pursuant to Civil Code of Procedure, §1258.010 through §1258.300.

Therefore, if an appraiser is appearing as a witness outside of Los Angeles County, it is imperative that all local rules affecting the preparation and exchange of appraisal reports be discovered and adhered to. If there are no local rules, the procedure is controlled by §1258.010 and all relevant sections in the *Code of Civil Procedure*.

However, an appraiser should be aware of the fact that §1258.300 provides a procedure for exchange of valuation data by court rule in lieu of the legislative code requirement. The Los Angeles County Superior Court has adopted such a rule known as the *Eminent Domain Policy Memorandum*. Therefore, in Los Angeles County, the local *Eminent Domain Policy Memorandum* is controlling.

The policy memorandum includes Exhibit A, which is captioned *Requirements for Valuation Data*. A copy of Exhibit A is attached to every first pretrial conference order. The attorneys representing the parties are also expected to provide each appraiser with a copy, in order to enable the appraiser to properly prepare the appraisal report.

Timetable

At the first pretrial conference, the parties select pretrial dates and the trial date.

Herbert M. Klein has been the Los Angeles Superior Court Commissioner of the Eminent Domain Division since 1970. As Court Commissioner, Klein reviews every appraisal report submitted for trial purposes in Los Angeles. Prior to this post, Commissioner Klein was a Los Angeles Deputy City Attorney, primarily assigned to eminent domain cases. Commissioner Klein is the author of the Eminent Domain Benchbook for the Superior Court.

The final pretrial conference date is selected far enough in advance so as to allow sufficient time for the appraiser to prepare his or her appraisal report. Sometimes the first pretrial conference takes place before the attorney or the property owner has hired an appraiser. In these cases, the attorney is simply guessing when he or she picks a date for the final pretrial conference, which is the date for the exchange of the completed written report in accordance with Exhibit A.

Sometimes the attorney or property owner has contacted the appraiser in advance of the first pretrial conference and requested a commitment as to the time it would take for the appraiser to complete the written appraisal report. Based upon the appraiser's presentations, the parties then select a final pretrial conference date. If the appraiser does not complete the report in time, the final pretrial conference date has to be continued. This usually results in the continuance also of the mandatory settlement conference date and sometimes the trial date.

Many of these continuances are opposed by the other parties, who have made calendaring commitments based upon the timetable selected in that particular case. This sometimes results in opposition to continuances by motion proceedings, which inevitably lead to additional attorney's fees and costs of suit.

Preparation of the Appraisal Report

The Exhibit A requirements for valuation data are self-explanatory. However, certain issues regarding the preparation of the appraisal reports should be emphasized.

Page Numbers

All pages in the appraisal report should be numbered. There used to be a practice years ago of stripping the appraisal report, particularly of redundant matter such as photographs and exhibits which were not going to be submitted as part of the appraisal presentation. Consequently, the ap-

praisers were encouraged not to number their reports so that when the report was stripped, it would not be known that the other side was in fact receiving a stripped report.

This practice of stripping the appraisal reports is less common now, and appraisers are encouraged to number the pages to facilitate the reference of particular pages during the settlement conference.

Case Name and Number

It is required by Exhibit A to include the case name and number, as well as the parcel number, on the caption of the appraisal

The reader of the appraisal report should be able to understand how the dollar valuation conclusions were reached.

report. The correct parcel number is the number that appears on the complaint, not the assessor's rolls, unless they happen to coincide. When one appraiser uses the assessor's number, there is a question as to whether the two parcel numbers refer to the same real property.

Severance Damages

If the appraisal includes an opinion of severance damages, a detailed description of the reasons for such damages should be included. It is not enough to say the property in the before condition is worth \$10 a square foot and in the after condition is worth \$3 a square foot. An explanation of how these amounts were arrived at must be included.

Precondemnation Damages

Likewise, if an opinion of precondemnation damages is included in the appraisal, all reasoning and data must be explained. It is not enough to simply state a dollar figure and leave it at that.

Valuation Approaches

The three main valuation approaches for valuing real property are the market or comparable sales approach; the cost reproduction approach; and the income approach. For valuing business goodwill, the two main approaches are the excess earning capitalization method and the market method. In either valuation analysis, if one

or more of the particular approaches is not applicable to the subject, the reason for not using this particular approach should be included.

Show All Math

All of the math used in the computations should be included in the report. The reader of the appraisal report should be able to understand how the dollar valuation conclusions were reached.

Further, the analysis and factors of consideration in selecting a capitalization rate should be explained. It is not enough to say "I selected 9% or 10%." Why? What factors were considered in selecting the capitalization rate?

Sales Verification

It is important to note, on the comparable sales approach, unverified sales may be subject to a motion to strike the sale. Verifying the sale means the appraiser is able to testify that he or she spoke to somebody connected with the sale, e.g., the

Verifying the sale means the appraiser is able to testify that he or she spoke to somebody connected with the sale.

buyer, the seller, the broker or salesperson, the attorney, or the loan officer, who can verify that it was an open market transaction as described in the definition of fair market value. The definition of fair market value is contained in the Code of Civil Procedure is §1263.320.

Sales Map

When I wrote Exhibit A back in 1976, I

foolishly neglected to include as a requirement for the appraisal report the preparation of a sales map, which is usually a blowup of *The Thomas Guide*, showing the location of the subject property and the location of the comparable sales in relation to the subject property.

The sales map is a very important piece of physical data which juries usually zero in on as one of the main factors in helping them reach their conclusions as to the comparability of sales. Everybody who believes they understand anything about real estate in California, including jurors, have had LOCATION—LOCATION—LOCATION drummed into them, so that they believe that the location of the comparable sales to the subject property is of paramount importance. Therefore, inclusion of a sales map in the appraisal report and as an exhibit to be offered at the time of trial is essential.

The Final Pretrial Conference Hearing

Assuming all of the aforementioned requirements, as well as those included in Exhibit A, are met, the appraisal report will be submitted for exchange at the final pretrial conference. One of my functions is to examine each appraisal report to make sure that they comply with the requirements for valuation data. If they do, the reports are exchanged. Plaintiff gets defendant's; defendant gets plaintiff's. If the reports do not comply, the court has various options open to it:

1. If the failure to comply is on something minor such as not completely explaining a valuation conclusion, but the report is otherwise in compliance with Exhibit A, the court will generally exchange the appraisal reports and require that the appraiser provide the other side with a letter explaining

the missing information.

2. If the report is substantially incomplete and in noncompliance with Exhibit A, unless the other party is willing to exchange, notwithstanding the failure to comply with Exhibit A, then the court will not exchange the appraisal reports. Instead, the court will place a rubber name stamp on each page of the appraisal report for identification at the time of trial, and the appraisal may be subject to exclusion at trial upon a motion in limine, which is a form of pretrial motion, made before the jury is impaneled. Failure to comply with the requirements for valuation exchange may have very drastic consequences.

There is a new case that appraisers and attorneys may want to read, *State of California, ex rel., Public Works Board v. Bragg*, 183CA1.App.3d 1018 (1986). In the Bragg case, the state's counsel did not submit an appraisal report timely. When the parties appeared in Department 43 before me, Bragg's attorney made an oral motion to exclude the state's appraisal report and the appraiser's opinion at the time of trial, and I reserved the ruling on that to the time of trial, to be handled by the trial judge. I deferred the ruling because the delay in getting to trial may have provided sufficient passage of time so as to have removed the untimeliness of the submission.

On the trial date, before the trial judge, Bragg made a motion in limine to exclude the report on the grounds that the state did not comply with the pretrial order and with the requirements of Exhibit A, and the trial judge granted the motion and excluded the appraisal report. The result was a trial in which the plaintiff did not participate in the trial. Bragg testified to a fair market value; her appraiser testified, and the jury



Northeastern Land Services, Ltd.

194 Waterman St.
Providence, RI 02906
Tel. (401) 273-2570

Northeastern Land Services, Ltd.

Right of Way Services since 1986

Pipeline companies, Electric transmission, Natural Gas,
Municipalities and Telecommunications

- Title examination & abstract
- Land and easement acquisition
- Negotiations and damage claim settlement
- Mineral lease acquisition
- Agency permits and licenses
- Relocation assistance

Inquiries and resumes from qualified field agents encouraged.

found within the range of her opinion and the opinion of her own appraiser. Plaintiff's appraiser never testified.

The plaintiff appealed, and on appeal the appellate court reversed on the ground that imposing a sanction of completely denying the right of the plaintiff to present an appraisal witness was too stringent and too harsh a sanction, since it penalizes the client for the attorney's failure to provide a timely appraisal report. The matter was then remanded back to the trial court to conduct a hearing to decide on the proper sanction against the attorney—not the client.

The overwhelming majority, between 90 to 95%, of eminent domain cases do settle prior to trial.

The case doesn't say anything about imposing a sanction against the appraiser, but

if the attorney is going to get burned on this because of the failure of an appraiser to prepare an appraisal report timely, then that attorney is certainly going to think twice about hiring that appraiser again.

Mandatory Settlement Conference

Assuming that there has been an exchange of appraisal reports at the final pretrial conference, a week or two after that exchange, Department 60 holds a settlement conference. Both sides have had an opportunity to assimilate and assess the relative merits of the other side's appraisal report, and they should be prepared at that point to engage in meaningful discussion, in order to settle the case.

The overwhelming majority, between 90 to 95%, of eminent domain cases do settle prior to trial. But it should be understood that the settlement conference sometimes discloses certain hazy areas that have to be explained. Consequently, the appraiser might have to be available for the settlement conference in order to provide clarification.

Further Depositions

It is possible that after the exchange of appraisal reports, that the other side may want to take the deposition of the appraiser to ask further questions regarding the appraisal report and appraisal data. This occurs most often on areas concerning opinions affecting a reasonable probability of a zone change, or on appraisals regarding goodwill.

Following the settlement conference, the appraiser is no longer involved with the pretrial process. However, if the matter proceeds to trial, the attorney for the other side is going to have a copy of the appraisal report right in front of him/her while the appraiser testifies, and he/she may object to anything that is not contained within the four corners of the appraisal report. Hence, it is essential that every major factor that was considered by the appraiser in reaching the opinion of value must be in the appraisal report, or it is subject to being erased from the record on a motion to strike.

(IRMA)

Reprinted with permission from Compensable Business Loss Review, Jan/Feb 1989, Vol. 2, No. 4.



Paducah & Louisville Railway, Inc.

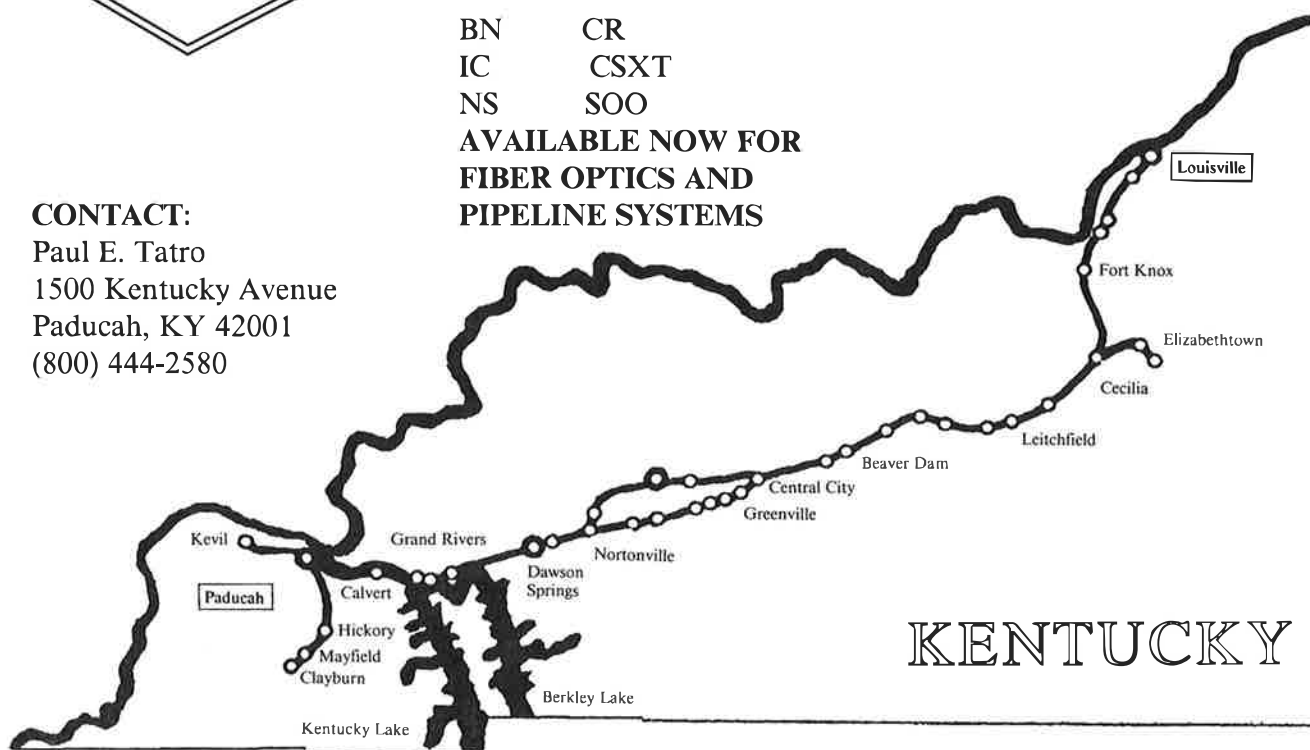
America's foremost regional railroad connecting with

BN CR
IC CSXT
NS SOO

**AVAILABLE NOW FOR
FIBER OPTICS AND
PIPELINE SYSTEMS**

CONTACT:

Paul E. Tatro
1500 Kentucky Avenue
Paducah, KY 42001
(800) 444-2580



KENTUCKY