Teamwork Is Essential For Trial Preparation

By RICHARD L. RIEMER, SR/WA

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

respect to character, size, situation, usability and improvements to be comparable, and to be of assistance in shedding light on the value of the property being condemned.

A particular word of caution—an error in the price, size, or date of an important sale can be fatal to your case—and the attorney can only stand by and suffer with the client and the witness when he is forced to admit his error.

I do not intend to convey the impression that this is a one-way street with all of the requirements for accuracy to be the obligation of the appraiser. The attorney thoroughly researches and analyzes every legal question presented by the facts. This requires a thorough knowledge and understanding of the facts and a recognition of the legal problems presented. If a factor must be eliminated from the appraiser's consideration because the law does not recognize it as compensable, it is up to the attorney to give the appropriate instructions to the appraiser.

Most certainly before the matter comes to trial, the attorney should accompany the appraiser on a visit to the property, as well as to each of the properties used as comparable sales. The attorney at this time must make himself thoroughly familiar with every facet of the property being acquired and the larger parcel of which it is a part. He should be familiar with the dimensions of the property; the improvements located thereon; the zoning, both existing and potential; the character of the neighborhood; and all other factors involving the ownership. In addition, he must be familiar with each of the properties involved as comparable sales, and be able to compare them to the subject property. The attorney must rely upon the appraiser for the factual background which will prepare him for the trial of the lawsuit; thus, any error or omission by the appraiser will be perpetuated by the attorney.

If the sales proposed to be used by the opposition can be discovered prior to the trial, the attorney and the appraiser should together visit each of the parcels involved in said sales, and collectively analyze the appropriateness of their use as comparable sales. Here again, the attorney will rely upon the appraiser's knowledge of the factors involved as a basis for his cross-examination of the appraiser who has utilized the sale. In such an event, also, the appraiser can render invaluable assistance in analyzing the probable appraisal process used by his opponent to guide the attorney in pointing out the weaknesses and fallacies of the approaches used.

After reviewing the appraisal report and visiting the property, the attorney and the appraiser should review the most desirable approach in presenting the case to the jury, and they should decide on the exhibits which will be of the greatest assistance in presenting the property owner's position to the jury. Normally, the attorney will rely on the appraiser to furnish photographs of the subject property and of any of the comparable sales which have particular import in the case.

Clearly, the best defense against extensive cross-examination is a thorough and complete knowledge of the property. If this knowledge has been gained prior to completing the report, the appraiser will have an answer for each question posed by the cross-examiner, and under normal circumstances the answers will assist his case rather than detract from it. The attorney will no doubt instruct the witness that it is a mistake to argue with the attorney, and that it is much more desirable to answer the question posed by the cross-examiner as concisely as possible. The attorney will also instruct the appraiser that in the event it is necessary to explain an answer, the court's permission should be requested and invariably will be granted. In those instances where further amplification is called for, your own attorney will be in a position on redirect to call for the amplification required.

The attorney must have the same thorough and complete knowledge of the facts since this is the very basis for his cross-examination. It has long been an unwritten rule that no question is ever asked by an attorney on cross-examination unless the examiner already knows the answer. To be effective in cross-examination, the attorney must know the facts about the property being acquired and the sales used in support of the appraisal analysis. The attorney must know, when an answer is given by a witness, whether it correctly represents the facts. He can have this knowledge only by knowing all of the factors important to the property.

The attorney must also weave these facts together in preparing a clear, concise and convincing opening statement. While it is improper to argue the case at this point, it is important to have the jury aware at the outset of your client's position and the logic therefor.

In summary, it is my opinion that the appraiser and the attorney, to be effective in carrying their respective portions of the load in a condemnation case, must cooperate through the entire appraisal period—from the time the matter is assigned to the appraiser until the time that the case goes to the jury. The appraiser should not instruct the attorney on what law is, nor should the attorney attempt to dictate the appraisal process to be used. The attorney should give legal direction to the appraiser, and explain to him the basis for the legal rulings involved, and the appraiser should likewise acquaint the attorney with all of the facts about the property being appraised and the appraisal process outlined. With cooperation such as this, the client will receive the best representation possible; the appraiser will stand a better chance of having the judge or jury accept his theory of the case, and the attorney will stand a better chance of being successful for his client.

SREA Members Veto Merger

The members of the Society of Real Estate Appraisers (SREA) rejected consolidation with the American Institute of Real Estate Appraisers (AIREA). The members of AIREA had approved the merger; however, SREA members voted 7,375 to 6,094 against the consolidation effort. Under the General Not for Profit Corporation Act of Illinois, a two-thirds majority vote is required from each organization's membership.

IN MEMORIAM

Milton J. Chapman	**Chapter 29**
William L. Hose	**Chapter 42**
Howard Lawrence	**Chapter 67**