What Eminent Domain Lawyers Need From Trial Appraisers

(9 MILESTONES ON THE PATH TO SUCCESSFUL TESTIMONY)

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The Setting

"It is generally safer to take the judgments of unskilled jurors than the opinions of hired and, generally, biased experts" *Ferguson vs. Hubbell*

"There has been a widespread and growing distrust of expert witnesses in our courts . . ." *Welch vs. TVA*

"An expert opinion is only an ordinary guess in evening clothes." *Earl M. Kerstetter Inc. v. Commonwealth*

The Setting

The job of the appraiser, to the extent possible, is to disabuse the courts of these thoughts.

How can we do this?

What Does & Doesn't Work . . .

- "Do's and Don'ts" for 9 milestones on the path to a good outcome
- Presented in chronological order, not necessarily in order of importance
- Milestones start with first contact and end with the trial
- The deposition and trial are NOT the time to prepare for success

The 9 Milestones

1. The first phone call
2. Determination of the scope of work
3. Assembly of the trial team
4. Interaction between counsel and the team
5. Draft reports / pre-submission conference
6. Deposition preparation
7. Deposition testimony
8. Trial preparation
9. Trial testimony

1. The First Phone Call

- ***Do:***
  - Clear conflicts (client, property, or issues)
  - Understand the issue and type of case
  - Determine the timeline (discovery cut off)
  - Determine information available / needed
  - Begin prudent workfile management
- ***Don't:***
  - Accept assignments with conflicts
  - Accept assignments with unrealistic timeframes
  - Take inaccurate or unnecessary notes

2. The Scope of Work

- ***Do:***
  - Determine the property to be appraised (larger parcel for example)
  - Determine the date of value
  - Determine property rights to be appraised (fee, leased fee, leasehold, easement, etc.)
  - Determine valuation approaches and methods to be used
  - Determine necessary discovery
  - Consider prior legal rulings
  - Consider needed future motions, legal rulings, and jury instructions
  - Determine what "the project" is and isn't
- ***Don't:***
  - Assume that all approaches to value are appropriate or acceptable
  - Discard applicable and necessary approaches
  - Forget rules of evidence
  - Forget applicable case law
  - Overlook report requirements (Rule 26?)

2. The Scope of Work – SR 1-2 (Problem Identification)

STANDARDS RULE 1-2, PROBLEM IDENTIFICATION

In developing a real property appraisal, an appraiser must:

(a) identify the client and other intended users;[18]

(b) identify the intended use of the appraiser's opinions and conclusions;

Comment: An appraiser must not allow the intended use of an assignment or a client's objectives to cause the assignment results to be biased.[19]

(c) identify the type and definition of value, and ascertain whether the value is to be the most probable price:

(i) in terms of cash; or

(ii) in terms of financial arrangements equivalent to cash; or

(iii) in other precisely defined terms; and

2. The Scope of Work – SR 1-2 (Problem Identification)

(f) identify any extraordinary assumptions necessary in the assignment. An extraordinary assumption may be used in an assignment only if:

- (i) the extraordinary assumption is required to properly develop credible opinions and conclusions;
- (ii) the appraiser has a reasonable basis for the extraordinary assumption; and
- (iii) use of the extraordinary assumption results in a credible analysis;

(g) identify any hypothetical conditions necessary in the assignment. A hypothetical condition may be used in an assignment only if:

- (i) use of the hypothetical condition is clearly required for legal purposes, for purposes of reasonable analysis, or for purposes of comparison; and
- (ii) use of the hypothetical condition results in a credible analysis; and

3. Assembly of the Trial Team

- ***Do:***
  - Disclose the limits of your expertise (stay in your lane)
  - Ask for other professional expertise when appropriate (noise/vibration, engineering, geo-tech, biology, traffic, cost estimating, etc.)
  - Interact with the other experts, perhaps as "quarterback"
  - Continue prudent workfile management
- ***Don't:***
  - Opine beyond your expertise
  - Act like you are an expert in everything
  - Ignore the opinions and conclusions of other team experts

4. Interactions with Counsel

- ***Do:***
  - Remember that communications are generally discoverable (in CA courts)
  - Assume that all communications will be published to the jury
  - Consider that "no notes" may not be credible
  - Continue prudent workfile management
- ***Don't:***
  - Forget that you are independent
  - Forget that you must comply with USPAP
  - Forget that you are the valuation professional
  - Forget that the "e" in email stands for "***everybody***"

5. Draft Reports / Presubmission Conference

- ***Do:***
  - Remember that workfiles are generally discoverable
  - Consider and understand what must be retained per professional standards
  - Accurately & succinctly describe the nature of meetings and communications
- ***Don't:***
  - Hide or obfuscate facts or material

6. Deposition Preparation

- ***Do:***
  - Consider both the strengths and weaknesses of the appraisal
  - Discuss what materials must be produced
  - Advise counsel about production requests that are problematic (e.g. mediation)
  - Discuss counsel's goals for the deposition
  - Prepare rebuttal?
- ***Don't:***
  - Fail to prepare
  - Plan to go in and "wing it"

7. Deposition Testimony

- ***Do:***
  - Listen carefully to each question, and answer ***that*** question
  - Pause before every answer to allow for objections
  - Provide an appropriate answer, then wait for the next question
  - Answer truthfully; "I don't know" or "I don't recall" may be the only truthful answer
  - Ask for clarification if you don't understand the question
  - Read the transcript carefully; discuss proposed changes with counsel
- ***Don't:***
  - Try to be funny or clever
  - Assume that you know what the questioner really wants to know
  - Forget that the attorney defending the deposition is typically ***NOT*** your lawyer
  - Answer questions that you do not understand
  - Forget that you are on camera (for videotaped depositions)
  - Fail to concede obvious points

8. Trial Preparation

- ***Do:***
  - Respect the role of counsel as the leader of the case
  - Review your deposition transcript carefully
  - Review the depo transcripts of other experts
  - Consult with counsel regarding trial exhibits (pictures and other)
  - Discuss direct and cross with counsel
  - Consider how to communicate the case to the trier of fact
  - Discuss legal rulings and jury instructions with counsel
- ***Don't:***
  - Fail to prepare (review file and read depo)
  - Wait until the last minute
  - Assume that the case will settle
  - Forget hearsay limitations
  - Freak Out

9. Trial Testimony

- ***Do:***
  - Share your qualifications on direct
  - Remember that trial is the time to tell your story
  - Think of yourself as a teacher
  - Integrate the testimony and interact with exhibits
  - Pause before answers to allow for objections
  - Answer truthfully; "I don't know" or "I don't recall" may be the only truthful answer
  - Ask for clarification if you don't understand the question
- ***Don't:***
  - Try to be funny
  - Use avoidable jargon
  - Be condescending to the trier of fact
  - Change your attitude and demeanor on cross exam
  - Give answers that are inconsistent with your deposition

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