DISCOVERY ETHICS IN CONDEMNATION

Oregon Eminent Domain Conference
Portland
May 28, 2008

Mark J. Fucile

Fucile & Reising LLP
115 NW 1st Avenue, Suite 401
Portland, OR 97209
503.224.4895
mark@frllp.com
www.frllp.com

Mark Fucile of Fucile & Reising LLP focuses on legal ethics, condemnation litigation and product liability defense. In his legal ethics practice, Mark handles professional responsibility, regulatory and attorney-client privilege matters and law firm related litigation for lawyers, law firms and legal departments throughout the Northwest. Mark is a former member of the Oregon State Bar Legal Ethics Committee, is the past chair and a current member of the Washington State Bar Rules of Professional Conduct Committee and is a member of the Idaho State Bar Professionalism & Ethics Section. Mark is a contributing editor-author for the Oregon State Bar's Ethical Oregon Lawyer and the Washington State Bar's Legal Ethics Deskbook. He is also the ethics columnist for the Multnomah Bar's Multnomah Lawyer and the Washington State Bar News and is a regular contributor on law firm risk management to the Oregon State Bar Bulletin, the Idaho State Bar Advocate and the Alaska Bar Rag. In his condemnation practice, Mark represents property owners in direct and inverse condemnation cases in state and federal court and also has significant experience representing agencies and utilities as condemners. He is the contributing editor for condemnation/inverse condemnation for the Oregon State Bar's Real Estate & Land Use Digest and was the author of a two-part series on Oregon condemnation procedure and valuation in 2004 for the Oregon State Bar's Litigation Journal. Mark is admitted in Oregon, Washington, Idaho, Alaska and the District of Columbia. B.S., Lewis & Clark College, 1979; J.D., UCLA School of Law, 1982.

Introduction

Discovery in condemnation cases in Oregon state court is both more confined and more expansive than a typical civil case. It is more confined in the sense that the focus of most condemnation cases (absent a challenge to the taking itself) is solely on valuation. Discovery, therefore, usually involves an investigation of the possible uses of the property, the owner's plans for the property, any environmental or other permitting issues affecting the property, past sales or efforts to sell the property and sales of comparable properties. Discovery is more expansive because the parties are now required to exchange appraisal reports before trial. That albeit limited form of expert discovery is vastly different than other civil cases where there is no expert discovery and "trial by ambush" remains the rule rather than the exception.

These unique aspects of condemnation litigation in Oregon state court provide the context for three key discovery ethics issues that are examined in this paper and the accompanying presentation: (1) government-retained appraiser contact with represented property owners; (2) contacts with opposing experts beyond statutory appraisal exchange and trial; and (3) the appraisal reports that must be exchanged to opposing parties.[1]

[1] Although the procedural mechanisms under ORS Chapter 35 for private condemners, such as utilities, vary somewhat from those applicable to public condemners, such as cities, the issues discussed in this paper and the accompanying presentation apply with equal measure to both.

I. Government-Retained Appraiser Contact With Represented Property Owners

Since the Legislature amended ORS Chapter 35 in 1997, a property owner has had a specific right under ORS 35.346(3) to accompany the government's appraiser on the appraiser's inspection of the property involved in a condemnation case. At the same time, RPC 4.2[2] generally prohibits a lawyer from causing one of the lawyer's agents from initiating communications with a represented party about the subject of the representation. Therefore, a government lawyer cannot direct the appraiser to interview the property owner during the inspection if the property owner's lawyer has not given specific permission for such communication to take place. *See* OSB Formal Ethics Ops 2005-161 (dealing with State agency personnel in particular), 2005-6 (discussing the "no contact" rule generally). If, however, the property owner *volunteers* a statement to the appraiser that runs counter to the property owner's position at trial, that statement should not violate the "no contact" rule and may be considered an admission. *See State Dept. of Transportation v. Jeans*, 80 Or App 582, 585-86, 723 P2d 344 (1986)

[2] RPC 4.2 reads:

> "In representing a client or the lawyer's own interests, a lawyer shall not communicate or cause another to communicate on the subject of the representation with a person the lawyer knows to be represented by a lawyer on that subject unless:
>
> "(a) the lawyer has the prior consent of a lawyer representing such other person;
>
> "(b) the lawyer is authorized by law or by court order to do so; or
>
> "(c) a written agreement requires a written notice or demand to be sent to such other person, in which case a copy of such notice or demand shall also be sent to such other person's lawyer."

(noting that a property owner's voluntary statement to an appraiser during the course of an inspection might be admissible as a party admission).

II. Contacts with Opposing Experts

Contacts with opposing experts to learn their views about a specific case outside the context of appraisal reports that are required to be exchanged under ORS 35.346 and trial (through cross-examination) present an unusual intersection of Oregon ethics and condemnation law. Under RPC 3.4(c)[3], lawyers are enjoined from knowingly violating the rules of the forum in which a case is pending. As noted, ORS 35.346 now allows expert discovery in the form of appraisal exchanges.

Oregon State Bar Formal Ethics Opinion 2005-132 addresses contacts with opposing experts in civil litigation generally. It draws an important distinction between federal and state courts. In the former, where the vehicles for expert discovery are specified in FRCP 26(b)(4), lawyers in federal civil litigation are limited to the avenues provided in the rules—interrogatories and depositions. In Oregon state court beyond condemnation, by contrast, there is generally no expert discovery. 2005-132, therefore, concludes that contact with opposing experts is not generally prohibited in state court proceedings. 2005-132, however, does *not* deal with condemnation. Because ORS 35.346 now provides limited expert discovery in condemnation in the form of appraisal

[3] RPC 3.4(c) reads:

> "A lawyer shall not:
>
> . . . .
>
> "(c) knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists."

exchange, an argument could be made that the proper analysis in condemnation is now closer to the federal court situation posited in 2005-132: because a specific form of expert discovery is recognized under the controlling rules, informal contacts are impliedly prohibited. This intersection of ethics and condemnation law awaits further development by the ethics opinions and case law.

At the same time, it should be noted that the scenario just described assumes the expert is still under retention by a party as either a testifying expert or a litigation consultant. In *State v. Riddle*, 330 Or 471, 8 P3d 980 (2000), the Supreme Court held that contact with a party's former expert is permitted as long as the contact does not invade the party's work product protection or attorney-client privilege. This also assumes that an expert is also not a fact witness. In *Gwin v. Lynn*, 344 Or 65, 176 P3d 1249 (2008), the Supreme Court held that an expert who is also a fact witness is subject to pretrial discovery regarding the person's role as a fact witness. The Court of Appeals, for example, held in *City of Portland v. Nudelman*, 45 Or App 425, 608 P2d 1190 (1980), that an appraisal report made to assist with project planning rather than litigation was discoverable. *Accord State Dept. of Trans. v. Winters*, 170 Or App 118, 132, 10 P3d 961 (2000) (citing *Nudelman* affirmatively on this point).

III. Appraisal Exchange

RPC 3.4(a) prohibits lawyers from "unlawfully obstruct[ing]" a party's access to evidence and RPC 3.4(d)[4], in turn, requires lawyers to make "reasonably diligent effort to comply with a legally proper discovery request by an opposing party[.]" A lawyer's ethical duties in this regard, therefore, flow from the underlying rules of the forum.

As noted earlier, in 1997 the Legislature brought expert discovery to Oregon condemnation cases. Under revisions to ORS 35.346, the parties to a condemnation case are now required to disclose appraisal reports at three distinct points:

- The public agency's prelitigation offer in acquisitions valued at $20,000 or more must be accompanied under ORS 35.346(2) by the appraisal report upon which the agency based its offer.

- If the property owner rejects the agency's offer and the acquisition moves into litigation, the property owner must provide the agency with its appraisal report at least 60 days before trial or arbitration under ORS 35.346(4).

---

[4] RPCs 3.4(a) and (d) read:

> "A lawyer shall not:
>
> "(a) knowingly and unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
>
> . . . . .
>
> "(d) in pretrial procedure, knowingly make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party."

- If a case proceeds to trial, ORS 35.346(5)(b) requires each side to provide the other with all other appraisal reports obtained "as part of the condemnation action"—whether they will be used at trial or not.

Further, under ORS 35.346(8), if an appraisal "relies on a written report, opinion or estimate of a person who is not an appraiser, a copy of the written report, opinion or estimate must be provided with the appraisal" and if an appraisal "relies on an unwritten report, opinion or estimate of a person who is not an appraiser, the party providing the appraisal must also provide the name and address of the person who provided the unwritten report, opinion or estimate."

The penalty under ORS 35.346(5)(a) for the failure to follow these exchange requirements is that the appraisal involved cannot be used at trial.

The amendments to ORS 35.346 that created the appraisal exchange mechanism left open precisely what constituted an "appraisal report" and did not address whether draft reports must also be exchanged. The Oregon Supreme Court answered those questions in *Dept. of Trans. v. Stallcup*, 341 Or 93, 138 P3d 9 (2006). In *Stallcup*, the Supreme Court held that the appraisal exchange requirement only applies to completed (*i.e.*, signed) reports, not drafts. Beyond *Stallcup*, however, drafts and other appraisal work papers (or those of other experts) should remain discoverable (upon timely and proper document request or subpoena) for potential use on cross-examination once the appraiser (or other expert) has testified on direct.