

“Cross Examination of an Appraiser – An Update”

presented by
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Introduction

With the practice of law in many jurisdictions now trending toward negotiated resolutions achieved in mediation, trial skills and techniques have become lost arts for both lawyers and testifying experts alike. Notwithstanding, it is the ability to strategize and win trials that enhances all other areas of a professional's abilities with regard to legal or factual analysis required throughout an eminent domain case.

One of the most fundamental tests of an expert witness, particularly a real estate appraiser, is cross examination in the context of a trial by jury. It is during cross examination before a jury that an appraiser defends both objective fact and subjective judgment, making the appraiser, not purely an advocate, but an advocate for his or her opinion of value.

Trial Preparation

Before highlighting ten helpful tips to preparing for cross examination, some opening comments as to jury trial preparation are in order. An appraiser's attitude toward trial in general is the foundation for withstanding the assault of an accomplished trial lawyer during cross examination.

For an appraiser without trial

experience, the prospect of an upcoming jury trial may be a daunting task. Trial preparation in this instance becomes a necessary walk-through to ensure accuracy. For those appraisers with vast trial experience, renewed examination needs to be given to the specific facts and circumstances at hand because no eminent domain case is an exact replica of the case which proceeded before it.

A. Working from Trial Backwards

The best suggestion for the appraiser, whether preparing an opinion of value on behalf of either condemnor or condemnee in eminent domain, is to work from trial backwards. Working from trial backwards renders the best reflection of what strengths and weaknesses exist in a case. What is clearly seen by both common sense and more exacting scrutiny – if looking ahead to how a case is perceived by potential jurors – are the uphill and downhill tracks that challenge a juror's understanding of the appraiser's opinion of value. One sure manner of prevailing during cross examination is to exercise due care in the preparation of one's opinion of value in the first place.

With this in mind, sometimes it is the most simple observation that drives the legal or factual issues in an eminent domain case. It may be the evidentiary phenomena of the sale of the property next door or a

readily apparent severance damage. At times, these are the very facts that need to be distinguished or explained with market data as to how a willing buyer and willing seller would consider such phenomena as bearing on price negotiated at arms-length. Reconcile your opinion with the simple observations. Blow-up the deed of conveyance and purchase price of that sale next door. Take a picture of an unkept retention pond and show the maintenance requirements of the permit. Put these facts out in direct examination. It becomes quite a challenge for one side to avoid the unavoidable. This is especially so when a lawyer attempts to shake the credibility of an appraiser's opinion on cross examination when the simple observation serves as the backdrop for a juror's understanding and was adequately presented on direct.

However, if the driving issue in a case is more complex, the appraiser should not relinquish an argument just because of the difficulty in its comprehension, but find a way to explain it. This is where the art of trial practice finds the raw material to create something beautiful. Because a reasonable opinion of value has more than likely been achieved by some other market participant in the free enterprise system, there should be some real-world example outside the courtroom to assist the appraiser in explaining the opinion of value inside the courtroom. Ultimately, the most powerful argument is the truth, even if it takes all that a an appraiser can to give comprehension and bring the point home.

B. It is not Enough to be Right

The first essential building block with regard to providing expert testimony for an

eminent domain case is to be "right." Accuracy, together with truthfulness, in the reporting of market data is foundational. Without it, an opinion will not stand, provided an opposing counsel is also diligent in his or her preparation to expose error. However, being right is not enough.

It is sage advice to appreciate that one can be right, but still lose an eminent domain trial. Fear of what may happen at trial is often a better motivator than either believing one is a step ahead or just plain arrogance. It is not enough to be right, one must find a way to win with what is right.

All trial preparation should be undertaken with the objective of winning. Going through the motions of trial preparation or proceeding in countless directions without strategy will not provide a path to victory at trial. Both lawyer and appraiser should list all necessary tasks to be completed before trial and prioritize which tasks are essential and which tasks are only desirable.

Inevitably, not all tasks will be accomplished. Doing without 100% of what was intended to be ready for trial is most often the situation at hand. Understanding that a jury is likely only to remember 10% of what is presented emphasizes that the testifying appraiser should be selective about what is put in front of the jury. Trial preparation should filter through what evidence makes the best case to be presented before a jury.

C. Build a Sense of Story

A trial tells a story, or it least it should. The role of a trial lawyer and the real estate appraiser is essentially to be

storytellers. Thus, trial preparation includes organizing the legal and factual arguments of a case so as to create a compelling storyline. Character development, foreshadowing, plot, irony, moments of climax . . . all have their place in an eminent domain trial storyline. Every novel ever written began with a storyteller who developed the narrative in his or her head before putting pen to paper. Suspense, sequence of events, and central themes – all should be considered in preparation of a trial in order to use the momentum afforded by the different stages within a trial.

Story, too, brings to life the presentation of evidence. Common, universal themes or shared experiences should be highlighted from one witness to the next. Because most every one understands a chronology of facts and circumstances as same appear in a story, the appraiser must make sure that the presentation of testimony and evidence is consistent with the entire truth to be told. Inconsistency is the hobgoblin of ill-preparedness. Be consistent with those who come before and after the testifying appraiser. An appraiser's testimony that completes the essential elements earlier presented, and makes sense of what is yet to come, places a jury in the best position to accept the appraiser's opinion of value and achieve a happy ending for a client.

D. Perseverance

An eminent domain trial can be uncertain business. The remote possibility, or the unanticipated, can occur with frequency at an eminent domain trial. As such, it is so very necessary that a real estate appraiser who intends to testify carry into the courtroom a commitment to

persevere.

It may be that the first day of a trial holds a disheartening experience. It may be that because of some adverse evidentiary ruling or the like, one's teeth kicked in even before an appraiser testifies. It may happen that a discovery is made of some awful secret which a client did not previously disclose. It may be, instead, a surprise such as an amendment to the construction plans or a new cure. Any of these scenarios can happen. Remember, part of trial preparation is being prepared for the unexpected.

Under these circumstances, gold is refined. Find a way. Adjust your case, over-haul if necessary. Be prepared to explain why a new opinion of value is justified. Preserve issues for appeal. Most of all, persevere.

Ten Helpful Tips in Preparing for Cross Examination

Having considered the appraiser's attitude when preparing for a jury trial in eminent domain valuation, here are some more specific tips to consider if you are a real estate appraiser preparing for cross examination:

□ **#1: Tell the Truth!**

Cross-examination is considered by legal practitioners to be "the greatest legal engine ever invented for the discovery of truth." [5 Wigmore, Evidence §1367]. Never be unwilling to accept a fact that is true even if same is used to impeach your opinion of value. If you find that you were wrong, admit to error, but defend the

credibility of your opinion and synthesize whether any new fact is consistent with your opinion of value or requires a change. No one is perfect; an appraiser can miss and still be the more persuasive, credible witness particularly if truthful and if truly concerned about the truth.

□ **#2: It is Your Opinion**

You are in control. It is your estimate of compensation at stake. It is your opinion that needs to be conveyed to the jury, not the opinion of the lawyer who cross examines you. If the lawyer seems to be putting a spin on your testimony, you need to correct the spin. Do not wait for rebuttal. You are allowed to explain your answer. It is better to leave the jury with the knowledge that your opinion is other than what is suggested by an opposing counsel than to rely on corrective measures that may or may not take place later on in trial when you are not present.

□ **#3: Avoid Arrogance**

While you defend your opinion, do not be arrogant. Understand that it is in the nature of being the one who must answer what is asked that places you in a defensive posture. Respond to the question asked with confidence, and an overall desire to communicate. Do not attempt to out-wit, out-think, or out-perform the lawyer asking the questions. Do not be evasive. It is more important for individual jurors to appreciate the integrity of your opinion than it is to be entertained or to leave them with the impression that you are invincible. See if your interrogator has a short fuse, and avoid yours from being ignited.

□ **#4: Standard of Care**

Without confusing the jury as to your impartiality, respond in such a manner to the questions asked that demonstrates that you met the "standard of care" when preparing the appraisal opinion. This goes beyond the Uniform Standards of Professional Appraisal Practice. It means that you, personally, inspected the subject property and sales. It means that you can explain the delegation of work amongst your associate appraisers and staff and how you maintain the quality and ownership of the opinion of value. It means that bring with you to trial an organized file and trial notebook that, from all appearances, you care about the competency of your opinion recognizing the importance of the issue to be decided.

A testifying expert must bring to the courtroom his or her entire file supporting the appraisal opinion. In most jurisdictions, because the underlying facts or basis of an expert opinion is subject to impeachment on cross examination, an appraisal opinion may be stricken if the file is left behind at the office and not available to the opposing counsel at trial.

□ **#5: Know Your Predicate**

Trial is an adversarial process. The fire that an appraiser walks through in cross examination is ten times the temperature of any review process that an appraiser may go through in a context apart from litigation. The questions asked on cross examination are intended to leave an impression with lay jurors. It is more than sufficient in most appraisal assignments to either make reasonable assumptions or to rely on the opinions of others without knowing the rationale behind their

conclusions.

Know the names and credentials of the other experts you rely on for your predicate. Understand their opinions and be able to explain the foundational basis or assumptions as a sidewalk engineer, land planner, hydrologist or the like. Know when to say when – do not make the mistake of stepping across the line of your expertise, but do not evade questions by simply referring in your testimony to ask the next guy who takes the witness stand.

It is the appraiser who is supposed to consider the importance of all the evidence that preceded his or her testimony in a jury trial. After all, the appraiser puts the number on it. If the appraiser does not consider an essential element that may be important to the lawyer trying the case, it may not appear all that important to the jurors making the ultimate determination of value. Make certain that there is an understanding between appraiser and lawyer as to the essential elements of the case so that you as the appraiser can validate the importance of each element as it relates to value.

□ **#6: Know the Law**

The determination of just and full compensation is a mixed question of law and fact. To the greatest extent possible, there needs to be a seamless transition from the arguments of the lawyer trying the case to the testimony of the appraiser providing an opinion of value. Both the lawyer and appraiser benefit from appreciating and understanding each other's discipline. Great results at trial are most typically the result of a brilliant lawyer and appraiser alike.

Whether or not the appraisal opinion addresses a jurisdictional exception, the appraiser is better prepared for cross examination if able to explain the legal issues that define a case and demonstrate how same issues were considered throughout an appraisal assignment, including the ultimate conclusion of value.

Study applicable jury instructions before taking the stand for cross examination. The lawyers in the case are seeking to shape and mold testimony in light of the jury instructions. If you want to know where the lawyer is going with his or her questions on cross examination, jury instructions usually signal what is ahead.

In a jurisdiction such as Florida, recent trials have demanded a higher level of proficiency than in the past in understanding legal issues on the part of the testifying appraiser. A short list of legal issues that should be familiar to the appraiser and that should shape both appraisal methodology and ultimate conclusion of value, are as follows:

- ! Just or Full Compensation
(Relationship to Market Value)
- ! General or Special Benefits of

! Anticipation of the Project or

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! Threat of Condemnation

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appraisal methodology addresses the competing arguments of opposing lawyers. The appraisal report should be precisely formatted to address the legal instruction or legal assumptions that serve as a predicate for the valuation, and should be precisely formatted to reserve opinion should an adverse ruling follow the preparation of the appraisal opinion.

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Overall, the appraiser should be able to explain how the law is intended to result in a full and fair measure of compensation that is consistent with market principles and would otherwise be the price agreed between a willing buyer and willing seller apart from an involuntary taking. If the appraiser cannot explain the application of the law to the facts and circumstances of the appraisal assignment, the appraiser should not bother testifying at trial to a lay jury.

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□ **7: Prior Statements**

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The appraiser who understands the rules of evidence in the jurisdiction of the appraisal opinion better than the opposing lawyer is in control of the use of prior statement made in a deposition or appraisal report during the course of any cross examination. Every jurisdiction has its rules of evidence concerning the manner in which a prior statement can be used to impeach a witness and be published to the jury. The specific procedures in the courtroom may be heavily influenced by the particular trial judge. Because the use of prior statements is often what contributes to the anxiety of the testifying appraiser at trial, a command of knowing what steps must be undertaken by the lawyer before impeachment or publication of a prior statement is essential.

! Damages resulting from the Taking of Property not put to an Existing Use (Expansion Area)

! Damages resulting from Aesthetic Loss or Market Fear

! Damages, not resulting from the use of the property taken, but Integral and Inseparable Aspects of the Project (Exception to "General Rule" of Damages)

The competent appraiser should know the prevailing case law on point and should contemplate carefully how his or her

In most instances, a prior statement cannot be admitted into evidence or published to the jury unless the lawyer first provides in his or her questioning an opportunity for the testifying appraiser to recollect the prior occasion of his or her making a statement, whether on deposition or in an appraisal report, and then determine if the witness admits or denies that the statement was, in fact, made. If a witness distinctly admits to the prior statement, it is highly probable that the trial judge will not allow the statement to be admitted into evidence or published to the jury. If a witness denies making the statement, or does not distinctly admit to the statement taking away the dispute as to its interpretation, the statement may be admitted into evidence and published to the jury. However, prior to admitting the statement into evidence, a witness must be afforded the opportunity to fully explain the inconsistency in the prior statement, or difference with the present testimony, and bring the two statements into context.

The appraiser should thoroughly review prior depositions or reports in preparation for cross examination so that the appraiser's recollection is already refreshed as to context before taking the stand. Much of the impact of any apparent inconsistency can be diffused if addressed in direct examination.

With the recent improvement to the process of matching video to text (known as VTS (Video-to-Text Synchronization)), the appraiser's comfort with procedures that will be used during cross examination with regard to prior statements is all the more critical to preparation for trial.

□ **#8: Answer with Examples**

Seeing is believing. There is no more effective debunking of a poignant question on cross examination than answering the attempted impeachment with an example. Do not assume the jurors remember what may have been said on direct examination. Turn the momentum of the question against the opposing counsel and highlight the market data that is the foundation for your opinion.

Use your exhibits; again, you are in control. If explaining your answer is best accomplished by referring to an exhibit introduced during direct examination, or an exhibit that was not introduced on direct examination but that was prepared specifically in anticipation of a question on cross examination, step down from the stand and fully explain your answer utilizing the exhibit demonstrably. If the trial court limits your explanation and indicates that the court's preference is to take the matter up on redirect examination, do not forget to go back and respond, particularly if the jurors are expecting an answer.

Sometimes it takes faith. Faith, after all, is believing what one cannot see or know for certain from the facts and circumstances of life. However, willing buyers and willing sellers often make decisions and incur calculated risks based upon what neither buyer nor seller can demonstrate by example. If the facts and circumstances of a case present a market in transition, reflecting forces that affect supply and demand of real estate different than the past, the importance of examples to prove the predicate of the appraiser's judgment on the matter is of primary significance. Market phenomena, other than sales transactions, should be carefully identified in testimony if serving as the

basis of the appraiser's demonstrating a trend. Everyday the market deals with uncertainty. The lack of a comparable sale should not excuse the recognition of a trend in use or value that is reasonably concluded from other reliable indicia typically considered by willing buyers and willing sellers in the marketplace.

If your appraisal opinion is based on more than assumption, let the jury know in concrete terms what market examples serve as the foundation for any appraisal judgment exercised. The jurors need to be persuaded that such judgment is trustworthy.

□ **#9: Do Not Shoot from the Hip**

The lawyer asking the questions knows where he or she is going, more so than you as a testifying appraiser on cross examination. If analogizing to a sporting contest, remember the turf is wet while you are playing defense. Only when clearly recognizing the tactic or direction of an opposing counsel should the appraiser attempt to jump the pattern. The more experienced the lawyer, the more cautious the appraiser. The more experienced the appraiser, the more cautious the lawyer. However, the adage is true: "On Any Given Sunday"

With this caution in mind, the testifying appraiser should give ample preparation to those aspects of his or her opinion that are best saved for cross examination in anticipated response to a question that both the lawyer trying the case and appraiser believe will be posed by opposing counsel. This requires coordination with the lawyer trying the case and should not be done unilaterally by the appraiser at trial. Once the appraiser takes the witness stand, the opportunity for coordination with the lawyer is over so, again, emphasis is put on preparation in advance of trial. Also, because the introduction of testimony or evidence that one desires to put before the jury depends upon whether the matter is brought up by a question by opposing lawyer, both the lawyer trying the case and the testifying appraiser need to consider the calculated risk of passing on direct examination and holding back testimony or evidence until

cross examination.

One must be extremely careful of doors that were intentionally left shut on direct examination. The course of a trial can be altered completely in a single response to a well-crafted question by the opposing lawyer on cross examination. It only takes a toe-hold to open some doors that were intended to stay closed. Particular attention must be given to understanding any rulings on motions in limine that precede the appraiser's testimony at trial.

□ **#10: Stay on Theme**

During cross examination, the testifying appraiser should maintain the jury's focus on the theme, or themes, of the case centering around your appraisal opinion. Remember the storyline. Do not let the jurors lose recognition of the forest for an individual tree; remember you are there to win the war and not any one skirmish that occurs during cross examination.

When all is said and done, the appraiser should not leave the stand without providing the jurors with the reason why the appraisal opinion is that which provides the full measure of compensation to which the facts and law would entitle the owner to receive. It is the real estate appraiser that provides this valuable service to assist the jury in its balancing the exercise of sovereign power for the good of the public with the individual civil liberties of the owner who is deprived of private ownership.

Conclusion

In conclusion, the appraiser who looks forward to the challenge of defending his or her opinion on cross examination is always better served than the appraiser who becomes paralyzed by anxiety. Respect, or constructive fear, is a prudent motivator.

The greatest comfort, and purest intention, is to be illuminated by the cause of your client, whether a condemnor or condemnee. Remember, justice is a splendid and worthwhile virtue. It goes hand in hand with truth. Without conceit, or the thought that your opinion is the only perspective that has validity in the facts and circumstances of a case, be bold in your approach to cross examination. It is with this conviction that an appraiser can be the best advocate for his or her opinion and assist the jury in determining just and full compensation.

About the Speaker . . .

Andrew is a third generation trial lawyer. Born in Miami, Florida, he graduated from Wheaton College (B.A. English Literature, 1988) and University of Florida College of Law (J.D., 1991).

Early on, Andrew had familiarity with his firm's practice of law devoted to protecting property rights and representing owners in eminent domain proceedings, working summers in both high school and college. Today, he has been in law practice for 14 years. He is best known for his work throughout Florida representing owners in jury trial proceedings. He has completed jury trials in Duval, St. Johns, Escambia,

Walton, Leon, Alachua, Lake, Hillsborough, Pasco, Dade, Broward, and Martin Counties. In addition, he has resolved over a hundred cases in mediation settlements without the necessity of proceeding to trial. His energetic style of practice reflects his view that it is a privilege to protect the civil right of private ownership and that the practice of law is a high professional calling.

In 2004 and 2005, Andrew was chosen by his peers as one of the "*Legal Elite*" in the State of Florida in the field of eminent domain, as recognized in Florida Trend magazine.

Florida Evidence Code
Chapter 90, Florida Statutes (2003)

90.608 Who may impeach.--Any party, including the party calling the witness, may attack the credibility of a witness by:

- (1) Introducing statements of the witness which are inconsistent with the witness's present testimony.
- (2) Showing that the witness is biased.
- (3) Attacking the character of the witness in accordance with the provisions of s. 90.609 or s. 90.610.
- (4) Showing a defect of capacity, ability, or opportunity in the witness to observe, remember, or recount the matters about which the witness testified.
- (5) Proof by other witnesses that material facts are not as testified to by the witness being impeached.

90.612 Mode and order of interrogation and presentation.--

(1) The judge shall exercise reasonable control over the mode and order of the interrogation of witnesses and the presentation of evidence, so as to:

- (a) Facilitate, through effective interrogation and presentation, the discovery of the truth.
- (b) Avoid needless consumption of time.
- (c) Protect witnesses from harassment or undue embarrassment.

(2) Cross-examination of a witness is limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in its discretion, permit inquiry into additional matters.

(3) Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness's testimony. Ordinarily, leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

The judge shall take special care to protect a witness under age 14 from questions that are in a form that cannot reasonably be

understood by a person of the age and understanding of the witness, and shall take special care to restrict the unnecessary repetition of questions.

90.613 Refreshing the memory of a witness.--When a witness uses a writing or other item to refresh memory while testifying, an adverse party is entitled to have such writing or other item produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce it, or, in the case of a writing, to introduce those portions which relate to the testimony of the witness, in evidence. If it is claimed that the writing contains matters not related to the subject matter of the testimony, the judge shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objection shall be preserved and made available to the appellate court in the event of an appeal. If a writing or other item is not produced or delivered pursuant to order under this section, the testimony of the witness concerning those matters shall be stricken.

90.614 Prior statements of witnesses.--

(1) When a witness is examined concerning the witness's prior written statement or concerning an oral statement that has been reduced to writing, the court, on motion of the adverse party, shall order the statement to be shown to the witness or its contents disclosed to him or her.

(2) Extrinsic evidence of a prior inconsistent statement by a witness is inadmissible unless the witness is first afforded an opportunity to explain or deny the prior statement and the opposing party is afforded an opportunity to interrogate the witness on it, or the interests of justice otherwise require. If a witness denies making or does not distinctly admit making the prior inconsistent statement, extrinsic evidence of such statement is admissible. This subsection is not applicable to admissions of a party-opponent as defined in s. 90.803(18).

90.702 Testimony by experts.--If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion; however, the opinion is admissible only if it can be applied to evidence at trial.

90.703 Opinion on ultimate issue.--Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it includes an ultimate issue to be decided by the trier of fact.

90.704 Basis of opinion testimony by experts.--The facts or data upon which an expert bases an opinion or inference may be those perceived by, or made known to, the expert at or before the trial. If the facts or data are of a type reasonably relied upon by experts in the subject to support the opinion expressed, the facts or data need not be admissible in evidence.

90.705 Disclosure of facts or data underlying expert opinion.--

(1) Unless otherwise required by the court, an expert may testify in terms of opinion or inferences and give reasons without prior disclosure of the underlying facts or data. On cross-examination the expert shall be required to specify the facts or data.

(2) Prior to the witness giving the opinion, a party against whom the opinion or inference is offered may conduct a voir dire examination of the witness directed to the underlying facts or data for the witness's opinion. If the party establishes prima facie evidence that the expert does not have a sufficient basis for the opinion, the opinions and inferences of the expert are inadmissible unless the party offering the testimony establishes the underlying facts or data.

90.706 Authoritativeness of literature for use in cross-examination.--Statements of facts or opinions on a subject of science, art, or specialized knowledge contained in a published treatise, periodical, book, dissertation, pamphlet, or other writing may be used in cross-examination of an expert witness if the expert witness recognizes the author or the treatise, periodical, book, dissertation, pamphlet, or other writing to be authoritative, or, notwithstanding nonrecognition by the expert witness, if the trial court finds the author or the treatise, periodical, book, dissertation, pamphlet, or other writing to be authoritative and relevant to the subject matter.