Teamwork Is Essential For Trial Preparation

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It has long been stated that the key to success in the trial of a lawsuit is "preparedness." This is particularly true in the trial of a condemnation or eminent domain matter.

The trial of such a case can be divided into two distinct phases. On the one hand, the expert witness, the real estate appraiser, must present on direct examination (that is, under questioning of his client's own attorney) his analysis of the property being appraised, the facts related thereto, and his opinion of fair market value and severance damages. He must also bear the brunt of the cross-examination by the opposing counsel. In this phase of the presentation, the "laboring oar" is in the hands of the appraiser.

The other phase of the presentation is more directly the responsibility of the attorney; for, it involves the systematic destruction or discrediting of the approach, analysis and opinion of the expert witness used by the opposition through the effective use of the art of cross-examination.

Performing within a vacuum or, in other words, standing alone, neither the appraisal witness nor the attorney can present the client's case to the optimum. Cooperation during the period of trial preparation is essential if the true interests of the client, whether public agency or property owner, are to be best served.

As a general proposition, the real estate appraiser must furnish the *facts* upon which the client's case is built. His investigation is the "source book" for all factual questions.

The attorney must furnish legal guidance and direction to the appraiser and apply the rules of legal construction and application to the facts discovered by the appraiser—thus, the need for cooperation.

Without the facts to work with, the attorney can spend hours and days in preparation and legal research only to find that he has overlooked the very problems presented in the case being tried.

Without legal guidance, the appraiser may give weight to facts or factors which the law refuses to recognize as compensable. Thus, it is possible that his entire testimony may be stricken from the court record, and the client may be left with no evidence to refute the evidence presented by the other side.

It perhaps should be set forth now, and emphasized, that by cooperation, I do not infer that the attorney should dictate to the appraiser, nor should the appraiser dictate to the attorney. I suggest only an exchange of ideas and concepts so that both the appraiser and the attorney are better prepared to present the case then in question.

One might well inquire at this time as to when this "cooperation" should commence. Clearly, the appraiser will not stand for the attorney or the client telling him how to appraise the property nor the value to be placed thereon; however, it is my opinion that this cooperation, this exchange of ideas and problems, should most certainly commence before the appraisal report itself is completed—before it is reduced to writing.

Soon after the appraiser is employed, a meeting is suggested between the appraiser, the attorney and the right-of-way agent, of a condemning agency, to clarify the basic facts concerning the property being acquired and the larger parcel of which it is a part.

These facts include the legal description of the part taken as well as the larger parcel if a partial taking is involved; the ownership interests; existing liens and encumbrances; existing zoning; content of the general plan in regard to that property; area of the part taken as well as the remainder property; the date of valuation; and the date of condition.

In addition, the appraisal assignment needs to be refined. What issues need to be decided? Fair Market Value? Severance Damage? Special Benefits? Good Will?

Unfortunately, all too often, the attorney does not have this information available early enough—maybe because he hasn't pressed the client to retain an appraiser; maybe because he hasn't asked the appraiser for the information; or maybe because he doesn't see the importance of an error in these facts. What if the attorney is, in a pre-trial conference or negotiations, called upon to agree to these facts? If no larger parcel is described, severance damages may be removed as an issue.

If the date of value is not ascertained with certainty, the appraisal may have to be completely redone. If zoning is not ascertained on both the part being taken and the larger parcel, it is possible that severance damages may be eliminated as an issue. If the property is already being used by the condemnor and the date of condition not established, improvements on the property when taken may be overlooked.

Lately, it has been the complaint of many attorneys specializing in condemnation work that the first time they see the report of their own appraisal witness is immediately before trial. You can readily see that is then too late to correct any errors in legal interpretation or approach, and since the opposition will often have a copy of this report at the time of trial, the appraiser's opinion may well be stricken from evidence, or, at the very least, his effectiveness can be substantially reduced through cross-examination.

There must be time for the appraiser and the attorney to go over the report in detail together. All facts must be carefully reviewed to eliminate error; all theories must be reviewed from a legal standpoint to eliminate theories or approaches forbidden by statutory or case law. Every sale must be analyzed to make sure the market data requirements are satisfied: that the sale was freely made in good faith; that it was made sufficiently near in time to the date of value; that it was sufficiently near the property being valued; and that it is sufficiently like the subject in