Preparation of Appraisal Testimony

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• Experience in Alabama bears out the suggestion made earlier in this workshop that the chief issue in most eminent domain cases is valuation. The key to successful trial of condemnation actions is good preparation of appraisal testimony.

Of course, appraisal testimony does not stand on its own feet; a factual foundation must be provided for the jury to evaluate the evidence of value, and frequently this foundation requires the presentation of extensive and complex engineering data. It is our practice to open cases of condemnation by calling to the witness stand a State highway department engineer who explains in simple language the extent and character of the land being taken, the highway department's proposed plans and intentions regarding construction, and the location of this project with respect to the remainder, if any, of the landowner's tract. We have the engineers testify as to the topography of the land in question even though the jury later views the property; we want this factual foundation in the trial record.

This testimony of the engineers is relatively easy to prepare and present. The engineer witness is a qualified professional expert, experienced in dealing with scientific data and ideas. Once he starts his systematic description of the property in question, the sequence of the evidence, and the introduction of exhibits, if any, requires a minimum of supervision and guidance by counsel. Often, counsel's chief problem will be to emphasize by his questions the important features of maps, exhibits, or testimonal data so that the engineer's testimony will leave a series of simple, hard-hitting facts and explanations with the jury. This is the foundation for the appraisal testimony that follows.

Appraisal witnesses are a different breed than engineer witnesses. Both are qualified professional experts, but the appraisers do not deal with the explicit factual detail that the engineer does. Appraisals are essentially matters of opinion, and as such their validity and credibility depend on the correctness of the appraiser's underlying data and the accuracy of his analysis. The primary job of counsel is to be sure that when an appraisal witness goes into court his testimony will pass the test of credibility.

The first step in the preparation of appraisal testimony involves preparation of the attorney who will examine the witness. He cannot examine an expert witness before the jury unless he has some idea of what that expert is talking about, what research he has done, and how his conclusions should be evaluated. The first step for the lawyer, therefore, is to acquire as thorough an understanding as possible of the appraiser's report, including a familiarity with the comparables that the appraiser cites.

Once the trail attorney is familiar with the report, he should see how well the appraiser is prepared to present it. Here numerous details must be checked. Is the description of the property accurate? Is the testimony based on the latest plan of the highway department or some preliminary engineering plan? Are the data regarding improvements on the property completely up to date? If more than one appraisal and variations exist, how can they be explained?

When testimony relating to the property being condemned has been

checked, he should turn to the testimony regarding comparable sales. Practice in Alabama is to have the appraiser and trial counsel inspect these properties together whenever possible. We also have them work together to prepare a property ownership map and a map of comparables.

We prepare appraisal testimony as if we had the burden of proof at every step of the way. We say to the appraiser, "This is your opinion; if you cannot prove to the jury that it is a good sound opinion, you had better go back and do some more work." So the appraiser tells us of each comparable, where it is, what its condition is, and what allowances he has made in comparing it to the property being taken.

After returning from inspection of these properties, we have a conference to go over the basis of the appraisal. Has he included any personal property in his appraisal of the land? Has he eliminated any items of real property on the assumption they were personalty? Alabama law on valuation is simple and direct; we use straight before-and-after value. We can offset enhancement against the whole taking so that awards of no damages are possible, and occasionally are achieved. Thus we need to know the elements of value on which an appraisal is based.

In some instances, of course, counsel cannot put his finger on factual support for everything his appraisal witness says. This occurs most often in connection with severance damages. In these cases the opinion must be made persuasive by reference to the method that is used. So we go over the appraiser's method with him; we have him explain it to us as he will explain it to the jury; we strive to make it as understandable as possible in all of its steps.

These, briefly, are the major phases of the practice in preparing valuation testimony for right-of-way condemnations. In some respects the over-all problem is simpler than in other States because Alabama's eminent domain law is not very complex, and the administrative law and procedure are not as extensive as in some of the larger, more urbanized States. But certain problems exist wherever eminent domain is involved, which, accordingly, condemnors everywhere encounter.

One of these is the problem that arises when two competent appraisers have been used and one turns out to be much higher than the other. The condemnee knows the condemnor has had two appraisals because he has seen both visit the property. He probably has talked to both and may even have an impression of their opinions. At this point trial counsel must make an important decision. Should he put both appraisers on the witness stand, and risk the danger that the jury will take the high figure or compromise the difference between the two? Or should he leave the high appraisal out of the testimony and risk the danger that counsel for the condemnee will somehow pry this information out on cross-examination in an embarrassing light? We have concluded in Alabama that generally the best course is to leave out appraisal testimony that we think is unrealistic, and present only what is in our judgment a reasonable and fair valuation.

A second recurring problem is that of how much appraisal testimony to introduce at the Commissioners' preliminary hearing. When we know we are going to court later, we like to offer as little as possible in order to give the least advance notice to the other side regarding the details of our case.

Third, there is the problem of supplemental appraisals. These are sometimes called for because of changes in the condition of the property or highway plans. Sometimes, however, they are dictated by the desire to have a different witness carry the weight of proof in a condemnation case. Some appraisers are qualified but will not make good witnesses; some who will be good witnesses may not be qualified to testify unless they make an appraisal. Possibly, also, the original appraiser has made some remarks to the property owner which

would be improper in the record of his testimony. An illustration of why we are sensitive to this matter occurred recently in a condemnation involving a junk yard. We relied on an appraiser whom we had hired to visit and appraise this land. The case was a long one, but for all practical purposes ended abruptly for the condemnor when counsel for the landowner called this appraiser to the stand for cross-examination and said, "Now, Mr. X, is it not true that you told the property owner on such and such a date that the State's offer was ridiculous?" Ever since that case I have personally gone over the testimony of the appraiser who is going to appear for the State with him, and ascertained exactly what was said during his visit to the property in question, what elements he has considered, and any other incidental facts, many of which I am sure seemed trivial to him at the time. Sometimes, however, this type of advance investigation will lead counsel to the conclusion that he must order a supplemental appraisal.

I think all condemnors must also encounter situations in which they find that their appraisals are just too unrealistic to be used. When these appraisals come in and are considered in the preparation for trial, counsel may be convinced that his appraisers are too far out of line to be credible. He may reach this conclusion by talking to other property owners in the area, or to people who deal in real estate. Whatever his sources, trial counsel may become convinced that it is futile to try to use these professional experts on the witness stand. Such cases may arise in rural areas where outsiders are customarily distrusted, or in other areas where land speculation is occurring and where sales and sales attitudes are inflated because of high-pressure advertising. Where such situations occur we prefer to leave the professional appraisers alone and hire local real estate people who have bought and sold land in the area over a long period. We think they are generally reliable in their sense of what the true value of the local land is. Our experience with these people has been very good. There is another advantage using local people, and this is their credibility. Particularly in rural areas the mail carrier, the probate commissioner, a real estate man, or a farmer well known in his neighborhood may be more persuasive than an outside appraiser. This cannot be ignored in the preparation of the case.

These are some of the problems that arise in the preparation of appraisal testimony. Some of them can be solved simply by greater diligence of trial counsel and his appraisal witnesses in the preparation of their case. Others may have to wait on the development of new fact-finding techniques in the valuation process. For the present, however, we may conclude that all of them deserve attention whenever right-of-way is to be acquired through condemnation proceedings.