

# Discovery in Condemnation

## A Plan and Purpose

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## **STRATEGIC DISCOVERY**

### **Will Discovery Help Settle the Case or Improve Your Client's Chances at Trial?**

“He discovereth deep things out of darkness, and bringeth out to light the shadow of death.”  
Job 12:22.

“America was discovered accidentally by a great seaman who was looking for something else. When discovered it was not wanted, and most of the exploration of the next 50 years was done in the hope of getting through or around it. America was named after a man who discovered no part of the New World. History is like that, very chancy.”

Samuel Eliot Morison, *The Oxford History of the American People* (1965).

“Haystack everything. Give him so much material he'll never see the end of it.”  
“Just remember one thing ... discovery is a two-way street.”

Michael Connelly, *The Reversal* (2010).

### **DISCOVERY STRATEGY**

#### **12 Questions to Ask Yourself**

1. What discovery is allowed?
2. What kind of evidentiary proceeding will I have?
3. What Rules of Evidence will apply?
4. What are the Legal issues?
5. What facts do I need to know?
6. What surprises would I like to avoid at trial?
7. What surprises would I like to save for use at trial?

8. What discovery is justified by the case?
9. What will depositions, or interrogatories, or requests for production do for me?
10. What is the best order in which to accomplish discovery?
11. Who is likely to end up paying for the discovery?
12. Does it matter if my opponent responds in kind?

### **12 THINGS TO DO:**

1. Know your judge.
2. Know your discovery rules.
3. Ask the 12 questions.
4. Make your list of what you need to prove, and how to prove it.
5. Make a list of what your opponent will try to prove, and how you will prevent it.
6. Start with a standardized set of interrogatories, or requests for production, for deposition questions.
7. Look, personally, at every comparable property used by every appraiser.
8. Know the appraisers and their body of work:
  - How often do they testify in condemnation?
  - On which side do they normally testify?
  - Any disciplinary actions?
  - Any inconsistencies in their body of work?
9. Check the accuracy of each appraiser's data regarding each comparable sale.
10. Check the subsequent history of each comparable sale.

11. Know the Yellow Book (Uniform Appraisal Standards for Federal Land Acquisitions).
12. Know USPAP (the Uniform Standards of Professional Appraisal Practice established by the Appraisal Standards Board of the Appraisal Foundation.)

### **12 THINGS YOU SHOULD NOT DO:**

1. Rely on a standardized set of interrogatories, requests for production, or deposition questions, without expanding and restricting your requests to meet the needs of the case.
2. Rely on the appraisers' photographs of comparable sales or rentals, instead of personally viewing them.
3. Forget about e-discovery.
4. Assume local courts will, or will not follow the federal court practices and procedures, or any other standards or procedures with which you are familiar.
5. Assume your appraiser will deliver a report in a timely manner.
6. Wait until a week before trial to think about what you will prove and what the jury instructions ought to be.
7. Assume the condemning authority has negotiated in good faith.
8. Assume your opponent has obtained only one appraisal.
9. Assume there is a public use intended for the property.
10. Assume there is a public need for the property.
11. Assume the appraisal complies with USPAP.
12. Assume the appraisal complies with the state's condemnation rules.

### **DISCOVERY STRATEGY**

1. Investigate. Learn the basic facts.
2. Learn/outline the applicable law.
3. Determine what you need to prove.
4. Determine what you want to prevent your opponent from proving.
5. Think about the fact-finder. What will the fact-finder want to see and hear?
6. Consider how to go about obtaining the missing facts/evidence.
  - A. Investigation, or
  - B. Discovery, and what method, and what order?
  - C. Consider how to avoid creating discoverable information that will benefit your opponent.

### **SOME OF THE THINGS I WANT TO KNOW**

#### Basic Facts in a Condemnation Case:

- Who has knowledge of the facts?
- Who has custody of relevant documents?
- Are there any architects or engineers involved?
- Who has inspected the property for valuation purposes?
- Have there been any tax value protests by the owner?
- Have there been any appraisals in the last five years?
- Has the property been listed for sale in the last five years?
- Have there been any offers to purchase in the last five years?
- Are there restrictive covenants?
- Are there any leases, easements, or licenses?
- Are there any known adverse claims or encroachments?
- Is there any evidence of contamination?
- Is it in a flood plain?
- Is it in a flight path?
- Are there any access restrictions?
- What are the zoning, subdivision and land use controls?
- Is it in a blighted area?

- What does the Comprehensive Plan show for the property?
- What is the history of use?
- What are the plans for future use?
- Have any other experts consulted with the owner?
- What is the income stream, if applicable?
- What is the unity of ownership?
- What is the unity of use?
- If a large parcel, is there more than one highest and best use, or do different areas contribute equally to value?

**WHAT TYPE/EXTENT OF DISCOVERY IS PERMITTED OR REQUIRED? WILL YOUR JUDGE EXPECT YOU TO FOLLOW THE FEDERAL RULES?**

**Disclosure of Experts.**

Fed. Rules Civ. P. 26(a)(2): Each party must disclose the identity of its expert witnesses and produce an expert report for each expert witness. The report must:

- A. Be in writing, signed by the experts.
- B. State the opinions and basis therefore.
- C. Contain the data and information considered by the expert.
- D. Identify the documents supplied by counsel.
- E. Identify the exhibits used to support.
- F. State the qualifications of the expert.
- G. List the publications authored by the expert in the last ten years.
- H. Disclose the expert's compensation.
- I. List all other cases in which the expert has testified in the last four years.

**Scope of Other Discovery**

Fed. Rules Civ. P. 26(b)(1): Parties may obtain discovery regarding any matter, not privileged, **that is relevant** to the claim or defense of any party.

'Relevant' encompasses "any matter that bears on or that reasonably could lead to other matters that could bear on, any issue that is or may be in the case."

*Kidwiler v. Progressive Paloverde Insurance Company*, 192 F.R.D. 193, 199 (N.D.W. Va. 2000).

Fed. Rules Civ. P. 26(b)(4)(A): A party may depose any person who has been identified as an expert witness whose opinions may be presented at trial.

Fed. Rules Civ. P. 26(b)(4)(B): A party may, through interrogatories or by deposition, discover facts known or opinions held by an expert who has been retained ... and who is not expected to be called as a witness ... only ... upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

Fed. Rules Civ. P. 34(a): Scope. A party may serve on any other party a request to produce and permit the party making the request ... to inspect, copy, test, or sample any designated documents or electronically-stored information - including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained - translated, if necessary, by the respondent in to reasonably useable form ....

Nebraska Rules of Discovery Sec. 6-326(B)(1): In general, parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, ... if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Nebraska Rules of Discovery Sec. 26(B)(4): Discovery of facts known and opinions held by experts ... may be obtained only as follows:

(A)(i) A party may through interrogatories require any other party to identify each person whom the party expects to call as an expert witness at trial, to state:

- the subject matter on which the expert is expected to testify, and
- the substance of the facts and opinions in which the expert is expected to testify, and
- a summary of the grounds for each opinion.

(ii) Upon motion, the court may order further discovery (of experts) by other means.

(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial only ... upon a showing of exceptional circumstances under which it is

impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

Nebraska Rules of Discovery Sec. 34(a): Any party may serve on any other party a request (1) to produce and permit the party making the request ... to inspect, copy, test, or sample any designated documents or electronically-stored information (including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained), translated, if necessary, by the respondent into reasonably useable form. ...

### **Is Discovery Under Your State's Rules of Civil Procedure Similar to the Federal Rules, and is Discovery in the Usual Manner even Relevant?**

A Sampling of States -

#### **New York:**

- There is no jury; the case is tried to a judge.
- The matter is not initially heard by an appointed board or commission.
- There is no requirement to negotiate prior to filing.
- There is very little discovery. The condemning authority may obtain the owner's financial records and leases.
- The parties must swap appraisals prior to trial.
- Further discovery was specifically dropped from New York condemnation legislation.

#### **New Jersey:**

- The rules of discovery are not applicable except by leave of court.
- Appraisal reports are required to be exchanged.
- A jury trial is provided for.

#### **Minnesota and Texas:**

- Appraisal reports must be exchanged prior to the initial hearing before a court-appointed commission.
- On appeal, the case is subject to regular discovery rules.
- On appeal, it can be tried to a jury.

**California:**

- The condemning authority's offer must include an appraisal summary.
- The condemnor must pay the first \$5,000 of the owner's appraisal.
- Appraisal must be exchanged before trial to a jury.

**Florida:**

- The condemning authority must submit to the owner, upon request, their appraisal, and any maps or plans.
- After petition is filed, normal discovery rules apply.
- 12-person jury trial is available.

**Nebraska:**

- Condemning authority must enter into "good faith negotiations" prior to filing.
- Condemnations are initially heard by three-member board of appraisers appointed by county judge.
- On appeal, amount of compensation is tried to a 12-person jury.
- Standard Rules of Discovery apply.
- There is no codified requirement to trade appraisals.

**DISCOVERY OF OPINIONS OF APPRAISERS OR OTHER VALUATION EXPERTS**

**Remember:**

- In some states, not all valuation experts are credentialed appraisers.
- Not all valuation consultations result in appraisals.
- Interrogatories will not tell you what books or articles the appraiser relied upon.
- Interrogatories will not tell you the appraiser's analysis.
- Interrogatories will not tell you all of the information considered by the appraiser.

Should you depose the appraiser?

Only if you hope to gain information not found in the report.

Appraiser deposition advice:

1. Do not waste time and money asking the appraiser about the comparable sales. They are in the report, and generally, anything you can do to impeach is best done at trial.
2. Investigate the comparable sales of all appraisers, and know them better than the appraisers know them.
3. Do not fire your big artillery in deposition unless you can destroy the appraiser, and even then, maybe not unless you can also destroy your opponent's case.
4. Said another way, do not succumb to the urge to be too brilliant too soon.
5. Trade appraisals, and then decide whether to depose the appraiser.
6. If you depose the appraiser, ask for any appraisal instructions that were given to the appraiser.
7. Subpoena the Work File. It can be a treasure trove of non-information.
8. If the appraiser forgets the Work File, wait for the appraiser to get it. (I like to depose appraisers at their office or nearby.)
9. Ask yourself if you really need the deposition of an appraiser. Will it really tell you anything that you do not get by reading the document, and will it be worthwhile?

**TELLTALE SIGNS THAT MAY LEAD YOU TO WANT TO TAKE AN APPRAISER'S DEPOSITION:**

1. Does the appraisal lack detail in describing the work of the appraiser in forming his or her opinions? Such as,
  - A. Why is the rate of depreciation in the cost approach unusually high or low?
  - B. Why is the cap rate and the income approach unusually high or low?
  - C. Why is one comparable sale considered to be so far superior or inferior to the property in question?

- D. Has the appraiser used a qualitative approach to analyzing the comparable sales rather than showing their analysis in a quantitative manner?
- E. Why does the appraisal contain a subdivision analysis or claims that one was done without showing the analysis?

2. Buzz Words:

Does the appraisal contain statements that:

- A. “I didn’t use the \_\_\_\_\_ approach because \_\_\_\_\_.”
- B. “A multiple regression analysis reveals an effect upon the remainder” (or ‘does reveal an effect upon the remainder’).
- C. “I consulted with”, or “based upon information from \_\_\_\_\_”.

- 3. The Appraisal Contains Extraordinary Assumptions, Limiting Conditions, or Specific Instructions, or a Definition of Fair Market Value Different From the Standard.
- 4. If you know that the appraiser and/or attorney has a habit of trying to stray from or add to the appraisal at trial, then you want to pin down the extent of the opinions to which they will testify.
- 5. If it is a large tract with different areas that will not contribute equally to value.
- 6. If the appraisal was part of a large project where numerous parcels were appraised for a set price.

**SCOPE AND DESIGN OF THE PROJECT.**

- Can the design be changed to lessen the impact on the property?
- Are the design standards that the engineers claim must be followed really design standards or just guidelines, or are they simply what the design engineer would like to see?

- How much property is really needed? If it seems like excess property is being acquired - why?
- When will it be put to the public use for which it is taken?

### **CONSIDER E-DISCOVERY**

- It applies to condemnation.
- The need for attorney/client follow-up applies in condemnation.
- Is it ethical to use it as a sword?
- Do you have a litigation hold letter, and do you use it for property owners who anticipate a condemnation?
- Do we really need to be concerned about e-discovery standards established by federal judges?
- Know what your judge will do.

The Following are Actual Statements from Nebraska Trial Judges Regarding E-Discovery:

1. “If a litigation hold letter has not gone out - do it when you get back to the office.”
2. “You are not going to bother me with that issue, are you?”
3. As to discovery of a report by an appraiser who was not listed as an expert witness:  
“Counsel, I know what the rules say, but in this court if you have it, give it to them. I don’t care what it is, or what form it is in. If they ask for it, give it to them. That’s the best way to stay out of trouble in this court.”