

Working with Experts

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The retention of an expert requires certain basic tenets, and if any are broken it is likely that the viability of a condemnation just compensation claim will be destroyed. Condemnation counsel need to follow a specific approach in dealing with the process.

The key to obtaining a decent appraiser is finding one who can fully explain and justify his valuation process to the final fact finder. However, separate and apart from the quality of the appraiser's speaking and writing abilities are the following:

1. **Trust.** If counsel does not trust his appraiser to be honest, fair and responsible, counsel would be better off looking somewhere else for an appraiser. Appraisers are indeed fickle, but almost uniformly honest. When appraisers gain experience in a jurisdiction and are successful in a consecutive series of cases, often they view themselves with a type of confidence often called "arrogance" or "extreme arrogance." At times, this self authenticating attitude will harm counsel with the appraiser in a preparation process, but also may find itself creating an unsuccessful result with the trial testimony of the appraiser.

2. **Contract.** A written contract or a memorandum of an agreement as to both fees and services are required. For purposes of this process, the following should be reviewed:

- a) **Contract amount.** Contract amount should be related to the amount of effort placed in the case. Because of the contingent nature of condemnation owners' claims, all too frequently the amount is in some way related to the size of the claim. This process is a self-fulfilling road to devastation. In many jurisdictions, the expert witness fees are reimbursed. It is difficult for Courts to reimburse premised upon the time spent in a relatively small case; likewise, it is difficult for Courts to understand that a part of the basis of a greater fee in large cases may be premised upon the risk and efforts involved. One thing that is clear is that the contracts should be clear enough between counsel (or client) and the expert witness that the expert witness is satisfied that he will be paid fairly and appropriately.
- b) **Date of Completion.** Thirty years ago, motion practice at the trial court level was an

adjournment practice. Stays or postponements were over half of the motions filed in many jurisdictions. Courts now follow what has existed in the federal process for many years; i.e., requisite specific time parameters for discovery, exchange of appraisals and trial. The contract should include the date the appraisal will be completed.

- c) **Contingent Fees.** It is extremely dangerous, and, in most jurisdictions, unethical for an appraiser to value the property with any part of the payment being contingent upon a just compensation amount or result. This is a dangerous precedent for which counsel and appraisers should simply pass.

3. Division of Responsibility as to Other Experts. In the appraisal cases, the issue is one not of comparing oranges to oranges and apples to apples, but rather one of conflicting highest and best uses or underlying factual data. Frequently, engineers, land planners, environmental experts, soil experts or lawyer experts may be required. In such circumstances, there should be a specific delineation of the responsibility between the appraiser and other experts. This will mean that the two experts would be best off meeting and discussing the delineation of the responsibilities and how their expert testimony conforms to a fair understanding of the facts of the case.

4. Understanding of Expert Knowledge. The expert must have some specific and clear knowledge of the process in the jurisdiction separate and apart from a specific valuation process.

- a) Many jurisdictions maintain definitions of fair market and the highest and best use and hearsay rules of a very nature. The expert may best be provided with a specific explanation of the rules in the jurisdiction and an understanding of the rules are paramount to proceeding. Just by example, many jurisdictions require the buyers and sellers of a property to be specifically introduced in order for their comparable sales to be utilized by an expert as a comparable.
- b) The qualifications and experiences of an expert go far in the process. To reiterate the responsibility Paragraph 3 above, the qualifications and experience of the expert may very well be the key to a successful and

appropriate result.

5. Understanding of Approaches. The rules of the jurisdiction play an important part of the understanding of the appraisal process.

- a) Does the appraiser have an appropriate understanding of the comparables, given the underlying expertise and factual basis provided by what the expert has learned about the property or the information provided by other experts such as engineers.
- b) In the income approach, does the expert have a proper understanding of the market in order to appropriately determine the fair rental values, adjustments to the gross income, appropriate expenditures and of greatest importance, the appropriate rate of return?
- c) In dealing with the cost approach, does the expert have a fair basis for the determination of costs, and how does the expert determine the various depreciation factors?