

ALI-ABA Course of Study
Condemnation 101: Fundamentals of Condemnation Law and Land Valuation

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**Valuation Methodology Practice: Working with Valuation Witnesses
(Engineers, Land Planners, Accountants, and Real Estate Appraisers)**

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Expert Witnesses:

Selection of and Working with Appraisers and Other Experts

I. Analyze your Case

Before consulting with experts, review the facts and the law in order to perform a preliminary analysis of your case.

- A. **Review condemnation documents.** You should review the condemnation documents and other available information concerning details regarding the project, the taking, and the agency's offer.
- B. **Review the neighborhood and the subject property.** You should become familiar with the neighborhood and the subject property. You will want to ascertain how the property is being used and what might be its highest and best use. You want to inspect the taking and you should request the agency "stake" the project line if it is a partial taking. If a partial taking, you should analyze potential damage and enhancement to the remainder. You should obtain historical and current ground and aerial photographs to help analyze the property.
- C. **Meet with the owner.** You should discuss with the owner his knowledge of the property and any discussions he might have had with the agency, including the identity of their appraiser. You should discuss how the property has been used and what might be its highest and best use. You should review and assemble valuation data germane to the Sales, Cost and Income approaches. For the Sales approach, you will want to investigate sales of the subject and sales of comparable properties. For the Cost approach, you will want to investigate new construction cost data. For the Income approach, you will want to analyze gross rents, operating expenses and net rent of the subject together with this same data for comparable properties.
- D. **Ascertain the type of case.** If it is a total taking, you will want to focus on the highest and best use and valuation of the entire property. If it is a partial taking, you will want to focus on these same issues and the issues of damage or enhancement to the remaining land and improvements.
- E. **Preliminary theme.** After having studied the facts and reviewed applicable law, you are then prepared to "quarterback" the case and to select your "ball carriers."

II. Expert Selection Considerations

- A. **Select the minimum number of experts necessary to accomplish your objectives.** Experts are expensive and your time working with them is costly. The more experts you involve the more likely inconsistencies will be developed among them. Frequently, each one of your witnesses will hurt you in some way on the stand, so minimize them.
- B. **Case theme dictates experts.** The nature of your case will dictate which experts you need. Issues such as valuation, highest and best use, construction costs, building plans, zoning issues, permit issues, and site layouts will determine whether you need one or more appraisers, land use planners, engineers, construction estimators, architects, zoning professionals, etc.
- C. **Expert Considerations.** A number of considerations should be analyzed when selecting an expert(s). I will discuss these in the context of selecting an appraisal expert, but the same analysis should apply to other experts.
1. **Reputation/Known quantity.** You should "investigate" a prospective appraiser based on your own experience or the experience of others in whom you have confidence.
 2. **Age.** I like appraisers around 50 years of age, as they are not too young or too old.
 3. **Experience.** You want an appraiser who is well known, respected and does good work. Select an appraiser who has done non-condemnation appraisals of the kinds of property similar to the subject, especially if the subject is a "special use" property. The appraiser should have condemnation experience that includes familiarity with the law, involvement in prior cases, and a comfort level with the adversarial system, having worked with and against lawyers. I like appraisers whose work consists partly of condemnation appraising but, largely, non-condemnation appraising, as they appear to be less of a "hired gun." I like an appraiser who has worked for agencies and owners. The appraiser should have experience in working with other experts and should know when predicate information is necessary for his opinion.
 4. **Qualifications.** The appraiser should be licensed and/or certified by the appropriate bodies for the appraisal of the type of property at issue and qualified by the appropriate tribunals. Memberships in appraisal organizations such as The Institute are desirable. It is desirable that the

appraiser be from your state, your locale, and have previously performed non-condemnation appraisals in your neighborhood. It is helpful if the appraiser has performed non-condemnation appraisals on "big projects" in your locale. Notable authorships, teaching experience and awards are desirable.

5. **Concerns.** Appraisers who have testified in many cases and who have numerous reports in circulation can be undesirable. Carefully question and investigate the appraiser for any disciplinary problems he has had at any time in any capacity. You must be sure that the appraiser is willing to "go to the mat" in your case. Appraisers often work for agencies and owners and are sometimes tempered by their working relationship with agencies or their desire to work for agencies.
- D. **Advocate of opinion.** The attorney is the advocate for the client and the appraiser is the advocate of his opinion. His appearance should be professional. He should be a teacher and communicator, not a reader. He should be polite with a pleasing personality but firm. He should be very good at eye contact.
 - E. **Fee arrangement.** A clear and detailed fee arrangement should be documented covering all potential services, pre-report, report, and post-report. The attorney should select the appraiser with the input of the client. Either the attorney or the client may engage the appraiser, but it must be made clear that the client, and only the client, is responsible for the payment of the fees of the expert. However, it is important to your credibility that you ensure that the appraiser is paid so that appraisers will work with you again. The fee arrangement cannot be contingent. As the client must clearly understand the fee arrangement, up-front estimates are recommended.

III. Attorney/Expert Working Relationship

- A. **The "quarterback" and "ball-carrier" should be compatible.** You want a knowledgeable and experienced appraiser who is open to your ideas and who will be amenable to your attempt to influence his opinion upward. The appraiser should be enthusiastic, willing to work, and available to you. The appraisers you prefer should be willing to "work with you" on their fees in cases with unsatisfactory results.
- B. **Attorney provides documents.** The attorney should provide the appraiser with the condemnation documents, having double checked the agency's data, plus all available property value-related documents.

IV. Preparation of Report(s)

- A. ***You must be involved.*** Do not simply give the assignment to the appraiser and receive his final product. Instead, visit the property with the potential appraiser and review your theme and range of values with him. If he realizes you are knowledgeable in law and the facts, he will feel more comfortable embracing the high end of the valuation range. Also, if you explain a jury's tendency to average, this will help in raising his opinion. If the potential appraiser is unwilling to embrace your theme and/or range of value, carefully listen to his explanation. You might be wrong, which could result in your attempting to "overreach" in the case. If the adjudicator of value believes you are overreaching, they will frequently severely penalize you. The client will usually attempt to overreach and you must control this tendency. If, on the other hand, you find an appraiser who is willing to embrace your theme and range of value, then you should "ice" the previous potential appraiser.
- B. ***Valuation data.*** Once a testifying appraiser is selected, you should inform him of valuation data as a cost savings shortcut, but he must independently verify such data. You should also review the data he has obtained.
- C. ***Oral review.*** Before a report is first drafted, you should conduct an oral review of the report, the estimated opinion and the basis of the opinion, so that there are no surprises.
- D. ***Review draft report.*** You should then review a draft of the report, and double-check the math!
- E. ***Report communications.*** All communications regarding the report should be through you and not directly to the client or other experts. The appraiser may, of course, gather data directly.
- F. ***Final report.*** The final report should be accurate and comprehensive as it will likely control the parameters of the experts' testimony. It is harmful to subsequently change a final report and hard to "back-fill" with additional bases for opinion after the appraiser opinion has been reached. The form of the report should comport with eminent domain law. Decide whether you want a Limited Restricted Report or a Complete Self-Contained Report. Review the Assumptions and Limiting Conditions portion of report.
- G. ***Alternative approaches.*** The appraiser may consider different approaches to the valuation of the same property depending on subsequent rulings by the court on such issues as second takings, acceptable appraisal methodology, etc.

- H. **Client "On Board."** The client must be a part of the team throughout the process. You, the client, and the appraiser need to be on the same page. There should be no surprises. Clients are often unrealistic; to control this tendency, suggest the client bring you data that supports the client's view.

V. Legal Issues

The attorney must work with the appraiser in communicating what is compensable, what are acceptable methods of appraisal, and other relevant portions of the eminent domain laws. While the laws of jurisdictions vary, below are possible legal issues:

- A. **Fair Market Value.** Be sure that the definition of fair market value, which the appraiser uses, is the definition used by your eminent domain laws.
- B. **Date of Value.** Make sure the appraiser has formed his opinion as of the date of value prescribed by your laws.
- C. **Project influence.** Frequently eminent domain laws provide that the valuation of the subject property before the taking should not include any influence up or down brought on by the announcement of the project.
- D. **Highest and best use.** Eminent domain laws provide that the subject property should be valued at its highest and best use even though it is not so used as of the date of valuation.
- E. **Second takings.** In the case of a second taking of a portion or the remainder of the subject property, you must determine whether or not the property in this taking should be valued as influenced, or uninfluenced, by the project which caused the first taking.
- F. **Parent tract.** In determining the "before" property, you must determine what the law specifies regarding the "before" tract. It may be more or less than the agency uses and it may require inclusion of non-contiguous parcels which are an integral part of the operation of which the subject tract is a part.
- G. **Lots vs. acreage.** You must determine the applicable law so that the appraiser can determine whether or not a tract with the potential of subdivision can be valued as lots or as raw acreage.

- H. ***Before and after.*** Usually the appraiser must value the entire property before the taking and then value the entire property remaining after the taking. Valuation of merely the property taken is often inadmissible.
- I. ***Probability of re-zoning.*** Your laws might provide that the subject property can be valued at a higher use even though not presently so zoned, if you can show there is a reasonable probability of it being zoned for the higher use as of the date of value.
- J. ***Uneconomic remnant.*** Some jurisdictions require the agency to condemn a remaining piece of property which is shown to be an uneconomic remnant according to your laws' definition.
- K. ***Legal or illegal non-conforming use.*** Your laws may deal with the method of valuing legal or illegal non-conforming uses.
- L. ***Project renders remainder non-conforming.*** Your laws may deal with the valuation of the remainder in a partial taking if the taking renders the remaining parcel non-conforming.
- M. ***Equipment and fixtures.*** Your laws may determine what is equipment and what are fixtures and the compensability of same.
- N. ***Realty and personalty.*** Your laws may determine what is realty and what is personalty and the compensability of same.
- O. ***Approaches to value.***
1. ***Sales comparison.*** Your laws may govern what constitutes a comparable sale dealing with such issues as terms, improvements, size, timing, location, use, and whether the sales were before or after the date of value.
 2. ***Cost.*** Your laws may govern new construction estimates and depreciation.
 3. ***Income.*** Your laws may dictate which income approaches are acceptable, such as the Direct Capitalization Method or the Discounted Cash Flow Analysis Method. Your laws probably do not allow the capitalization of the net profits of the business operation on the subject as a method of valuing the subject.

- P. **Undivided fee rule.** Your laws may dictate whether one sum of money must be awarded for the taking of a piece of property without regard to the various interests therein. In addition, your laws may govern how many parties of interest may testify as to their respective opinions of value in a piece of property.
- Q. **Apportionment.** Your laws may govern the valuation process in an apportionment proceeding.
- R. **Property rights.** Your laws may govern the nature of the property rights which each party of interest in the subject property has and what rights the agency can acquire.
- S. **Non-compensable.** Your laws may state which types of damages are non-compensable in an eminent domain proceeding such as personal concerns, lost business profits, inconvenience during project construction and relocation expenses.
- T. **Approaches which may not serve as basis of opinion of value.**
1. **Tax assessed value.** Your laws may state what may not serve as a basis of the appraiser's opinion of value, such as the value of the property for tax assessment purposes.
 2. **Offers, options, mortgage amount, listings.** Your laws may state that the amounts at which the subject property is offered, optioned, mortgaged, or listed for sale, cannot serve as the basis of an appraiser's opinion of value.
 3. **Other property acquired by an agency with the power of eminent domain.** Your laws may not allow comparable sales transactions involving an agency with the power of eminent domain.
- U. **Daubert/Kumho.** You should be familiar with the *Daubert* opinion as extended by *Kumho* in Federal and to the extent adopted by State courts concerning the judge's gatekeeper function insofar as whether or not the judge will allow your expert to express his opinion to the trier of fact.

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the Supreme Court explained that the trial court is obliged, under F.R.E. 702, to serve as a "gatekeeper" to "insure that any and all scientific testimony or evidence admitted is not only relevant but reliable." *Id.* at 589. The Court derived the gatekeeping responsibility from Rule 702's language requiring an expert opinion

to be founded upon “knowledge.” *Id.* at 590. Under Rule 702, the Court held, an expert’s opinion must “have a reliable basis in the knowledge and experience of his discipline.” *Id.* at 592. The Court identified four non-exclusive factors to guide the trial court’s determination of the admissibility of an expert’s opinion. These factors are: testing, peer review and publication, risk of error and general acceptance within a relevant scientific community. *Id.* at 593.

In *Kuhmo Tire Co. v. Carmichael*, 527 U.S. 137, 119 S. Ct. 1167 (1999), the Court concluded that *Daubert*’s factors may apply to all expert testimony based on scientific, technical or other specialized principles. *Id.* at 1171. The Court elaborated that “a trial court should consider the specific factors identified in *Daubert* where they are *reasonable measures* of reliability of expert testimony.” *Id.* at 1176 (emphasis added). Although the *Daubert* factors will often be appropriate for determining the reliability of the challenged expert, *Kuhmo* confirms the “considerable leeway” the trial court enjoys “in deciding in a particular case how to go about determining whether particular expert testimony is reliable.” *Id.* Where the factual basis, data, principles, methods, or their application by an expert in his testimony are called into question, the trial judge must determine whether the testimony has a reliable basis in the knowledge and experience of the relevant discipline. *Id.* at 1774.

The following state court condemnation cases have considered *Kuhmo* where one party has challenged the admissibility of the other’s expert opinion: *Exxon Pipeline Co. v. Zwahr*, 2002 WL 1027003 (Tex. 2002); *City of Harlingen v. Sharboneau*, 48 S.W.3d 177 (Tex. 2001); *Exxon Pipeline Co. v. Hill*, 788 So. 2d 1154 (La. 2001) *Rogers v. Horseshoe Entertainment*, 766 So. 2d 595 (La. App. 2 Cir. 2000); *West Virginia Division of Highways v. Butler*, 516 S.E. 2d 769 (W. Va. 1999).

- V. **Hearsay.** Your laws may govern the appraiser’s reliance on hearsay in forming his opinion and his ability to testify to the hearsay in the appraisal hearing.
- W. **Appraisal methodology.** Your laws may govern acceptable and unacceptable appraisal methodology.

VI. Coordination of Experts

- A. **Multiple Appraisers.** If you determine that more than one appraiser is necessary, I recommend you keep them unaware of the other’s involvement until their reports are finalized. Any cross-fertilization of “considerations” should be done orally by you. This is to defend against the allegation of appraiser collusion.

- B. **Predicate witness.** An appraiser relying on a predicate witness should be familiar with that witness and his opinion and should make sure that the predicate witness's information and opinion are accurate.

VII. Discovery

- A. **Preparation.** In preparation for discovery, the attorney and appraiser must revisit the subject property along with the themes of the case and all details of the valuation report. You should engage in mock cross-examination.
- B. **Strategy.** You and the client should decide prior to deposition whether this is a case that will likely be tried or settled. If it is a case to be tried, the expert may be less forthcoming. If it is a case to be settled, the expert may be more forthcoming and attempt "to win the case" in the deposition.

VIII. Trial

- A. **Direct examination.** You want to give an impression of thorough preparation rather than a "canned" delivery. The appraiser should talk to the jury or person who will make the valuation decision. The attorney's location should facilitate the appraiser's communication with the factfinder. I want to re-emphasize that the appraiser should make eye contact with and talk to the valuation decision maker and not read his report. You and the appraiser should again revisit the property and thoroughly re-examine the theme of the case, the appraiser's opinion and the bases thereof. To avoid a dull monotonic examination, change your voice inflection and throw in some cross-examination style questions. I suggest addressing problems with the appraiser's opinion or underlying data on direct examination rather than having the jury hear them for the first time during cross-examination.
- B. **Cross examination.** The appraiser should be an advocate of his opinion. He should be courteous and professional but firm. He should not be pushed around but, likewise, he should not be combative or "lose his cool."
- C. **Cross examination assistance.** Your expert should review their experts' discovery responses and report(s) and assist you in preparation for the cross-examination of their expert. A formal critical review of the other expert's report(s) is unnecessary.