"Pitfalls and Tactics for an Owner in Federal Condemnation"[1]

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I. Introduction

Lawyers who have never – or have not recently – tried a condemnation case in federal court must pay careful attention to substantive and procedural differences between federal and state condemnation trial practice, such as those created by the amendments to the federal rules governing pre-trial disclosure. The purposes of this article are to discuss some of these differences, to identify the potential pitfalls created by those differences, and to suggest ways of avoiding those pitfalls.

This article may be helpful to attorneys representing the Government and owners alike. As its title suggests, however, it is directed primarily to attorneys representing owners simply because the Government's lawyers are typically familiar with the intricacies of federal practice and many owner's lawyers, by virtue of their primarily state law practices, are not. The objective of this article is to help owners' lawyers avoid the pitfalls which might await them in federal court.

Condemnation trials in federal court differ from condemnation trials in most state courts in several ways. Unlike the situation in most state proceedings, the parties in a federal condemnation case may not know, for months after the case is filed, whether the compensation case will be tried to a judge, jury, magistrate, or commission.[2] The court may not decide this issue until as late as the pretrial conference.

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[1]This article appeared in the ALI-ABA Course of Study materials from the Eminent Domain and Land Valuation Litigation Seminar presented in January, 2004.

[2]See, Fed. R. Civ. P. 71A(h).

The next difference which the practitioner may encounter is the limited access which the parties have to the federal judge prior to trial. In most federal courts, many motions are decided on memoranda of law, and not on oral argument, which is discretionary with the court.[3] Oftentimes, the court will appoint a magistrate to preside over hearings regarding discovery and other preliminary matters.[4] It is not unusual for the parties to appear before the judge for the first time at a pretrial conference, not very long before trial.

The issue of whether federal or state law applies is likely to arise in federal condemnation cases. The court may need to decide whether an issue is substantive or procedural, and, if substantive, whether it relates to a matter governed by state or federal law. In state condemnation proceedings, the law of the state generally applies, unless federal constitutional protections are broader than those afforded by the particular state constitution.

Federal jury trials differ slightly from jury trials in most state courts. In federal jury trials, the judge typically conducts voir dire, with the attorneys submitting proposed questions in advance of trial. The rule relating to the admissibility of the bases of expert opinion may be different in federal court, and federal courts are generally more likely than state courts to exclude methods of valuation other than the comparable sales approach.

By far, the two differences which present the most danger to the attorney unaccustomed to representing owners in federal court are the federal mandatory disclosure process and the disparity in experience in federal court between the owners' attorneys and the Government's attorneys. In federal cases, including condemnation cases, the parties are required to comply with mandatory disclosure requirements. These mandatory disclosures are separate and apart from ordinary discovery procedures. The federal courts demand strict compliance, and the sanctions for noncompliance are extremely severe.

Because of these mandatory disclosure requirements, and the strictness with which they may be enforced, it is essential that the practitioner prepare a much more thorough case far earlier than may be required in most state court proceedings.

Many federal condemnation cases also involve a disparity of experience between the owner's attorneys and the Government's attorneys. The Government's lawyers try all of their cases in federal court. They are intimately familiar with the federal rules. They not only know the rules backwards and forwards, but they appreciate the subtleties of the rules, and know how

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[3]See, e.g., S.D. Fla. L.R. 7.1B.

[4]See, The Magistrate Act, 28 U.S.C., Section 636(b)(1)(A); Fed. R. Civ. P. 72.

to use them to their client's advantage. Many owners' attorneys, on the other hand, practice more frequently in state court, where the rules of disclosure and evidence may be far less demanding and not nearly as strictly enforced.

Determining just compensation within the adversary system of justice requires a level playing field. At a minimum, lawyers representing property owners should be as familiar with the rules applied in federal court, as are the Government's attorneys. While this article is not intended to serve as a substitute for a thorough review of the rules and laws to be applied, it is intended to acquaint the practitioner with the potential pitfalls involved in representing an owner in a federal condemnation case. By recognizing and avoiding those pitfalls, the owner's lawyer can assure that just compensation is determined by a full and fair evaluation of all of the factors which affect the value the owner's property.

This article contains four parts. Parts I and II discuss the potential pitfalls facing the practitioner in federal court. Part I is devoted to mandatory disclosures and sanctions which may be applied for noncompliance. Part II discusses other potential pitfalls. Part III is this lawyer's idea of a checklist of "do's" and "don'ts" for preparing and presenting a condemnation case in federal court, and Part IV is an appendix which includes a chart summarizing the deadlines in Rule 26 and some sample orders and instructions used in federal condemnation trials.

Part I: Mandatory Disclosures

II. The Federal Mandatory Disclosure System

Disclosure and evidentiary rules are far stricter in federal court than they are in most state courts. Strict compliance is often required. It is thus essential that the attorney representing an owner in a federal condemnation case for the first time learn these rules and how to use them.

Understanding the full import of the federal rules at, or near trial, is too late. The condemnee's lawyer must carefully develop her case months before the case is ever set for trial, so that expert reports and other material may be exchanged far earlier than the dates required under most state court procedures. It is only through the full understanding and appreciation of these rules and their deadlines that the owner's attorney will be able to meet mandatory disclosure requirements with the completeness required in order to present a thorough case.

It is not sufficient for the lawyer to simply know what the rules say. She must understand that these rules will dictate the way that she prepares and presents the owner's case and the way she defends the owner against the Government's case.

It should also be noted that reliance on this article, alone, is not sufficient. It is essential that the practitioner read and understand both the Federal Rules of Civil Procedure and the Local

Rules of the Court in which her case is pending. It is then essential for the practitioner to read and understand disclosure and other requirements established by the Court's orders and determines how the various rules and orders interrelate in terms of scope and deadlines.

The most significant difference between federal and state condemnation cases is that, in federal cases, a party's right to present evidence at trial is typically limited to those matters which are expressly disclosed on or before required deadlines. In discussing how attorneys should regard these requirements, one federal trial judge wrote:

> ... (G)iven the severity of the automatic exclusion sanction of Rule 37 (c)(1), prudence dictates that counsel be as complete and thorough as possible in making and supplementing Rule 26(a)(2)(B) disclosures. *Accord 1st Source Bank*, 167 F.R.D. 61, 67 (N.D. Ind. 1996)(suggesting that until Rule 26(a)(2)(b) is modified to include a safe harbor provision or a meet and confer provision as a prerequisite to exclusion for an inadequate disclosure, "counsel would seem well advised to err on the side of overinclusiveness."). As a rule of thumb, if the failure to comply with the required disclosure involves a material aspect of the expert's testimony, and if the opposing party can show prejudice in connection with lack of disclosure, then the opinion of the expert should be excluded, in whole or in part, at trial.[5]

Because compliance with strict disclosure rules may determine the scope of evidence which the attorney will be able to present at trial, it is essential that, in preparing her case, the attorney "work backwards" from trial. The attorney must identify every fact, opinion, document, and exhibit which she believes is necessary to present at trial. The attorney must then make certain that those facts, opinions, documents, and exhibits are all disclosed on or before the required deadlines.

III. Required disclosures: Determining which rules apply

The disclosures which parties to a federal law suit are required to make, apart from responses to discovery requests, are referred to as "required disclosures." They may be imposed by court order, the Federal Rules of Civil Procedure, or the Local Rules of the Federal Court. In general, if a disclosure is not required by a court order or local rule, then it may be required by Rule 26 of the Federal Rules of Civil Procedure.

The scope of and deadline for various disclosures will be determined by either a court order, the Federal Rules of Civil Procedure, or the Local Rules of Court. A deadline for a particular disclosure may be one date under the Rules but another date under a particular court

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[5]Sullivan v. Glock, Inc., 175 F.R.D. 497, 503 (DC Md. 1997).

order. It is thus important for the practitioner to determine which rules or court orders apply to the case at hand.

The disclosure requirements contained within the federal rules, the local rules, and the court's order may differ in several respects. Of utmost importance would be differences with regard to scope, deadlines, and formalities of signatures, verifications, filing, and service.   It is not unusual for there to be some uncertainty as to which of the various disclosure rules apply. In the case of uncertainty, it is always wise to reach a stipulation among the parties or secure an order of clarification from the court or magistrate.

It may not be possible to determine which set of rules, or which combination of rules, apply until the Court enters an order. Until the appropriate order is entered, attorneys would be well advised to prepare their cases in a way that will allow them to meet the earliest disclosure deadlines with the fullest possible disclosures.

IV. Disclosure requirements under Rule 26

Rule 26 of the Federal Rules of Civil Procedure sets forth three different types of disclosures:

1. Initial Disclosures.[6]

2. Disclosures of Expert Testimony. [7]

3. Pretrial Disclosures.[8]

These disclosures are required to be made without regard to any discovery propounded by the opposing party.[9]

In general, Rule 26 defines the scope and sets the deadlines for the production of the various disclosures. A chart summarizing the deadlines imposed by Rule 26 is located within the Appendix. Rule 26 also provides that the scope and deadlines of certain disclosures may be varied by stipulation or court order.   An order setting trial date and discovery deadlines which

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[6] Fed. R. Civ.P. 26 (a)(1).

[7] Fed. R. Civ.P. 26 (a)(2).

[8]Fed. R. Civ.P. 26 (a)(3).

[9]Fed. R. Civ.P. 26(a)(1).

was entered in a recent federal condemnation case is located within the Appendix as an example. It thus important to determine, as early as possible, the scope of and deadlines for the various required disclosures.

V. Initial disclosure of discoverable information under Rule 26

The first type of disclosure required by rule 26 is the "Initial Disclosure." [10] The rules of civil procedure of many state courts do not include this type of disclosure, so it is important for the practitioner to acquaint himself with its specific requirements and be prepared to meet all appropriate deadlines.

Unless a stipulation or court order provides otherwise, an owner in a federal condemnation case must make an initial disclosure of certain specified information within 14 days after the Rule 26(f) conference.[11] The practical effect of this provision is that initial disclosures may be required as early as 83 days after a condemnee makes his appearance in the case.[12]

The matters required to be disclosed under the initial disclosure are the following:

1. The names, addresses, and telephone numbers of each individual likely to have discoverable information which the disclosing party may use to support its claims or defenses, unless solely for impeachment, identifying the subjects of the information.[13]

2. A copy of, or a description by category and location of, all documents, data compilations, and tangible things that are in the possession, custody, or control of

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[10]Fed. R. Civ. P. 26 (a)(1).

[11]Fed. R. Civ. P. 26 (a)(1)(E). The Rule 26(f) conference must be held no later than 21 days before a scheduling conference is held or a scheduling order is due under Fed. R. Civ. P. 16(b).

[12]Pursuant to Fed. R. Civ. P. 16 (b), a scheduling order shall issue within 90 days after the appearance of the defendant and within 120 days after the complaint is served on the defendant. Thus, the Rule 26 (f) conference may be required as early as 69 days after the appearance by the defendant or 99 days after the defendant is served with process. Consequently, initial disclosures may be required as early as 83 days after the appearance of defendant.

[13]Fed. R. Civ. P. 26 (a)(1)(A).

the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment[14].

[14]Fed. R. Civ. P. 26 (a)(1)(B).

3. A computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered.[15]

The initial disclosure is to be provided to the Government and all other parties in the case.

The parties must make their initial disclosures based on the information then reasonably available to them and are not excused from making their disclosures either because they are challenging the sufficiency of another party's disclosures or because another party has not made its disclosures.[16]

While the plain language of Fed. R. Civ. P. 26 (a)(1) could arguably be read as requiring the disclosure of anticipated expert testimony and materials relied upon by anticipated expert witnesses, the courts have held otherwise.[17]

VI. Disclosure of expert testimony under Rule 26

A. In general

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[15] Fed. R. Civ. P. 26 (a)(1)(C).

[16] Fed. R. Civ. P. 26 (a)(1)(E).

[17] United States v. Dentsply International, Inc., Civil Action No. 99-5 MMS, 2000 U.S. Dist. LEXIS 6994; 2000-1 Trade Cas. (CCH) P72,920 (U.S. District Court, Delaware); Nave v. Artex Manufacturing, Inc., Civil Action No. 96-2002-EEO, 1997 U.S. Dist. LEXIS 5335 (U.S. District Court, Kansas).

The parties to a federal condemnation case are also required by Rule 26 to disclose the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence.[18]

Unless a stipulation or court order provides otherwise, this expert testimony disclosure must be accompanied by a written report, signed by the expert. The written report, in turn, must contain:

- A statement of all opinions to be expressed.
- The basis or reasons for each opinion.
- The data or other information considered by the witness in forming his opinions.
- Any exhibits to be used as a summary of the opinions.
- Any exhibits to be used for support of the opinions.
- The qualifications of the expert witness.
- A list of all publications authored by the witness within the past ten years.
- The compensation to be paid for the study and testimony.
- A listing of any other cases in which the witness has testified as an expert at trial within the preceding four years
- A listing of any other cases in which the witness has testified as an expert by deposition within the preceding four years.

Unless a stipulation or court order provides otherwise, these expert disclosures must be made at least 90 days before the trial date or the date the case is required to be ready for trial unless the expert testimony or other evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party, in which case they are to be made within 30 days of the disclosure made by the other party.

B. Rebuttal reports

[18] Fed. R. Civ. P. 26 (a)(2)(A).

1. In general

Rule 26 requires the parties to exchange rebuttal reports 30 days after the exchange of ordinary expert reports. [19]

The rule contemplates that the parties, at trial, will not only need to present evidence in support of their valuation position, but will need to present evidence which responds to, rebuts, or disproves evidence presented by their opponent. Since the parties will not know, for a certainty, the nature of the evidence intended to be introduced by their opponents until the expert reports are exchanged, the date for the exchange of rebuttal reports is tied to the date for the exchange of expert reports.

In some cases, 30 days may not be enough time within which to plan and implement a rebuttal case plan. The well-prepared attorney anticipates areas of rebuttal well before the exchange of reports, has a system in place for the review of its opponent's expert reports, and has experts poised to prepare rebuttal reports in time to meet required deadlines.

2. Anticipating areas of rebuttal

Anticipating areas of rebuttal requires nothing more than trying to anticipate the opposition's valuation position and investigating the facts which would tend to support that position. If possible, these facts should be investigated before the exchange of expert reports, so that the party has a longer period of time within which to prepare its rebuttal reports.

It is obviously impossible to anticipate all matters which need to be rebutted at trial, and it is inefficient to prepare for matters which may never arise. Nevertheless, if the owner's attorney is able to identify facts or data which will probably be presented by the Government at trial, then it is worth the effort to investigate and prepare for those matters, even before the owner receives and reviews the Government's expert reports.

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[19] Rule 26(a)(2)(C). This rule also applies to the disclosure of other forms of evidence and is not limited to expert reports. This rule provides that if evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under 26(a)(2)(B), disclosures must be made within 30 days of the disclosure.

If, for example, there are "comparable sales" in the area which would indicate a lower value than the owner's appraisal, then the owner's attorney should investigate those sales to determine, for example, whether they were arm's length, whether there was any unusual motivation on the part of the buyer or the seller, and whether the purchase price was agreed upon at a significantly earlier date.

If probability of rezoning is anticipated to be an issue at trial, and applications for rezonings in the area were denied, it would behoove the owner's attorney to investigate those denials as early as possible so as to be able to distinguish between the applications which were denied and the owner's situation.

3. Reviewing opposing expert reports

Since the time between the exchange of expert reports and the exchange of rebuttal reports is limited, it is wise for attorneys to have a plan in place for the review of opposing expert reports. Experts in the various specialties are often able to suggest potential rebuttal evidence which may not be apparent to the attorneys.

A threshold matter to resolve is whether rebuttal evidence will be presented by a party's "case-in-chief" experts or by different experts. Some experts are reluctant to testify to rebuttal evidence, believing that doing so affects their credibility as independent witnesses. Some attorneys have the same attitude.

Experts selected to testify to rebuttal evidence should be aware of the initial expert report exchange date and reserve sufficient time in order to review those reports and conduct the investigations necessary to prepare rebuttal reports. These dates should be provided to the experts as early as possible so that their schedules allow them to provide the necessary services in order to meet the court-imposed deadlines.

4. Preparing rebuttal reports

The same attention required in preparing complete original expert reports needs to be given to the preparation of rebuttal reports.

VII. Pretrial disclosures under Rule 26

In addition to serving initial and expert disclosures, the parties to a federal condemnation case must file and serve "pretrial disclosures" consisting of:

- The name, address, and telephone number of each witness. The pretrial

disclosure must separately identify (a) those persons whom the party “expects” to call as witnesses from (b) those persons whom the party “may” call as witnesses “if the need arises.[20]

- A designation of those witnesses whose testimony is expected to be presented by means of a deposition, and, if not taken stenographically, a transcript of the pertinent portions of the deposition testimony.[21]

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[20] Fed. R. Civ. P. 26 (a)(3)(A).

[21]Fed. R. Civ. P. 26 (a)(3)(B).

- An appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying (a) those which the party expects to offer and (b) those which the party "may" offer "if the need arises."[22]

VIII. The need for disclosures be full and complete and exchanged on time

It is important in federal condemnation cases to make sure the expert reports to be exchanged are full and complete. It may be difficult or impossible to introduce omitted matter at trial.

Parties cannot "reserve the right" to provide fuller and more complete disclosures later than the required disclosure date; and the fact that an opposing party may have stated that it "reserved the right" to provide fuller and more complete disclosures does not excuse a nondisclosing party from full compliance.[23]

A. Retaining experts who are capable of meeting disclosure requirements

Because of the sanctions which may potentially be imposed for incomplete or untimely disclosures, it is essential that the attorney retain those experts who are capable of fulfilling the requirements imposed by the federal rules.

The real estate appraiser, or other expert witness, not accustomed to testifying in federal court, may be surprised at the depth of information she is required to provide**.** It is the obligation of the attorney retaining the expert to assure that the expert is able to comply with the federal disclosure requirements before retaining that expert.

As one court has stated:

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[22]Fed. R. Civ. P. 26 (a)(3)(C).

[23]Rambus, Inc. v. Infineon Technologies, 145 F. Supp 2d 721, 724 (U.S.D.C. East Dist. Va. 2001).

> The bottom line is that experts...should not be offering their services as testifying experts in federal court unless they are fully prepared to comply with the disclosure requirements of Rule 26(a)(2)(B), Fed. R. Civ. P. And attorneys should not retain experts to testify in federal court without obtaining, at the outset, assurances that the expert has the information at his disposal which is required to be included in the expert report required by that rule.[24]

Since an expert will generally only be allowed to testify about those matters set forth in her report, the report should be full and complete. The attorney in a federal condemnation case should not to ask an expert to exclude a matter from her report for the purpose of surprising her opposition at trial. It is more likely that the attorney who asks her expert to exclude a matter, intending to surprise her opposition, will be surprised herself by the court preventing that expert from testifying about the matter intentionally excluded from the report.

B. Protecting against gaps in one's case

It is not unusual for a party to realize, for the first time during pre-trial discovery, that his case may have a gap or that his case would be more compelling if he could present just one more expert, not yet disclosed, or introduce into evidence just one more fact, not yet contained within one of the expert reports.

Sometimes, a statement in an opposing expert's report or a question posed by opposing counsel during deposition will alert an attorney to a gap or shortcoming in her case. In a condemnation case, for example, the owner's attorney might realize, for the first time during pre-trial discovery, that, utilizing the subject property for the use, believed by the owner's appraiser to be the highest and best use, requires a special permit, the probability of attaining of which the owner's appraiser never mentioned in his report. Even if the appraiser did, in fact, know about the permit requirement and even if he did, in fact, believe that securing the permit was reasonably probable, the fact that the appraiser did not mention the issue in his report and the fact that the owner's attorney did not list an independent witness on that issue may prevent the owner's attorney from presenting critical evidence on this issue at trial.

The ability of a party to "shore up" or supplement its case – after exchange of expert reports – is far more difficult in federal court than it is in most state courts. The rules and practice in state courts may allow for the amendment of witness lists and may be flexible enough to allow for experts to testify about matters not expressly addressed in their reports, especially if those matters are discussed during deposition. Such is not generally the case in federal court.

Since it is unlikely that a party to a federal condemnation case will be able to "shore up" its case after the exchange of expert and rebuttal reports, it is imperative that the attorney

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[24]Norris v. Murphy, Civil Action No. 00-12599-RBC, 2003 U.S. Dist. LEXIS 10795 (U.S. District Court, Mass.).

anticipate any gaps in her case well in advance of making initial disclosures, exchanging reports, and listing factual witnesses and exhibits. Since the need to identify shortcomings in one's case, as early as possible, is so acute in federal condemnations, it behooves the practitioner to be as thorough as possible in identifying those potential shortcomings.

There are several precautions which a condemnation attorney can take in an effort to avoid gaps in the expert reports exchanged. By avoiding these gaps, the attorney can provide herself with the best opportunity of presenting the fullest case at trial.

The following are some suggestions which may help an attorney minimize the risk of inadvertently leaving out an essential fact, opinion, or area of coverage from the expert reports:

- Subject the case to review by as many lawyers and experts as possible.

  An area of necessary coverage which may be overlooked by one lawyer or expert may be noticed by another lawyer or expert. Ask the reviewing parties to be critical. Ask them what areas have been overlooked or not addressed.

- Prepare a strategic outline detailing the matters which the owner needs to prove and the matters which the owner needs to disprove in order to win the case. For each such matter, designate the witness or document necessary to prove or disprove that matter. Pay special attention to those matters whose admissibility into evidence may depend upon predicate evidence. Make certain that predicate facts and opinions are contained within at least one of the experts' reports.

- Subject the strategic outline to continuous review and modification.

- Stay in continuous contact with your experts.

  Understand from your experts what matters they are intending to include within their reports and, just as importantly, what matters they are not intending to include within their reports.

- Retain more than one expert per specialty where client resources permit.

  Don't rely upon the assumption that your one expert in a particular area will reach the conclusion you need in order to prove your case or that her anticipated testimony will be as reliable after her deposition is taken. If you can, retain an additional expert in each specialty. This will help protect your client against the possibility that your primary expert will not agree with your client's view of the case and you have an additional witness to present to the jury in the same area of expertise in the event that, on deposition, it appears that your primary expert's trial testimony will not be as reliable, credible, or persuasive as you may have earlier

thought.

C. Including alternative opinions and supporting facts within the reports

Appraisal reports should contain, not only the appraisers' opinions of value based upon their own conclusions of highest and best use and other predicate concepts, but, if the attorney wishes to reserve the right to introduce other opinions of value into evidence, the appraisal reports should include valuations based upon differing highest and best uses and other predicate conclusions. A party to a federal condemnation who exchanges an appraisal based solely on that party's opinion of highest and best use, or other predicate conclusion, may not be allowed to introduce into evidence subsequently disclosed opinions based upon different situations. In an analogous situation, one court has held:

> The decision in *Loral Fairchild Corp. v. Victor Co. of Japan*, 911 F. Supp. 76 (E.D.N.Y. 1996) is instructive here. In that case, the patent holder repeatedly stated that it relied exclusively on a theory of liability in which claims 7 and 8 of its patent were limited to methods of operation of claim 1 in that patent. The parties, therefore, focused their discovery on the structure contained in claim 1. The plaintiff "Loral apparently foresaw no need to urge alternative theories based on differences in the words of claims 1 and 7." When the court interpreted claim 1 more narrowly than Loral advocated, Loral changed its theory of liability on claims 7 and 8.
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> Judge Radar of the Federal Circuit, sitting by designation, prevented Loral from pursuing this alternative theory because it would unduly prejudice Sony. He stated:
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>> At the outset of this litigation, Loral could have proceeded under alternative theories... It experts may have opined (as to different theories), and its discovery responses could have fairly represented this position. Loral chose not to follow this path.
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> The approach outlined in Loral is certainly not unusual. Indeed, in many cases, the expert reports posit alternate opinions predicated on the views of the opposition expert.[25]

Rulings by the court often change the practical landscape of a condemnation case. The expert reports exchanged should anticipate as many varying landscapes as possible and include

[25] Rambus, Inc. v. Infineon Technologies, 145 F. Supp 2d 721, 724 (E.D. Va. 2001).

expert opinions based on those assumed landscapes and those facts which may become relevant should the court make a particular ruling. The need to provide alternative opinions and additional facts within the expert's reports is easily illustrated by considering what could happen in a typical "probability of rezoning" case. The condemned property may be zoned for agricultural use as of the date of taking, and, based upon an agricultural use, the Government might value the property at $20,000. The owner, on the other hand, might assert a value based upon the probability of securing a change of zoning to a residential use. Believing that there exists a probability of rezoning and determining that this probability enhances the value of the property, the appraiser for the owner might believe that the value of the property is $100,000. If the owner's appraiser believes that the property, without considering the probability of rezoning, is worth $50,000 but does not include this opinion within her report, then the owner runs the risk of not being able to introduce this opinion into evidence if, for example, at a screening hearing, the court rules that there is insufficient evidence to allow the issue of probability of rezoning to go to the jury.

A well prepared federal case, and well prepared federal expert reports, should consider the value of the property, not just under the party's view of the property, but any other view of the property that could be argued by the opposing side or adopted by the court or jury. These alternative views of the property may involve differing opinions about probability of rezoning, other probabilities, project influence, threat of condemnation, whether certain elements of value are compensable, the legal effect of certain documents, and the application of various laws or other regulations.

D. Including qualifications, publications, compensation and listings of prior testimony within the reports

Rule 26(a)(2)(B) requires the parties to exchange, not only the experts opinions and the bases of those opinions, but other related information as well. As one court has noted:

> All too often lawyers focus almost exclusively on disclosing the expert's opinions, the supporting facts, data, and bases, and neglect their additional obligation to disclose the witness's qualifications, publications, compensation, and listing of prior testimony. This information, however, bears directly on whether the expert is qualified under Fed. R. Evid. 702, and commonly provides a factual basis to attack the credibility of the expert. Thus, a Rule 26(a)(2)(B) disclosure which does not completely address each of these elements may be lacking in a material respect.[26]

[26] Sullivan v. Glock, Inc., 175 F.R.D. 497, 503 (DC Md. 1997).

Courts have prohibited experts from testifying, because their list of cases in which they have testified has not been complete.[27]

E. Preserving the ability to utilize matter not contained within expert reports

Relevant information may become known – or, at least, known in the real estate market – only after the parties are required to exchange reports. A question may then arise as to whether a party might be able to exchange full reports on the date required by the court and also preserve its ability to present this relevant information as evidence at trial.

In situations like this, the parties have at least three potential means of preserving an opportunity to present "after acquired" information into evidence. First, a party may attempt to submit a supplemental report with the newly discovered evidence. Unless a court found that the evidence was truly "newly discovered," however, the court could rule that, with regard to that expert, the evidence allowed to be introduced at trial will be limited to the facts and opinions contained within that expert's original report, which by rule and order was required to be "complete" on the date of exchange.

Another possible ways of preserving the ability to introduce "after acquired" information is by introducing the information either as an independently relevant fact or through rebuttal. Since the parties are generally required to disclose factual witnesses, exhibits, and rebuttal witnesses and reports after the exchange of (case-in-chief) expert reports, the parties generally have a window of opportunity to add additional potential evidence after the initial expert report exchange. Assume, for example, that a comparable sale occurs, and the price of that sale supports one of the party's positions at trial. Assume further than the sale does not occur until after the expert reports are exchanged. By naming the buyer or seller of the transaction as a factual witness or by listing the recorded deed and/or unrecorded closing statement on one's exhibit list or by citing the sale in a timely filed rebuttal report, a party may be able to introduce that sale into evidence, notwithstanding the fact that it was not included in that party's appraisal report.

IX. Duty to supplement disclosures and discovery responses

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[27]See, e.g., Norris v. Murphy, Civil Action No. 00-12599-RBC, 2003 U.S. Dist. LEXIS 10795 (U.S. District Court, Mass.).

Some states do not impose a duty to supplement a discovery response which was complete, when made.[28] The federal rule is different. Rule 26 (e) imposes a duty to supplement, in certain instances, both mandatory disclosures and responses to discovery initiatives. The duty applies if either (a) the court orders supplementation, or (b) the circumstances described in subsections (1) or (2) of the rule apply. Subsection (1) applies to supplementing mandatory disclosures, and subsection (2) applies to supplementing discovery responses.

Parties are under an obligation to supplement mandatory disclosures, and responses to interrogatories, requests for production, and requests for admissions if:

- The party learns that, in some material respect, the information disclosed is incomplete or incorrect, and
- The additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing

[28]See, e.g. Fla. R. Civ. P. 1.280 (e).

With respect to mandatory expert disclosures, the duty to supplement applies, not only to information contained within the expert's reports which were exchanged, but to information provided through a deposition of the expert.[29]

Mandatory disclosures are required to be supplemented "at appropriate intervals" and by no later than the date required for the making of "pretrial disclosures" under Rule 26(a)(3).[30] Responses to interrogatories and requests for production and admissions are required to be supplemented "seasonably." [31]

Parties attempting to call a witness not timely disclosed or introduce into evidence a matter not timely exchanged within an expert report routinely argue that they are disclosing this new matter in order to comply with their obligation to supplement their prior disclosures. More often than not, the courts reject this type of argument. They remind the parties that Rule 26(a)(2) requires that:

> The report shall contain a <u>complete</u> statement of <u>all</u> opinions to be expressed and the basis and reasons therefor ...

The party asking the court to allow it to supplement one of its expert reports with new information, thus, by necessity, must admit that it did not comply with Rule 26(a)(2). In addition, several courts suggest that the duty to supplement is not intended to allow a party to submit an initial expert report and then supplement it with additional information which that party unilaterally deems appropriate. One court has stated:

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[29]Fed. R. Civ. P. 26(e)(1).

[30]Fed. R. Civ. P. 26(e)(1); see, Section VII. herein for a discussion of mandatory "pretrial disclosures" and their deadlines.

[31]Fed. R. Civ. P. 26(e)(2).

> The Court cannot accept a definition of supplementation which would essentially allow for unlimited bolstering of expert opinions. Rule 26(e) envisions supplementation when a party's discovery disclosures happen to be in some way defective so that the disclosure was incorrect or incomplete and, therefore, misleading. *See, Keener v. United States*, 181 F.R.D. 639 (D. Mont. 1998). It does not cover failures of omission because the expert did an inadequate or incomplete preparation. Id. at 641; *see, Schweizer v. DeKalb Swine Breeders, Inc.*, 954 F. Supp. 1495, 1510 (D. Kan. 1997)(no reason opinions could not have been stated earlier). To construe supplementation to apply whenever a party wants to bolster or submit additional expert opinions would reek havoc in docket control and amount to unlimited expert opinion preparation.[32]

X. Exclusion of evidence and other sanctions for failure to comply with disclosure requirements

A. In general

The Federal Rules of Civil Procedure allow the Court to impose sanctions in the event that a party does not make or properly supplement the disclosures required under Rule 26.[33] These sanctions are enumerated in Rule 37 (c) and include:

- Prohibiting a witness from testifying.[34]
- Prohibiting a party from presenting certain information into evidence.[35]
- Taxing costs.[36]
- Taxing attorney's fees.[37]

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[32] Akeva L.L.C. v. Mizuno Corp., 212 F.R.D. 306, 310 (USDC NC Mid 2002).

[33] Fed. R. Civ. P. 37 (c)(1).

[34] Fed. R. Civ. P. 37 (c)(1).

[35] Fed. R. Civ. P. 37 (c)(1).

[36] Fed. R. Civ. P. 37 (c)(1).

[37] Fed. R. Civ. P. 37 (c)(1).

- Entry of an order ruling that certain facts shall be taken to be established.[38]

[38] Fed. R. Civ. P. 37 (c)(1); Fed. R. Civ. P. 37 (b) (2)(A).

- Entry of an order ruling that a party may not support a designated claim or oppose a designated defense.[39]

- Entry of an order striking out pleadings or parts thereof.[40]

- Entry of an order staying the proceeding until disclosures are made or supplemented.[41]

- Dismissal of the action or any part thereof.[42]

- Entry of a judgment of default.[43]

Rule 37 (c)(1) contains two sentences. The first sentence provides for the sanction of exclusion of evidence, and states as follows:

> A party that without substantial justification fails to disclose information required by Rule 26(a) or Rule 26 (e)(1) or to amend a prior response to discovery as required by Rule 26 (e)(2), is not, unless such failure is harmless, permitted to use as evidence at trial, at a hearing, or on a motion any witness or information not so disclosed.

The second sentence provides for sanctions, in addition to or in lieu of the sanction of exclusion of evidence, and states:

> In addition to or in lieu of this sanction, the court, on motion and after an

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[39]Fed. R. Civ. P. 37 (c)(1); Fed. R. Civ. P. 37 (b) (2)(B).

[40]Fed. R. Civ. P. 37 (c)(1); Fed. R. Civ. P. 37 (b) (2)(C).

[41]Fed. R. Civ. P. 37 (c)(1); Fed. R. Civ. P. 37 (b) (2)(C).

[42]Fed. R. Civ. P. 37 (c)(1); Fed. R. Civ. P. 37 (b) (2)(C).

[43]Fed. R. Civ. P. 37 (c)(1); Fed. R. Civ. P. 37 (b) (2)(C).

> opportunity to be heard, may impose other appropriate sanctions. In addition to requiring payment of reasonable expenses, including attorney's fees, caused by the failure, these sanctions may include any of the actions authorized under Rule 37(b)(2)(A), (B), and (C) and may include informing the jury of the failure to make this disclosure.

In determining what sanctions to apply, the courts have discussed the interrelationship between these two sentences and whether, and to what extent the evidentiary exclusion sanction is automatic. One court has explained the interrelationship as follows:

> The first sentence of Rule 37(c)(1) provides an automatic preclusion sanction against the noncomplying party which prevents that party from offering the non-disclosed evidence at trial if that failure to disclose was not substantially justified, unless the failure was harmless. The second sentence of the rule is somewhat inconsistent with the first sentence, because that sentence permits, either in addition to, or in lieu of, the preclusion sanction, imposition of "other appropriate sanctions" ... Notwithstanding the second sentence, Rule 37(c)(1) has been described as a "self-executing sanction for failure to make a disclosure required by Rule 26 (a), 'designed to provide a strong inducement for disclosure." (Citations omitted).
>
> The rule, however, is not really self-executing. "Instead, the party seeking to invoke the preclusion sanction must first prove that the opposing party violated Rule 26(a) and 26 (e)((1) by failing to disclose the evidence in question earlier in the proceedings." (Citations omitted). Even when this is accomplished, the preclusion sanction does not automatically apply because the non-complying party will still have an opportunity to show that the failure was justified or that it was harmless.
>
> "The strong inducement for disclosure" results from the interplay between Rule 26 and Rule 37. Rule 26 was amended in 1993 with the explicit purpose to put an end to discovery practices which often resulted in protracted discovery and soaring litigation costs. [44]

There appears to be differing among the courts on the following issues affecting the particular sanction to be imposed:

- If noncompliance is not justified and not harmless, is the evidentiary exclusion mandatory?

- Is a finding of bad faith or callous disregard of the disclosure rules required for the

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[44] Rambus, Inc. v. Infineon Technologies, 145 F. Supp 2d 721, 724 (U.S.D.C. East Dist. Va. 2001).

court to exclude evidence?

- What circumstances constitute "substantial justification?"
- What circumstances constitute "harmlessness?"
- What factors to consider in determining whether to impose the evidentiary exclusion sanction?

B. Mandatory (or discretionary) nature of the evidentiary exclusion sanction

Some courts have held that, unless a disclosure noncompliance is substantially justified or is harmless, exclusion of evidence is a mandatory and self-executing sanction.[45] Other courts have held that trial courts have discretion to impose less severe sanctions under the "in lieu of" provision contained in the second sentence of Rule 37 (c)(1).[46]

C. Bad faith or callous disregard of disclosure requirements

Exclusion of evidence is recognized as a drastic sanction. Before imposing it, some courts require a showing of bad faith or that the resultant prejudice to the opposing party cannot be cured because, for example, use of the evidence is imminent or in progress.[47] Some courts allow the sanction of evidentiary exclusion to be applied only upon a finding of "callous disregard of the discovery rules."[48] Other courts more readily apply the exclusion sanction, interpreting the terms "substantial justification" and "harmless" very narrowly.[49] The determination of whether a Rule 26(a) violation is "substantially justified" or "harmless" is entrusted to the broad discretion of the trial court.[50]

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[45]See, e.g. Fund Commission Service, II, Inc. v. Westpac Banking Co., Civil Action No. 93 Civ. 8298 (KTD)(RLE), 1996 U.S. Dist LEXIS 11937 (SDNY 1996).

[46]Roberts v. Galen of Virginia, Inc., 325 F.3d 776 (6th Cir. 2003).

[47]Fitz, Inc. v. Ralph Wilson Plastics Co., 174 F.R.D. 587 (U.S.D.C. New Jersey, Camden Vicinage Div. 1997); ABB Air Preheater, Inc., 167 F.R.D. 668 (D.N.J. 1996).

[48]Tritchler v. Consolidation coal Co., 91 F.3d 134 , 1996 WL 379706 2 (4th Cir. 1996)(unpublished opinion).

[49]Salgado v. General Motors Corp., 150 F.3d 735, 742 (7th Cir. 1998).

[50]Mid-America Tablewares, Inc. v. Mogi Trading Co., 100 F.3d 1353, 1363 (7th Cir.

D. Substantial Justification

1996).

"Substantial justification" has been held to mean "justification to a degree that could satisfy a reasonable person that parties could differ as to whether the party was required to comply with the disclosure request. The proponent's position must have a reasonable basis in law and fact. The test is satisfied if there exists a genuine dispute concerning compliance." (Citations omitted). [51]

An expert's inability to provide a party with information necessary to meet Rule 26 expert disclosure requirements might not constitute "substantial justification" for nondisclosure.[52]

E. Harmlessness

The fact that a party provides its opponent with a listing of some, but not all, of the cases on which an expert worked during the past four years, as required by Rule 26(a)(2)(A), does not make the nondisclosure of the remaining cases "harmless."[53]

F. Factors considered in determining whether to exclude evidence

The different circuits have adopted different tests for determining whether to apply the

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[51]Fitz, Inc. v. Ralph Wilson Plastics Co., 174 F.R.D. 587, 591 (Camden Vicinage Div. N.J. 1997).

[52]See, Norris v. Murphy, Civil Action No. 00-12599-RBC, 2003 U.S. Dist. LEXIS 10795 (U.S. District Court, Mass.).

[53]Norris v. Murphy, Civil Action No. 00-12599-RBC, 2003 U.S. Dist. LEXIS 10795 (U.S. District Court, Mass.).

sanction of exclusion of evidence.

The First Circuit does not appear to have adopted a specific test, but has indicated that exclusion of evidence is a mandatory sanction, except upon a finding of substantial justification or that the noncompliance was harmless.[54]

The Second Circuit has not adopted a test, but has indicated that a trial court acts within its discretion in admitting certain undisclosed testimony, where the court is able "to take steps to erase whatever prejudice may have been created by the nondisclosure."[55]

The Fourth Circuit has applied a test which considers the following five factors:

(1) The surprise to the party against whom the witness was to have testified.

(2) The ability of the party to cure that surprise.

(3) The extent to which allowing the testimony would disrupt the trial.

(4) The explanation for the party's failure to name the witness before trial.

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[54]Portland, 2000 U.S. LEXIS 23916.

[55]Hein v. Curpum, 53 Fed. Appx. 134, 2002 U.S. App. LEXIS 24676 (2d Cir. 2002).

(5) The importance of the testimony.[56]

The Fifth Circuit requires consideration of the following factors:

(1) The party's explanation, if any, for failure to comply with the scheduling order.

(2) The prejudice to the opposing party of allowing the witness to testify.

(3) The possibility of curing such prejudice by granting a continuance.

(4) The importance of the witness's testimony.[57]

The Seventh Circuit has not articulated a test. Instead, it has held that exclusion of evidence is mandatory except upon a finding of substantial justification or harmlessness, and has indicated that the trial court has broad discretion in determining those factors.[58]

The Tenth Circuit has applied a test which considers the following four factors:

(1) The prejudice or surprise to the party against whom the testimony is offered.

(2) The ability of the party to cure the prejudice.

(3) The extent to which introducing such testimony would disrupt the trial.

(4) The moving party's bad faith or willfulness.

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[56] Burlington Insurance Co. v. Shipp, 215 F.3d 1317 (table), 2000 WL 620307 (4th Cir. 2000); United States v. $9,041,598.68, 163 F.3d 238, 251 (5th Cir. 1998) .

[57] Barrett v. Atlantic Richfield Co., 95 F.3d 375, 380 (5th Cir. 1996).

[58] Hicks v. Boston Scientific, 28 Fed. Appx 583, 2002 U.S. App. LEXUS 2633 (7th Cir. 2002).

G. Prejudice

The courts often recognize that, if a party is allowed to present evidence not disclosed in a timely manner, the opposing party will probably be required to take additional depositions, engage in further discovery and retain and list additional witness. While some courts have allowed these consequences rather than excluding evidence, others have held requiring the opposing party to engage in these additional processes because of a party's noncompliance constitutes prejudice.[59]

XI. Why attorneys fail to make full and complete disclosures

Because the rules of disclosure are rather strict, and because the remedies for noncompliance may be harsh, it is imperative that the condemnation attorney make certain that the expert reports exchanged with the opposing side are full and complete. There are a number of reasons why attorneys unaccustomed to federal practice might fail to exchange full and complete expert reports, and these reasons are potential pitfalls, in and of themselves. They include:

- Not paying attention to required deadlines.
- Waiting too long to retain experts.
- Retaining experts who do not have sufficient time – or are not responsible enough – to conclude their reports by the required deadlines or to conclude their preliminary analysis in sufficient time either (a) to allow the owner to determine whether it wishes to call that expert as a witness at trial, or (b) to allow the owner's attorney sufficient time to assure that all matters needed to be addressed by all of the reports to be exchanged are addressed.
- Retaining only one appraiser, only to find out – too late – that the appraiser's opinion of value is unacceptable to the client.
- Requesting that the experts provide meager reports, mistakenly thinking that providing the opposing side with minimal information in the reports will provide that party with a tactical advantage.

[59]Nave v. Artex Manufacturing, Inc., Civil Action No.96-2002-EEO , 1997 U.S. Dist. LEXIS 5335 (USDC Kan. 1997).

- Not advising each expert that the scope of their testimony at trial will be limited by the scope of their reports.

- Not making certain, before the exchange, that the expert's report contains all of the information which the attorney needs to be elicited from that witness.

- Failing to recognize an essential element in the party's case, so that no expert's report addresses that element.

- Failure to recognize an area of potential rebuttal.

The attorney handling a condemnation case in federal court should recognize the potential pitfalls listed above and take whatever actions are necessary to avoid them.

XII. Objections at trial to matters not disclosed in reports

Many federal judges will insist that the direct examination of expert witnesses be limited to those areas expressly disclosed within their duly exchanged reports. Direct examination questions of an expert, dealing with matters not discussed within that expert's report, are subject to objection at trial.

At or just before trial, the attorneys should provide the judge with additional copies of all expert reports, so that the court can rule on "nondisclosure" objections as quickly as possible.

The attorney conducting direct examination should be familiar enough with the report of the expert she is examining to be able to cite to the judge the language of the report which corresponds to the area of direct examination.

As with any objection, the objection that an area of direct examination was not contained with an expert's report is subject to being waived. During direct examination of expert witnesses, the opposing lawyer must guard against questions being asked which deal with matters not discussed within that expert's report. If the court is not able to sustain an objection until after the opposing witness answers the question, the objecting attorney should move to strike the objectionable answer. If the witness answers the question prior to the objection being raised, the objecting attorney should move to strike the answer for the purpose of being able to object to the answer.

If the jury is inadvertently allowed to hear expert testimony on direct examination, which was not contained within the expert's report and about which objection was timely made, the court may consider giving the jury a curative instruction or providing another appropriate remedy.

XIII. Dealing with the possibility that important evidence will be excluded

An attorney, because of a Rule 26 violation, may be compelled to begin trial under an order prohibiting her from introducing into evidence an important fact or opinion or from calling an important witness to the stand. In situations like this, "necessity (truly) breeds invention." There are few trial situations in which an attorney's inventiveness is more important than when he must present a critical fact, opinion, or witness which the judge has ruled cannot be presented. The resourceful attorney may be able to achieve her objectives, notwithstanding – and in full compliance with – the court's exclusionary ruling.

The attorney, faced with an exclusionary order, should consider whether there exists other evidence and/or witnesses available to prove the same point which the excluded evidence was intended to prove. Consideration should be given to evidence, on the same subject matter, which may be presented through an opposing witness on cross-examination. As an example, assume that, because of a disclosure violation, the court has ruled that the owner cannot call, as a witness, a certain zoning expert to testify to a rezoning of a property which the owner deems comparable. If the Government calls witnesses who are familiar with the rezoning on that property, the court's exclusionary ruling would probably not prevent the owner's attorney from cross-examining the Government's witness on the rezoning. Obviously, once an item is in evidence, it may be considered by the jury, irrespective of which party's witness testifies about it. Admittedly, eliciting an essential point solely from an opposing witness may deprive the party who is under the exclusionary order from presenting that point in a light most favorable to her position, and, yet, depending upon the quality of the cross-examination, the point may be made far more dramatically by cross-examination of an opposing witness than on direct examination by one's own witness.

"Proving" one's case through the opposition's witnesses requires careful planning. The depositions must be strategically planned and taken to discover the opposing witnesses' familiarity, experience, and recorded opinions on the point involved. During cross-examination, the inquiry must stay within the scope of direct examination. And, the party, under the exclusionary order, must be prepared to deal with the possibility that the opposing witness will not testify as anticipated.

Another means of introducing "excluded" evidence is by the opposing party "opening the door" to admissibility of that evidence. Assume, for example, that the owner's appraiser discovers a sale of a comparable property for $50,000 per acre two weeks after appraisals are exchanged and the court enters an order prohibiting that appraiser from testifying to that sale. If the Government's attorney, on cross-examination, asks, "Isn't it true that there are no sales in this area for more than $35,000 per acre," the Government's attorney may have "opened the door" to testimony which would be otherwise inadmissible. Attorneys for both sides dealing with exclusionary rulings should secure from the court a clear understanding of the scope and effect of

the ruling. Attorneys for both sides should avoid asking questions or eliciting testimony which would violate a court order, prejudice the other side, or cause a mistrial.

Part II: Other Potential Pitfalls

XIV. Being stopped at the gate: the judge as gatekeeper

Attorneys representing owners in federal condemnation cases should be prepared to defend against pretrial motions in limine to exclude evidence of highest and best use, value, and damages. Moving in limine to exclude the owner's evidence gives the condemning authority two opportunities to win its case: first, as a matter of law, before the judge, and second, as a matter of fact, before the trier of the facts. With regard to highest and best use, the Government often argues that a proffered use is either speculative or is only feasible because of its project. With regard to value and damages, the Government often argues that a particular valuation method or evidence of value is unreliable.

The Supreme Court has long recognized the role of the federal trial judge as a "screen" shielding the jury from unreliable evidence.[60] During the past decade, the Supreme Court has referred to this role of the trial judge as "gatekeeper."[61]

The Fifth Circuit Court of Appeals explained the roles of the judge and the jury when a party seeks to introduce evidence of a use which is not allowed under the existing zoning

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[60]Olson v. United States, 292 U.S. 246, 255 (1934), wherein the Court stated that "Elements affecting value that depend upon events or combinations of occurrences which, while within the realm of possibility, are not fairly shown to be reasonably probable, should be excluded from consideration for that would be to allow mere speculation and conjecture to become a guide for the ascertainment of value..."

[61]Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993); Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999).

regulations.

> ... (I)t is not uncommon within regulatory systems for permits or variances to be granted, or for the regulations themselves (especially zoning regulations) to be changed. And since the prospect of obtaining a permit or a change of zoning classification is a factor that might well be considered by a prospective purchaser, and thus a factor affecting the price a willing buyer would pay for the property, it will often represent an element of fair market value. Accordingly, it is well settled law that if the landowner can demonstrate a "reasonable possibility" that a permit will be issued or that a rezoning will occur, thereby freeing the property for a use which would otherwise be precluded by regulatory restrictions, the owner is entitled to have that "reasonable possibility" considered by the jury, provided of course that the use is otherwise a practicable and reasonably probable one. (Citations omitted.)
>
> We emphasize, however, that it is for the judge to determine whether this "reasonable possibility" exists. If and only if he finds that it does exist, then the jury must consider and decide what effect this reasonable possibility of a permit or zoning change has upon the fair market value of the condemned property.
>
> In sum, we hold that it is the trial courts responsibility under Rule 71A (h) to screen all proffered potential use and exclude from consideration by the trier of fact evidence of any potential uses upon which a just compensation award may not, as a matter of law, be based.[62]

The Fifth Circuit has held that the "guiding consideration" as to whether to allow a proffered potential use into evidence is:

> Could the jury (or commission) reasonably conclude that the potential for this use affects the fair market value of the property? [63]

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.,*[64] the Supreme Court interpreted the federal rule of evidence relating to expert testimony[65] as requiring the trial judge to serve as the "gatekeeper" between scientific expert testimony and the trier of the fact. In *Kumho Tire Co. v. Carmichael,*[66] the Court held that the "*Daubert*" gatekeeper role applied, not just to scientific

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[62]United States v. 320 Acres, 605 F.2d 762 (5th Cir. 1979).

[63] United States v. 320 Acres, 605 F.2d 762 ,819, n. 130 (5th Cir. 1979).

[64]509 U.S. 579 (1993).

[65]Fed. R. Evid. 702.

[66]526 U.S. 137 (1999).

expert testimony, but also to all forms of expert opinion. Since *Daubert* and *Kumho*, the Government, on occasion, has sought to exclude expert evidence on grounds of unreliability.

How different courts have treated Daubert objections in federal condemnation cases is illustrated by the trial and appellate courts' opinions in the case of *United States v. 14.38 Acres of Land*.[67] In that case, the Government condemned an easement, leaving a remainder. While the owner's appraiser admitted that he could locate no truly comparable sales, he testified that the value of the remainder was reduced by 50% because of the taking. The trial court excluded the severance damage testimony of the owner's appraiser because it found that the opinions he rendered were speculative and not based on reliable foundations and would thus be of no aid to the finder of fact in determining just compensation. The trial court found that the owner's appraiser's opinions, and the bases of those opinions, while within the realm of possibility, were not fairly shown to be reasonably probable.

The Fifth Circuit reversed the District Court's judgment in *United States v. 14.38 Acres of Land*, concluding that the trial court had abused its discretion in excluding the proffered expert testimony.

> Under the Federal Rules of Evidence, a qualified expert witness may testify "if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue..." Fed. R. Evid. 702. The trial court is charged with making initial determinations as to the admissibility of evidence. Fed. R. Evid. 104(a). However, in determining the admissibility of expert testimony, the district court should approach its task "with proper deference to the jury's role as the arbiter of disputes between conflicting opinions. As a general rule, questions relating to the bases and sources of an expert's opinion affect the weight to be assigned that opinion rather than its admissibility and should be left for the jury's consideration." *Viterbo v. Dow Chemical Co.,* 826 F.2d 420, 422 (5th Cir.1987). This is especially true in an eminent domain action, in which "expert opinion testimony acquires special significance...where the sole issue is the value of condemned property." *United States v. 68.94 Acres of Land, More or Less, Situate in Kent County, State of Delaware,* 918 F.2d 389, 393 (3rd Cir.1990). As the 68.94 Acres court observed:

[67]The opinion of the District Court is found at 884 F. Supp. 224 (N.D. Miss. 1995). The opinion of the Fifth Circuit Court of Appeal is found at 80 F.3d 1074 (5th Cir. 1996).

> The value of property taken by the Government, which is no longer on the market, is largely a matter of opinion. Since there are no infallible means for determining with absolute conviction what a willing buyer would have paid a willing seller for the condemnee's property at the time of taking, eminent domain proceedings commonly pit the Government's valuation experts against those of the landowner. Thus, the exclusion of one or all of either party's proposed experts can influence substantially the amount of compensation set by the fact finder. Not only does the landowner have a strong interest in receiving just compensation for the property, the public as well has vested interests in insuring that the Government does not pay for more than what the owner justly requires. Recognizing the critical role of expert witnesses in these cases and the strong interest on both sides that compensation be just, trial courts should proceed cautiously before removing from the jury's consideration expert assessments of value which may prove helpful. *Id.*[68]

In this case, the district court determined that pursuant to the Supreme Court's recent decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), the proposed expert testimony of Rogers Varner and Rip Walker was based on too flimsy a foundation to be admissible. The court found the testimony to be "speculative", because both witnesses were tentative about the possibility of flooding on Coker's property, and observed that even so-called "anticipated damages" must be based on "substantial data then available." 884 F. Supp. at 227. We think that the district court applied too stringent a reliability test in this regard. In *Daubert*, the Supreme Court held that common-law, "general acceptance" test for the admissibility of novel scientific evidence articulated in *Frye v. United States,* 54 App. D.C. 46, 293 F. 1013 (1923), did not survive the advent of the Federal Rules of Evidence, and articulated standards for determining the reliability of scientific expert testimony for purposes of admitting the evidence at trial. n3 The case did not otherwise work a sea change over federal evidence law. See *United States v. Sinclair,* 74 F.3d 753, 757 (7th Cir.1996). ("*Daubert*" does not create a special analysis for answering questions about the admissibility of all expert testimony.") Rather *Daubert* articulates what the Federal Rules of Evidence, as well as a trial court's traditional role, already required – that the trial court engage in the initial "gate keeping" task of establishing whether proffered evidence is sufficiently reliable and relevant, and thus presumptively admissible unless excludable on some other ground. *See Daubert*, 509 U.S. at ____, 113 S. Ct. at 2799. ("the Rules of Evidence...do assign to the trial judge the task of ensuring that an expert's testimony both rests on a

[68] United States v. 14.38 Acres of Land, 80 F.3d 1074, 1077-1079 (5th Cir. 1996)

reliable foundation and is relevant to the task at hand.") As the Court in *Daubert* makes clear, however, the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system: "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert*, 509 U.S. at _____, 113 S. Ct. at 2798.

In *United States v. 14.38 Acres of Land*, the Court also noted:

(The Government) argues that Varner's explanations of the effects of the new levee are "vague" and based on mere "possibility;" that Walker's conclusion that the property can no longer be sold cotton farming is belied by Coker's continued production of cotton; that the fact that the property may exist in a flood plain has not been altered by construction of the new levee; and that Walker's comparable sales, because based on the assumption of flooding, are not truly comparable. The perceived flaws in the testimony of Coker's experts are matters properly to be tested in the crucible of adversarial proceedings; they are not the basis for truncating that process.[69]

XV. Dealing with arguments by the Government that the existence of comparable sales excludes consideration of other evidence

Federal courts have long recognized that sales of similar properties generally represent the best indication of the value of the property being condemned.[70] The Government often cites this language in support of arguments that: (a) evidence of value produced by the owner – which are not comparable sales – should be excluded, or (b) that the court should instruct the jury that comparable sales are better evidence of value than other evidence presented.

In many cases, the courts have rejected these arguments. While the courts recognize the obvious probative value of comparable sales, they also acknowledge the importance of other types of evidence and how, in a given case, introduction of non-comparable sales evidence may be necessary for the trier of the fact to reach a fair determination of just compensation.

The Supreme Court has held that "All considerations that are fairly and substantially

[69]United States v. 14.38 Acres of Land, 80 F.3d 1074, 1079 (5th Cir. 1996).

[70]See, e.g., United States v. Toronto, Hamilton & Buffalo Nav. Co, 338 U.S. 396, 402 (1949); United States v. Whitehurst, 337 F.2d 765, 775 (4th Cir. 1964); United States v. Ham, 187 F.2d 265, 269 (8th Cir. 1951); Welch v. TVA, 108 F.2d 95, 101 (6th Cir. 1939); Baetjer v. United States, 143 F.2d 391, 397 (1st Cir. 1944).

involved in the bargaining (between the hypothetical buyer and seller) should be taken into account.[71] Often times, those "considerations" may not be capable of being described and their effect on value estimated by reference to comparable sales. Thus, while it is true that, generally speaking, the sale of the subject property and comparable sales are, indeed, among the best types of evidence to indicate the value of the property being condemned, they are certainly not the exclusive type of admissible evidence and the courts have been careful not to ascribe inappropriate importance to them.

[71]Olson v. United States, 292 U.S. 246, 255 (1934).

In *United States v. 344.85 Acres*,[72] for example, the Government appealed, claiming that the trial court had erred in refusing to give the jury the following instruction:

> A sale in the open market of the property in question reasonably near in time the date of taking is the best evidence of its fair market value. Lacking a free market sale of the property itself reasonably near the date of taking, sales on the open market of similar or comparable property reasonably near in time to the date of taking are the best evidence of the fair market value of the property being condemned. Of course, there will be differences in the size, shape, location and immediate surroundings of two pieces of property, and perhaps differences in other respects as well, and yet to the extent that they are similar or comparable, the price for which one sold on the open market is the best evidence of the fair market value of the other. "Similar" does not mean "identical," but having a resemblance. Obviously, no two properties are exactly alike in every respect, but this does not prevent their being comparable. Sales constitute the market. You must reject them as lacking in comparability before you turn to other means of determining market value.

The Seventh Circuit affirmed the trial court's refusal to give the jury the Government's proposed instruction. After first noting that the constitutional requirement of just compensation "includes all elements of value that inhere in the property" and that "all considerations that are fairly and substantially involved in the (hypothetical) bargaining should be taken into account," the court noted:

> It is true that (the owner's experts) did not base their opinions upon comparable sales, but, as we pointed out above, the testimony they did offer was relevant to the question of market value, and where there are opinions based upon comparable sales, other testimony bearing on the question of market value is not *ipso facto* excluded.
>
> The question of value, therefore, was for the jury and its function, despite the testimony of comparable sales by government witnesses, was to weigh testimony of both sides in search of the amount of compensation that would probably have been offered and accepted in an arm's length transaction at the time of taking. The jury would have no right to ignore testimony offered by the landowners' witnesses simply because it was not based on comparable sales even though on consideration of the testimony it might attach great or little weight vis-à-vis the testimony of sales. And it was entitled to take into consideration the effect of cross-examination

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[72] 384 F.2d 789, 790 (7th Cir. 1967).

of government experts upon their estimates of value from prior sales.[73]

[73]Unites States v. 344.85 Acres, 384 F.2d 789, 792 (7th Cir. 1967).

In determining the type of jury instructions to give, the courts have been careful not to suggest that the jury should give more weight to the evidence presented by one side or the other.[74]

It is also clear that, even though the "comparable sales" approach is an acceptable means of valuing property:

> ...(T)he law is not wedded to any particular formula or method for determining fair market value as the measure of just compensation. Reproduction costs, capitalization of net income or an interaction of these determinants may also be considered. ... The weight to be given to factual and opinion evidence on fair market value is for the jury.[75]

XVI. Defending against the Government's favorite objection: speculation

One of the Government's favorite objections at trial is "speculation." Since an owner's case is often based upon a potential, rather than the actual, use of the property, it is usually the Government – and not the owner – which raises the "speculation" objection.

The courts have consistently ruled that just compensation for the taking of property includes consideration of all elements of value that inhere in the property.[76] The term "all

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[74]See, e.g., United States v. Certain Land in the City of Fort Worth, 414 F.2d 1026 (5th Cir. 1969) where the court affirmed the trial court's refusal to grant a Government-proposed instruction that charged the jury that "A sale in the open market of the property in question reasonably near in time to the date of taking is the best evidence of its fair market value" or "Your are instructed that a purchase in the open market of the property in question reasonably near in time to the date of taking is an indicator of its fair market value."

[75]Unites States v. 421.89 Acres, 465 F.2d 336, 338-9 (8th Cir. 1972).

[76]Olson v. United States, 292 U.S. 246, 255 (1934).

elements" generally takes into account all factors which a hypothetical buyer and seller would consider in determining the purchase price the property.

Since a hypothetical buyer and seller obviously consider the future use and developability of the property in determining the price to be paid, the courts generally allow into evidence valuation testimony based upon potential uses, so long as those uses are not considered speculative. Probable, but not actual, conditions which the courts have allowed the trier of fact to consider include the probability of assembly, securing a rezoning or a permit, and the probability of annexation into a municipality. Since these conditions involve probabilities, rather than actualities, they often draw "speculation" objections from the Government.

The Supreme Court described "speculation" in the context of federal condemnations in the case of *Olson v. United States*:

> Elements affecting value that depend upon events or combinations of occurrences which, while within the realm of possibility, are not fairly shown to be reasonably probable, should be excluded from consideration, for that would be to allow mere speculation and conjecture to become a guide for the ascertainment of value – a thing to be condemned in business transactions as well as judicial ascertainment of truth.[77]

Federal courts often contrast "speculation" with "reasonably probability." In *United States v. 17.83 Acres*, for example, the court states:

> Without showing the cost of development, the Physiocs' contention that a communications tower would be profitable is conclusory. Furthermore, without electrical power, such use is merely speculative and not "reasonably probable."[78]

One court has held that the potential issuance of a permit and a rezoning is not speculative if it is "reasonably *possible*."[79]

The Government has argued that the use of a particular method of valuation and assumptions made under it were "speculative," and that the court should therefore exclude any testimony of the highest and best use and appraisal based upon those matters at trial. In *United States v. Certain Lands Situated in Detroit*,[80] the Government used the "speculation" objection to object to the owner's use of the income capitalization method of valuation, the assumption of

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[77]292 U.S. 246, 257 (1934).

[78]1998 U.S. App. Lexis 5238 (4th Cir. 1998)

[79]United States v. 320 Acres, 605 F.2d 762, 819 (5th Cir. 1979).

[80]547 Fed Supp. 680 (E.D. Mich. 1982).

certain profit flows under that method, and the probability that the condemned property would have been assembled with another property. While the court's decision in that case merely denied the Government's motion in limine, ruling that the contested matters raised factual issues to be determined at trial, the case demonstrates the type of evidence to which the Government can be expected to object on the grounds of speculation.

The owner's lawyer, whose case is based upon any *potential*, as opposed to actually existing, condition, should anticipate and prepare for a "speculation" objection. The attorney should marshal the evidence which proves a reasonable probability that, but for the taking and/or the project, that condition would have occurred. The owner's lawyer should not only anticipate an objection at trial, but should be prepared to defend a pre-trial motion in limine to exclude speculative evidence and should be prepared to present evidence and argument at a screening or *Daubert* hearing.[81]

XVII. Dealing with the new federal expert basis rule

The federal rule regarding the admissibility of facts and data upon which an expert bases an opinion has recently been amended.[82] Since the new rule may be significantly different from the rule applied in the practitioner's state court, it is important for the attorney to familiarize herself with the new federal rule.

Rule 703 of the Federal Rules of Evidence previously provided as follows:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Under this rule, the federal courts were divided as to (a) whether the expert was allowed to testify to facts or data upon which she relied if those facts or data were not otherwise admissible, and (b) the type of instruction, if any, which the court should give the jury, if those facts and data were allowed in evidence. Some courts, noting that litigants were utilizing Rule 703 as a conduit to introduce otherwise inadmissible evidence, either prohibited the expert from testifying about this information or instructed the jury that they should consider the information only in judging the expert's opinion, but that they should not consider the testimony as evidence of the truth or falsity of the given fact or data.

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[81]See, Section XIV, page 28 herein.

[82]Fed. R. Evidence 703, amended December, 2000.

In an effort to address this issue, the Supreme Court amended Rule 703 in 2000 in part by adding the following sentence:

> Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

Since condemnation trials depend so heavily on expert testimony, and since the facts and data upon which condemnation experts often rely may be deemed inadmissible if testified to only by those experts (because of authentication, best evidence, and hearsay concerns) the amendment to the rule may affect the manner in which practitioners now prepare and present their cases.

Real estate appraisers typically rely upon facts and data which arguably constitute inadmissible hearsay. Appraisers, for example, often rely upon verbal confirmations of circumstances surrounding comparable sales and leases, as well as cost estimates, and other opinions, provided by other experts. These confirmations, estimates, and opinions are statements, made out-of-court and not under oath, so that a court could determine that they constitute inadmissible hearsay. Under the prior rule, most courts allowed the appraiser and other experts to testify about the bases of their opinions, even if those bases contained otherwise inadmissible information.[83] The courts generally allowed the expert to testify to these matters in order to expedite the trial. The prior rule, however, contained no test for the court to apply in order to determine whether the expert could testify to these matters.

Under the amended Rule 703, the proponent of the expert opinion is barred from presenting the inadmissible facts or data to the jury unless the Court determines that the probative value in assisting the jury in evaluating the expert's opinion substantially outweighs the prejudicial effect of the evidence. In its notes, the Advisory Committee has suggested that, if, over objection, the court allows the otherwise inadmissible facts or data to be introduced into evidence, then the opponent of the evidence is entitled to a limiting instruction that the facts or data may not be used substantively.

XVIII. Allowing the opposing side the opportunity to discover the attorney's mental impressions

Over the years, federal courts have disagreed over the discoverability of an attorney's mental impressions, opinions, and legal conclusions when those matters have been communicated to experts intended to be called as witnesses at trial. The clear trend today is to require disclosure of those communications. The two most recent federal decisions deciding the issue have required

[83] See, e.g., United States v. 5,139.5 Acres, 200 F.2d 659 (4th Cir. 1952).

disclosure on the grounds that Rule 26, as recently amended, requires disclosure of all communications from the attorney to her testifying expert.[84]

While the former Rule 26(b)(4) required a party to disclose the "substance of the facts and opinions to which the expert was expected to testify and a summary of grounds for each opinion," the amended Rule 26(a)(2) now requires much fuller disclosure. Now, in addition to being required to disclosing "all opinions to be expressed and the basis and reasons therefor," parties are required to disclose "the data and other information considered by the witness in forming the opinions." The word "considered" has been held to be much broader than, for example, the phrase "relied upon" and one court has held:

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[84]Manufacturing Administration and Management Systems, Inc. v. ICT Group, Inc., 212 F.R.D. 110 (E.D.N.Y. 2002); Baum v. Village of Chittenango, Civil Action No. 5:00-CV-1516 (NAM/GLS), 2003 U.S. Dist. LEXIS 18393 (N.D.N.Y. 2003).

> Rule 26, therefore, plainly requires disclosure of all information reviewed in the formulation of an expert's opinion, notwithstanding the weight of any actual or perceived impact of that information on the expert's ultimate position.[85]

The term "all information reviewed in the formulation of the expert's opinion" has been held to include the lawyer's mental impressions, conclusions, and legal opinions previously considered an attorney's "core" work product, and therefore undiscoverable, even if shared with a testifying expert.[86]

Unless the practitioner can assure herself that, in her federal district and circuit, her mental impressions, conclusions, and legal opinions are not discoverable if communicated to a testifying expert, she would be well advised to refrain from making those communications, whether verbally or in writing. If the attorney determines that it is necessary to communicate "core work product" matters to the expert, the attorney should choose language which would not disadvantage that attorney or client should the communication be disclosed in court. Communications which may be embarrassing to a party, attorney, or witness and may be detrimental to a party's case could include those which:

- May be construed as evidencing an attorney's attempt to influence the opinion of the expert, especially one which seeks to persuade an expert to adopt the opinion of the attorney or her client.

- Evidences a close relationship between the attorney and expert, which in turn may be interpreted as a relationship in which the expert would be inclined to adopt the suggestions of the attorney.

- Deal with disputes between the party (and attorney) and the expert over the scope of the expert's assignment, the fulfillment of the expert's responsibilities, or the payment of the expert's fees.

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[85]Manufacturing Administration and Management Systems, Inc. v. ICT Group, Inc., 212 F.R.D. 110, 115 (E.D.N.Y. 2002)

[86]See, e.g., Manufacturing Administration and Management Systems, Inc. v. ICT Group, Inc., 212 F.R.D. 110 (E.D.N.Y. 2002); Baum v. Village of Chittenango, Civil Action No. 5:00-CV-1516 (NAM/GLS), 2003 U.S. Dist. LEXIS 18393 (N.D.N.Y.

- Mention any matter (e.g., a fact, another expert, or another expert's opinion) which the party does not wish for its opponent to know or does not wish to be disclosed at trial.

XIX. Dealing with prior rulings in other cases in the same federal project

Some federal projects, such as post offices and courthouses, are small and require the acquisition of relatively few properties. Other federal projects, like national parks and preserves, may be extremely large and require the acquisition of hundreds of parcels. In large multi-parcel projects, it is important for the owner's attorney to familiarize herself with the issues being raised and litigated in other cases within the same project. This may assist the owner in refining or jettisoning certain theories. While not technically binding on parties to other cases, legal rulings, and sometimes even valuations decisions, in one case can impact other cases in the same project.[87]

Some of the issues which the attorney anticipates arising in her case may arise and be decided in earlier cases. These issues may involve the scope of the project, project influence, probability of rezoning, probability of securing permits, and illegal use. If the same judge or commission is likely to rule on the same issue in successive cases, the attorney should monitor the status of issue-resolution in other cases and consider consolidation or collaboration with owners' counsel in the earlier cases.

Trying a case to a land commission which has already rendered valuation reports on other properties in the same project presents a unique challenge. On the one hand, no proposition of law is as fundamental as the right of a litigant to have its case decided by the evidence and argument presented in its trial without regard to matters presented in another trial in which it did not participate. Plaintiff A, for example, who breaks his arm in an automobile accident, is entitled to a trial on the facts, opinions, and arguments presented in his particular trial, and his award should not be affected by the amount of damages recovered by Plaintiff B, who broke his arm in another accident. Indeed, Plaintiff A would have the right to exercise a peremptory challenge to excuse a juror who sat on a Plaintiff B's jury.

Trying a case to a land commission, however, raises the possibility that the determination of just compensation for one owner will be affected by matters raised or decided by that commission in a trial involving another owner, in which the first owner has no right to participate.

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[87] See, United States v. 320 Acres, 605 F.2d 762 (5th Cir. 1979) as an example of complications which may occur because of prior rulings in cases within the same project.

Rule 71A(h) allows the court to appoint a commission under certain circumstances and allows the parties to examine and object to any designated commissioner. The rule also allows the court to disqualify one or more commissioners. A problem may arise, however, if a party seeks to disqualify one or more commissioners because they have already determined valuation awards for similar properties in the same project.

One court has recognized the unfairness of having a commission, which has already formed opinions of value, deciding a pending case. In 1952, the Tenth Circuit, discussing the propriety of the same commission, which had already expressed an opinion of value of the subject parcel, sitting as the appointed tribunal:

> Under the Federal rule the commissioners, in large measure, serve the function of a jury. The proceeding before the commission is quasi-judicial in character. We do not think it was appropriate to appoint as commissioners, under the Federal Rule, persons who had theretofore viewed the land, arrived at an opinion as to its value, and formally expressed that opinion to the court. A juror who has formed and expressed an opinion about the issues in a case is ordinarily regarded as disqualified.[88]

If it is inappropriate for commissioners to decide a case, after they have already formed an opinion of value on the property involved in that case, the question arises as to whether it is appropriate for commissioners to decide the value of one piece of property, after they have already determined the value of a neighboring piece of property. While such a proposition may to some seem fundamentally unfair, such is a distinct possibility under Rule 71(h) commission appointments. While the rule itself never mentions "uniformity of results" as one of the objectives of commission trials, the Supreme Court has mentioned the importance of achieving "uniformity of results" through commission trials. In *United States v. Merz,*[89] the Supreme Court states:

> The use of a commission to resolve the issue of just compensation is justified by the facility with which commissioners may inspect the property and a likelihood that uniformity of awards may be realized expeditiously.

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[88] United States v. Wallace, 201 F.2d 65, 67 (10th Cir. 1952).

[89] 376 U.S. 192, 196 (1964).

In *United States v. 5.00 Acres of Land,*[90] the owners appealed the trial court's refusal to disqualify commissioners who had heard and decided 39 earlier cases of unrepresented owners, claiming that those commissioners had become prejudiced by their involvement in the earlier cases. The Eleventh Circuit affirmed the trial court's decision not to disqualify the commission. While the court noted that, since the protection of a jury is not afforded, "the courts must be particularly vigilant to ensure that every precaution is taken to safeguard the rights of the individual landowners,"[91] it noted that "the purpose of the commission is to hear all cases for an entire project (citation omitted) and achieve some uniformity of result."

It is noteworthy that in *United States v. 5.00 Acres of Land,* there was nothing in the record to indicate the owner's rights had not been secured. An owner facing this situation should seek the earliest possible trial date so that the commission can hear an owner's case with the effective assistance of counsel first, or at least somewhat concurrently with, cases involving unrepresented owners (in which there is no effective rebuttal to the government's position). If a timely trial is denied, the owner should take care to build a record of all his attempts to obtain a timely trial, and of any demonstrable attempts by the government to manipulate the trial calendar to its undue advantage. This might lead to a different result than the one in *United States v. 5.00 Acres of Land.*

XX. Jury instructions and instructions to commissioners

One area of practice which is often not given enough attention by the attorneys is instructions to the jury or the commission. The instructions which the court gives to the jury or commission are of utmost importance and can, in certain cases, be outcome determinative. The careful practitioner makes the preparation of proposed jury or commission instructions a key part of her case plan. If a condemnation case can be thought of as a body, then the evidence is the "heart" or "guts" of the case, and the argument is the "skin." But the law, as summarized by the court's instructions to the jury or commission, is the all-important "skeleton," which must support all of the other parts of the body. No matter how well-presented or otherwise compelling a party's case may be, if a party's evidence or argument does not appear to the jury or commission to fit within the legal "skeleton," as instructed by the court, the party risks losing the trial.

There are no standard instructions in federal condemnation cases.

The Government's lawyers may provide *their* "standard" instructions to the court with the "assurance" that "These are the instructions that the courts ***always*** give in ***all*** of our cases." The careful owner's attorney will check each of the Government's proposed instructions to determine

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[90]673 F.2d 1244.

[91]United States v. 5.00 Acres of Land, 673 F.2d 1244, 1247.

whether (a) it reflects the law, and (b) whether it inappropriately suggests adoption of the Government's case.

Federal appellate decisions are filled with statements of law, policy, and practice, which, while accurate, in and of themselves, may nevertheless be inappropriate as an instruction to the commission or jury.[92] The Government's lawyers may seize upon such language which is particularly favorable to their case, and suggest that the court include it within its instructions. The attorney for the owner should pay special attention to attempts by the Government to secure instructions which favor their type of valuation methodology or evidence.[93] Unless the instruction is balanced and impartial, the trial court may not give the instruction, even if it contains language extracted verbatim from written appellate opinions.

Another important matter to consider when preparing proposed instructions is to determine whether a key element of a party's case may (or must) be established by an instruction from the court. It is fundamental that the law to be applied is never a factual issue,[94] and yet parties often elicit testimony – oftentimes from experts – about "what the law is." If a party's case depends, in part, on the jury or commission understanding a particular law or it application, the attorney should consider, not only asking the court to take judicial notice of a particular law, but also instructing the jury or commission about that law at the conclusion of the case. This is particularly important in federal condemnation trials where a proposition of state law may be particularly relevant to a party's case.

A. Instructions to the jury

Rule 51 of the Federal Rules of Civil Procedure establishes the general rules regarding the court's instruction of the jury at the end of the trial. That rule allows the judge to instruct the jury on the law, either before or after closing argument, but requires the judge to inform counsel of its proposed action on any request for a jury instruction before closing arguments commence.

The rule requires a party to object, with specificity, to any instruction prior to the jury retiring, in order to preserve its right to appeal. The rule also requires the court to allow a party to make its objections outside of the hearing of the jury.

Parties to a federal condemnation case should be prepared to argue proposed jury

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[92] Unites States v. 344.85 Acres, 384 F.2d 789 (7th Cir. 1967).

[93] See, Section XV, page 32, herein.

[94] Unites States v. 320 Acres, 605 F.2d 762, 818 (5th Cir. 1979).

instructions as early as the first day of trial. Rather than conducting a lengthy "charge conference" at the conclusion of the evidence, some federal judges take approximately 30 minutes each evening to address contested jury instructions. This procedure allows the court to proceed immediately to closing arguments or jury instructions, at the close of the evidence, thereby sparing the jury the often lengthy wait involved in a protracted "charge conference."

B. Instructions to the commission

For various reasons, instructions to a commission can be even more significant than instructions to a jury. For this reason, attorneys in a commission trial must be even more careful to consider the effect of the court's instructions than in a jury trial.

A commission and a jury may view instructions from the court differently. Because of the different dynamics involved in the two types of trials, a commission may view their instructions from the court as a charter to be strictly followed and applied, as the commission is reaching their decision. While a jury may view instructions from the court as a guide to be referred to as and when they deem it necessary, a commission may follow the court's instructions as mechanically as one would read and apply a manufacturer's instructions while putting together a bicycle.

While both the commission and the jury are required to follow the court's instructions, a jury verdict is far less likely to be overturned because of its failure to follow the court's instructions than is a commission's report. Verdicts in most eminent domain trials are general verdicts, which do not require the jury to explain their award. Commission reports, on the other hand, are required to contain written findings, supporting their recommended award.

Since a commission's findings are so easily reviewable for consistency with the court's instructions, it is more likely that a commission will be more mechanical than a jury in applying the court's instructions to their findings.

In addition, a commission may apply the court's instructions more mechanically than a jury simply out of a heightened sense of obligation to the court. While a jury may feel that its sole objective is to do justice, commissioners may feel that one of their primary objectives is to be faithful to the court which appointed them. Even if a commission may be inclined to rule one way because it feels that position is either more compelling or fair, it may be much more likely to rule a different way, simply because it feels that the alternative award is more consistent with the court's instructions.

Given these possibilities, it is imperative that the owner review carefully the Government's or the court's proposed instructions to the commission. An owner's attorney should not be reluctant to oppose a court-proposed instruction, simply because the court has given that instruction in other cases or because it is the court, as opposed to the opposing party, which is suggesting it. A general instruction which may be appropriate in the vast majority of trials may be inappropriate in the trial at bar, because of special circumstances in that case.

The success of the adversarial system depends, in large part, on the input of the attorneys in determining the appropriate instructions to be given.

The Supreme Court has stated that, in commission trials:

> ... (T)he litigants have a responsibility to assist the process by specifying their objections to instructions, by offering alternate ones, and by making their timely objections to the report in specific, rather than in generalized form, as required by equity practice.[95]

A set of instructions recently given by a district court to a commission is enclosed in the appendix. These instructions, as well as all other documents contained within the appendix, are not included as a statement that they necessarily reflect the law or are appropriate, but rather to provide the practitioner of an example of instructions which have been given to commissions in the past.

The United States Supreme Court has observed that a judge who uses a commission in a federal condemnation trial "establishes a tribunal that may become free-wheeling, taking the law from itself, unless subject to close supervision."[96] A fundamental responsibility of the court is thus to instruct the commission on the law to be applied. As the Supreme Court has noted:

> The instructions should explain with some particularity the qualifications of the expert witnesses, the weight to be given other opinion evidence, competent evidence of value, the best evidence of value, illustrative examples of severance damages, and the like. The commissioners should be instructed as to the manner of the hearing and the method of conducting it, of the right to view the property, and of the limited purpose of viewing. They should be instructed on the kind of evidence that is inadmissible and the manner of ruling on it.
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> The commissioners should also be instructed as to the kind of report to be filed. Since by Rule 71A(h) the report has the effect of a master's findings of fact under Rule 53(e)(2), the commission should be instructed as to what kind of findings should be included.[97]

In larger projects, instructions to the commissioners may issue long before a particular case is set for trial or even filed. Owner's counsel should carefully review the instructions at the

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[95]United States v. Mertz, 376 U.S. 192, 197 (1964).

[96]United States v. Mertz, 376 U.S. 192, 197 (1964).

[97]United States v. Mertz, 376 U.S. 192, 197 (1964).

outset of engagement and file any necessary objections as early as possible. Counsel should also seek any additional instructions which may pertain to the owner's particular case.

Part III: The Top Ten Rules for Trying a Condemnation Case in Federal Court

When preparing a case for trial, it is often helpful to have a checklist of "do's" and "don'ts". The following is this attorney's idea of a list of the top ten rules to follow in federal court.

1. Read and understand the Federal Rules of Civil Procedure, Local Rules, and all court orders regarding disclosures which apply to the case.

2. Keep track of all deadlines, and create and implement a case plan which meets all deadlines.

3. Retain only those experts who are able to meet the strict federal disclosure rules and who appreciate the critical importance of meeting them.

4. Retain more than one expert per specialty, so that, if the primary expert is not able to assist in the case, the client has an alternate.

5. Communicate to your experts – whom you may call as witnesses at trial – only those of your mental impressions, conclusions, and legal opinions which you are willing to have disclosed to the opposing party and disclosed at trial.

6. Make certain that all facts and opinions which are needed for trial are included in the expert reports which are exchanged, especially essential predicate facts and opinions and facts and opinions under alternative scenarios.

7. Make certain that the expert reports exchanged include, not only the expert's opinions and the basis of those opinions, but also the other documents required under Rule 26.

8. Make plans to prepare and exchange a rebuttal case within in the required time period.

9. At trial, object to the direct examination of an expert regarding matters not addressed in that expert's report.

10. At trial, be prepared to cite to the judge the location in your expert's report where a matter objected to by the opposing side is referenced.

Part IV: Appendix

FRCP 26 Deadlines

FRCP	Action	Deadline
26(d) Timing and Sequence of Discovery	Except where authorized under the rules or by order or agreement of parties, party may not seek discovery from any source before the parties have conferred as required by Rule 26(f).	
26(f) Meeting of Parties; Planning for Discovery	Except when otherwise ordered, parties must confer to consider nature and basis of their claims and defenses and possibilities of quick settlement or resolution of case, to make arrangements for disclosures under Rule 26(a)(1) and to develop proposed discovery plan that indicates parties views on: 1. what changes to timing, form or disclosure requirements under Rule 26(a) should be made and statement as to when disclosures under Rule 26(a)(1) were made or will be made 2. subjects on which discovery may be needed, when disc. should be completed, and whether disc. should be conducted in phases or limited/focused on particular issues 3. what changes should be made in limitations n discovery imposed by these rules or local rule, and what other limitations should apply 4. Any other orders that should be entered by Ct. under Rule 26(c) or under Rule 16(b) and (c)	Confer – As soon as practicable and in any event, at least 21 days before scheduling conference held or scheduling order due under Rule 16(b) (per Rule 16(b) order shall issue w/in 90 days after appearance of defendant and within 120 days after complaint served on defendant) Within 14 days of conference, attorneys of record must submit to Court written report outlining plan (Court may reduce these time periods)
16(b) Scheduling and Planning	Court shall enter scheduling order after either reviewing report of parties under 26(f) or consulting with attorneys with time limits for: 1. Joining parties and to amend pleadings; 2. File motions; and 3. Complete discovery. Order may also include: 4. Modifications of time for initial and expert disclosures;	Shall issue as soon as practicable but in any event, within 90 days after appearance of Defendant and within 120 days after complaint served on Def.

	5. Dates for pretrial conferences; and 6. Any other matters appropriate in circumstances of case.	
26(a)(1)	Initial Disclosure – Except to extent otherwise stipulated or ordered by Ct., party must provide to other parties (unless solely for impeachment): a. Name, address, phone number of each ind. likely to have discoverable info. that disclosing party may use to support claims or defenses, identifying the subjects of the info. b. Copies of or description by category and location of all docs, data compilations, and tangible things, in possession, custody or control of party and that disclosing party may use to support claim or defense c. Computation of any category of damages claimed by disclosing party, making available for inspection & copying (under r. 34) unprivileged upon which computation based d. Insurance docs	Disclosures must be made at or within 14 days after Rule 26(f) conference unless diff. time set by stipulation or court order, unless a party objects during the conference that initial disclosures aren't appropriate and states objections in Rule 26(f) discovery plan.
Rule 26(a)(2)(A) and (B) Disclosure of Expert Testimony	Party shall disclose identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705. If expert witness, the disclosure shall be accompanied by written report prepared and signed by witness. Report shall contain all opinions to be expressed and bases, data or other info considered by witness in formulating opinions, any exhibits to be used as summary or support of opinions, witness qualifications, including list of all publications in past 10 years, compensation to be paid for work and testimony, and list of any other cases in which testified at trial or deposition in past 4 yrs.	Disclosure shall be made as directed by Ct. In absence of Ct. order or stipulation of parties, disclosure shall be made at least 90 days before trial date or date that case is to be ready for trial. If rebuttal evidence, within 30 days after disclosure by other party.
Rule26(a)(2)(C) Disclosure of Rebuttal Testimony	If evidence intended solely to contradict or rebut evidence on the same subject matter identified by another party under 26(a)(2)(B), disclosures must be made in accordance with requirements of 26(a)(2) (A) and (B)	Within 30 days after disclosure by other party.
26(a)(3)	Party must provide other party and file w/ Ct., the	Unless otherwise directed

Pretrial Disclosures	following info. regarding evidence it may present at trial (other than solely for impeachment): a. name (if not previously provided), address and phone of witnesses identifying those which party expects to present and those they may call if need arises b. designate witnesses whose testimony is expected to be by depo. transcript with depo. transcript c. identification of each doc. or exhibit, including summaries of evidence, separately identifying those the party expects to offer and those which party may offer if need arises	by Ct., these disclosures must be made at least 30 days before trial. Party has 14 days to serve and promptly file list of any objections with grounds to use of depositions transcript and objections with grounds to admissibility of materials identified under rule 26(a)(3)(c). Objections not disclosed other than under Rules 402 and 403 of Fed. Evidence are waived unless excused by the Ct. for good cause.
Rule 16(b) Pretrial Conferences; Scheduling and Planning	After receiving report from parties under Rule 26(f) or after consulting with parties by scheduling conference or other means, the Court shall enter a scheduling order. The order may include: (4) modification to disclosures under 26(a) and (e)(1) and extent of discovery (5) date(s) for conferences before trial, a final pretrial conference and trial	Order shall issue as soon as practicable, but in any event, within 90 days after appearance of defendant and within 120 days after complaint served on defendant.