

Top Three Right of Way Agent Observations About Attorneys

A look from the other side

BY MICHAEL F. YOSHIBA, ESQ.



In the last issue of *Right of Way Magazine*, I addressed the top three attorney observations about right of way agents. This time, I decided to flip things around.

Some of you already know that before I became an attorney, I spent the first 10 years of my professional career working as a right of way agent. I've experienced both sides of the interactions between attorneys and right of way agents. Right of way agents typically spend an inordinate amount of time trying to fully understand the role and responsibilities of the eminent domain attorneys. With that in mind, I've assembled the top three right of way agent observations about attorneys.

1. Attorney use of legalese is extremely frustrating.

Attorneys go to law school to learn a new language. They learn words and phrases that are unfamiliar to most people, with right of way agents being among the under-informed. Most people understand the meaning of the individual words "eminent" and "domain" but are baffled when the two are combined and become the phrase "eminent domain." There may be one chapter in most law school real property text covering the topic of eminent domain. Eminent domain is an elective course in law school and a highly specialized area of law based upon the Fifth Amendment to the United States Constitution:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in

actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Attorneys that specialize in eminent domain begin by learning about the foundations and legal bases for public agencies taking private property for public uses. Acquired is the specific knowledge concerning the rights of individuals and those specific circumstances where private property owners are forced to sell their property to the government for the overall public good. Attorneys also learn about the litigation process including the gathering of evidence, the preparation and presentation of evidence to the court and judge or jury trials, as well as the accompanying theories concerning fairness and equity during the litigation process. As you may have surmised already, in law school, attorneys don't learn about the role of right of way agents in the eminent domain process. Newer attorneys will not have any familiarity with your local acquisition manual, relocation assistance regulations, the IRWA or the Uniform Standards of Professional Appraisal Practice.

Attorneys use legalese because that is what is required in the legal profession to argue in favor of the interpretation of words and phrases used in the eminent domain process. Using specific words and phrases preserves the ability to challenge any court rulings on facts and legal issues. In sum, right of way agents should not assume the meaning of legal terms, nor should they

be afraid to ask their attorney to explain any legalese in different and simpler terms.

2. “It depends” is the answer I get most often from attorneys.

Attorneys are frequently called upon to provide definitive answers to the legal questions posed by right of way agents. Certainly, it does not appear unreasonable for one to expect an attorney with four years of college undergraduate studies and three or more years of law school to have an immediate answer to your specific legal question. To understand the dilemma facing attorneys, let me pose the following question: how long does it take you to get home from work? Your answer will depend upon whether you drive, walk or take public transportation. The answer will also vary based upon the time of day, traffic on the route and the weather. “It depends” is a perfectly valid and acceptable answer to most questions, including legal questions.

Answers to legal questions require an analysis of facts and law. There are many instances where a concise and immediate response to legal questions is possible. However, most right of way agents only ask questions when the factual situation and legal issues are novel and unusual. Every eminent domain case is unique and presents

a different set of facts to be compared with applicable law. With each eminent domain case having different facts and different laws to apply, hopefully an attorney’s answer of “it depends” may now sound a little more reasonable.

3. Public agency attorneys settle everything and don’t want to take cases to trial

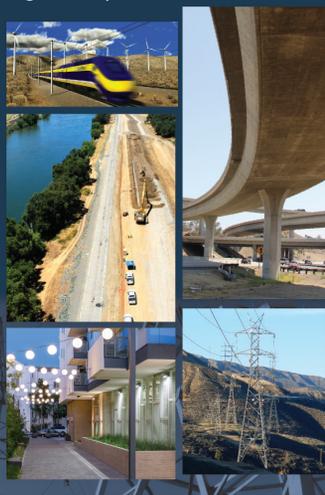
Public agency attorneys are not hesitant to take cases to trial. Instead, the ultimate goal of public agency attorneys is the fair and ethical treatment of property owners, which includes minimizing litigation and maximizing settlement opportunities in the face of the expected difference of opinions. The eminent domain legal process involves the taking of private property for a specific public purpose. Inherent in the taking process is the involuntary nature of the involvement of a private property owner for the betterment of the community as a whole. While on the one hand public agency attorneys are required to be zealous advocates for their public agency clients, these attorneys also must seek to treat affected property owners fairly and ethically. Public agency attorneys take cases to trial only when and where the differences of opinion are irreconcilable. ☹



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