CHAPTER 7A

Discovery of Multiple Appraisals and Compelling Testimony of Adversary's Appraisers*

SYNOPSIS

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§ 7A.01 Introduction

The trial of an eminent domain case is truly a "battle of the experts." To properly prepare for the battle, a trial attorney must master the discovery techniques designed to elicit the details of his adversary's appraisal reports. Without this detailed information, a trial attorney cannot conduct an effective cross examination of his adversary's appraiser.

Prior to the 1970 amendment to Rule 26(b)(4) of the Federal Rules of Civil Procedure (hereinafter "the Rule"),[1] the Federal Rules did

[1] Rule 26(b)(4) states:

Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A) (i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to 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 by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b)(4)(C) of this rule, concerning fees and expenses as the court may deem appropriate.

(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 as provided in Rule 35(b) or 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.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (b)(4)(a)(ii) and (b)(4)(B) of this rule; and (ii) with respect to discovery obtained under subdivision (b)(4)(A)(ii) of this rule the court may require, and with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

Order of the Supreme Court of the United States amending Rule 26 of the Federal Rules of Civil Procedure, 48 F.R.D. 459, 461-462 (1970).

Since 1970, several states have adopted their own rules which are the same or similar to Federal Rule 26(b)(4):

Alabama: Ala. R. Civ. P. 26(b)(4).

not provide a specific procedure for the discovery of information concerning expert witnesses. Prior to the amendment, courts differed significantly on issues concerning the discovery of expert information.[2] Inconsistencies among courts resulted in cases with similar

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Alaska: Alaska R. Civ. P. 26(b)(4).

Arizona: Ariz. R. Civ. P. 26(b)(4).

Arkansas: Ark. R. Civ. P. 26(b)(4).

Colorado: Colo. R. Civ. P. 26(b)(4).

Delaware: Del. R. Civ. P. 26(b)(4).

Florida: Fla. R. Civ. P. 1.280(b)(4)(A) (any person disclosed by interrogatories or otherwise as a person to be called as an expert witness at trial may be deposed in accordance with Rule 1.390 without motion or order of Court).

Hawaii: Haw. R. Civ. P. 26(b)(4).

Idaho: Idaho R. Civ. P. 26(b)(4).

Indiana: T.R. 26(b)(4).

Kentucky: Ky. R. Civ. P. 26.02(4).

Maine: Me. R. Civ. P. 26(b)(4).

Massachusetts: Mass. R. Civ. P. 26(b)(4).

Minnesota: Minn. R. Civ. P. 26:02(d).

Mississippi: Miss. R. Civ. P. 26(b)(4).

Montana: Mont. R. Civ. P. 26(b)(4).

Nevada: Nev. R. Civ. P. 26(b)(4).

New Hampshire: N.H. Super. Ct. R. 35(b)(3).

New Mexico: Rules of Civil Procedure for the District Courts, R.1-026(5).

North Dakota: N.D. R. Civ. P. 26(b)(4).

Oklahoma: Okla. Stat. tit. 12, § 3226(B)(3) (party has option to file expert interrogatories or to require an expert' s deposition).

Tennessee: Tenn. R. Civ. P. 26.02(4).

Texas: Rules of Civil Procedure, District and County Courts Rule 166(b)(2)(e) (expert reports must be produced. If the expert has not prepared a report, the Court may order him to prepare a report and to produce a copy of it before trial).

Vermont: Vt. R. Civ. P. 26(b)(4).

Utah: Utah R. Civ. P. 26(b)(4).

Virginia: Rules of Supreme Ct. of Va. R. 4:1(b)(4).

Washington: C.R. 26(b)(5) (depositions may be taken of each expert witness).

West Virginia: W.V. R. Civ. P. 26(b)(4).

Wisconsin: Wis. Stat. § 804.01(2)(d).

Wyoming: Wyo. R. Civ. P. 26(b)(4).

[2] Smith v. Ford Motor Co., 626 F.2d 784, 792 (10th Cir. 1980).

factual patterns being decided with diametrically opposite results.[3] The discovery of information concerning expert witnesses was in a "chaotic" state.[4] At one extreme, some courts held that the parties were not even required to disclose the identity of their expert witnesses.[5] At the other extreme, some courts held that each party was required to identify each expert witness and to make the experts available for depositions.[6] The drafters of the amendment intended to resolve this inharmonious state of affairs by providing a uniform, orderly scheme of discovery. That scheme of discovery is now embodied in Rule 26 of the Federal Rules of Civil Procedure.[7]

The Advisory Committee Notes point out that a prohibition against discovery of expert information produces in "acute form" the very evils that discovery was created to prevent: "Effective cross-examination of an expert witness requires advance preparation. The lawyer, even with the help of his own experts, frequently cannot anticipate the particular approach his adversary's expert will take or the data on which he will base his judgment on the stand."[8] The Advisory Committee cites a California study on Eminent Domain cases[9] for the proposition that there should be a pretrial exchange

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[3] Hayes & Ryder, *Special Topics in the Law of Evidence: Rule 26(b)(4) of the Federal Rules of Civil Procedure: Discovery of Expert Information*, 42 U. Miami L. Rev. 1101, 1108, n.28 (March-May 1988).

[4] *See id.* at 1108, n.29; Graham, *Discovery of Experts Under Rule 26(b)(4) of the Federal Rules of Civil Procedure, Part One: An Analytical Study*, 1976 U. Ill. L. F. 895, 899 n.16, citing Long, Discovery and Experts Under the Federal Rules of Civil Procedure, 38 F.R.D. 111, 119 (1966), originally printed in 39 Wash. L. Rev. 665 (1964) (no sound body of coherently related propositional law is deducible from the cases, nor have general standards employed by various courts yet furnished an adequate method of attack in this "hazy frontier of the discovery process").

[5] *United States:* United States v. 6.82 Acres of Land, More or Less, 18 F.R.D. 195, 197 (D.N.M. 1955); Hickey v. United States, 18 F.R.D. 88, 89 (E.D. Pa. 1952).

[6] *United States:* Sachs v. Aluminum Co. of Am., 167 F.2d 570 (6th Cir. 1948); Henlopen Hotel Corp. v. Aetna Ins. Co., 33 F.R.D. 306 (D. Del. 1963); Cold Metal Process Co. v. Aluminum Co. of America, 7 F.R.D. 425 (N.D. Ohio 1947).

[7] Smith v. Ford Motor Co., 626 F.2d 784, 792 (10th Cir. 1980).

[8] Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery, 48 F.R.D. 487, 503 (1970).

[9] California Law Revision Commission, Recommendation of the California Law Revision Commission Relating to Condemnation Law and Procedure, Volume 4, 707 (Dec. 1963).

of written statements detailing each side's valuation evidence.[10] Unfortunately, the Rule, as amended in 1970, does not provide for a mandatory exchange of expert reports. It is interesting to note that in an earlier proposal, the Advisory Committee did recommend unrestricted discovery, including the production of expert reports.[11] In this author's opinion, the failure to mandate a pretrial exchange of expert reports has caused unnecessary confusion and expense for parties engaged in the trial of eminent domain cases. If the Rule is further amended so as to require an exchange of appraisal reports, it is likely that there would be less of a need to conduct expensive and time consuming expert depositions.[12]

Because the Rule does not now mandate a pretrial exchange of appraisal reports, this Chapter will describe the discovery procedures which are available to obtain the identity of an adversary's appraisers and the substance of appraisal reports. This chapter will also consider the related issue of whether a party can compel the trial testimony of one of his adversary's appraisers.

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[10] The Law Commission noted that the obstacles to effective discovery in eminent domain cases could be overcome by legislation providing for a pretrial exchange of written statements containing pertinent valuation data. California Law Revision Commission, *supra* at 708. The Commission specifically recommended that at least 45 days before trial each party could demand an exchange of valuation data. Twenty days before trial, each party was required to serve written statements setting forth names of expert witnesses, opinions of the valuation witnesses and certain data upon which the opinions were based. The Commission concluded that appraisal reports *can* be made a part of the written statements. California Law Revision Commission, *supra* at 709. The Commission did not specifically recommend a *mandatory* exchange of the actual appraisal reports.

[11] Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for the United States District Courts, 43 F.R.D. 211, 235 (1967). *Cf.* Md. R. Pro. 410(c)(2) (expert report to be made available; if no report available, he may be deposed).

[12] In the Preliminary Draft, the Advisory Committee stated that if an expert's report affords the opposing party an adequate basis on which to prepare for cross examination and rebuttal, the court may prohibit a deposition. *Id.* at 235. *See also* Rule 166b(2)(3)(2) and (4) of the Texas Rules of Civil Procedure which wisely requires pretrial exchange of expert reports. The rule also forces experts to prepare written reports if they intend to testify at trial.

§ 7A.02 Impact of the Federal Rules of Civil Procedure on the Discovery of Information Concerning an Adversary's Appraisers

Before the 1970 amendment to the Rule, some courts held that appraisal reports and the substance of an appraiser's anticipated trial testimony were protected by the attorney-client privilege or the doctrine of attorney work product.[1] However, the amendment of the Rule eliminated the efficacy of those decisions. The Advisory Committee specified that the amendment repudiated the decisions that held an expert's information privileged simply because of his status as an expert.[2] The Committee also rejected as ill considered the decisions which sought to bring expert information within the work product doctrine.[3]

In order to marshal the discovery of information concerning expert witnesses, the amended Rule now divides experts into four categories:

(1) Experts a party expects to use at trial;

(2) Experts retained or specially employed in anticipation of litigation or preparation for trial but not expected to be used at trial;

(3) Experts informally consulted in preparation for trial but not retained;

(4) Experts whose information was not acquired in preparation for trial. This class includes both regular employees of a party not specially employed on the case and also experts who were actors or viewers of the occurrences that gave rise to suit.[4]

[1]—Appraisers Expected to Testify at Trial

Under the amended Rule, if a proper interrogatory is propounded, a party must disclose the identity of the appraisers who are expected to testify at trial. Such mandatory disclosure, in advance of trial, prevents any "surprise witnesses."[5] In addition to the identity of the

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[1] *Delaware:* Delaware v. 62.96247 Acres of Land, 57 Del. 40, 193 A.2d 799 (1963).

Oregon: Brink v. Multnomah County, 224 Or. 507, 356 P.2d 536 (1960).

[2] Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery, 48 F.R.D. 487, 504-505 (1970).

[3] *Id.* at 505.

[4] 8 C. Wright and A. Miller, Federal Practice and Procedure § 2029 (1984).

[5] Unfortunately, the Rule does not specify when the experts must be identified. Some Federal Courts have adopted local rules setting forth a timetable for disclosure. *See* n.8 *infra.*

testifying appraisers, a party is entitled to an interrogatory answer setting forth the subject matter on which the appraisers are expected to testify; the substance of the facts and opinions to which the appraisers are expected to testify and a summary of the grounds for the opinions of each appraiser. There is nothing in the amended Rule which requires, in the first instance, the production of the actual "appraisal reports."

In some cases, a party will provide detailed answers to the "expert interrogatories," including a complete list of all comparable sales relied on by the appraisers. In the more typical case, a party will provide a cryptic answer to the interrogatory setting forth no more than an appraiser's name, rank and serial number.

After receiving a party's answers to the standard expert interrogatories, a motion may be filed with the Court to obtain additional discovery in the form of (1) further answers to the interrogatories; (2) a deposition of the appraiser; or (3) a request for a copy of the Appraisal Report. Unfortunately, the amended Rule and the Advisory Committee Notes do not articulate a specific test to be used to determine when further discovery will be allowed. "Faced with the dilemma of interpreting a rule that provides for the granting of additional discovery upon motion, but which provides no standard for granting the motion as would be expected, the few reported decisions have taken divergent approaches."[6] Some Courts have adopted a liberal view and have allowed expert depositions without any showing of any special or unusual need,[7] while other courts have taken a more conservative approach and have denied expert depositions or the production of expert reports even though the opposing party filed sketchy and conclusory answers to the expert interrogatories which were not in keeping with the letter and spirit of the Amended Federal Rules of Civil Procedure.[8]

In a significant land damage case, after filing the obligatory expert interrogatories, a party may file a motion to obtain a copy of his adversary's appraisal report. Before resorting to the uncertainties inherent in the two step process articulated in the amended rule (expert interrogatories followed by a motion for further discovery),

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[6] Graham, *Discovery of Experts Under Rule 26(b)(4) of the Federal Rules of Civil Procedure, Part One: An Analytical Study,* 1976 U. Ill. L.F. 895 at 923.

[7] Herbst v. International Tel. & Tel. Corp., 65 F.R.D. 528 (D. Conn. 1975) (unlimited discovery of experts conditioned only on the payment of a proportionate share of the expert's expenses).

[8] Wilson v. Resnick, 51 F.R.D. 510 (E.D. Pa. 1970).

it is suggested that the trial attorney review the local rules of court[9] to determine if there is a specific rule dealing with the discovery or

(Text continued on page 7A-10)

[9] Several Federal District Courts have adopted local rules dealing specifically with the production of expert reports:

California:

Central District of California: **Rule 9.4.6:** "*Expert witnesses.* If expert witnesses are to be called at trial, the parties shall exchange short narrative statements of the qualifications of the expert and the testimony expected to be elicited at trial. If reports of experts to be called at trial have been prepared, they shall be exchanged but shall not substitute for the narrative statement required."

Southern District of California: **Rule 235(4)(e)(4):**

Eminent Domain Cases. Disclosure in addition to that contained within Local Rule 235-4 shall be made as follows: Not later than five days in advance of pretrial hearing each party appearing shall file with the trial judge in camera a summary "Statement of Comparable Transactions" which contains: relevant facts as to each sale or other transaction to be relied upon as comparable to the taking, including the alleged date of such transaction, the names of the parties thereto, the consideration paid and the date of recordation, the book, page or other identification of any record of such transaction. Such statements shall be in form and content suitable to be presented to the jury as a summary of evidence on the subject. The judge may thereafter release the list of comparables to opposing counsel.

At least five days prior to trial each party shall serve and file a "Statement as to Just Compensation" setting forth a brief schedule of contentions as to the fair market value in cash, at the time of taking, of the estate or interest taken, the maximum amount of any benefit proximately resulting from the taking and the amount of any claimed damage proximately resulting from severance.

Eastern District of California: **Rule 281(b)(6)(i)** states as follows:

(A) As to each parcel involved, its designation, general description, location and size; the interest taken; the names of persons claiming an interest therein and the interests claimed; whether an order of possession has been issued; each objection or defense to the taking, if any; and the claimed market value of the interest taken at the time of the taking.

(B) Whether consolidation of trial with other actions would be practicable or desirable.

(C) Suggested procedures for a mutual exchange of lists of comparable sales to be relied upon by the valuation experts, such lists to include for each transaction, to the extent known, the names of the parties, the date of transaction, amount of consideration, location of property and recording date.

(D) Whether evidence of value other than comparable sales is to be relied upon and, if so, the method of valuation and the authority for its use.

Colorado: **Rule 404 (Appendix C(VI)):** "Written summaries of opinions of expert witnesses and a description of experts' qualifications must be provided to opposing counsel no later than thirty days after the entry of the Pretrial Order."

Florida (Southern District): **Rule 14(J):** *"Exchange Reports of Expert Witnesses.* Where expert opinion evidence is to be offered at trial, a resume of oral or written reports of the experts shall be exchanged by the parties no later than seven days prior to pretrial conference, with copies attached to the pretrial stipulation. Resumes must disclose the expert opinion and its basis on all subjects on which the witness will be called upon to testify."

Georgia: (Northern District): **Rule 235.18(a):** "Each party must attach to list of witnesses a reasonably specific summary of the expected testimony of each expert witness."

Idaho: **Rule 71A.1:**

(1) Not later than ten (10) days in advance of the pretrial conference each party appearing shall lodge with the clerk, under seal, the original and sufficient additional copies for the judge and all parties appearing, of a summary "Statement of Comparable Transactions." Said summary shall contain the relevant facts as to each sale or other transaction to be relied upon as comparable to the taking, including the alleged date of such transaction, the names of the parties thereto, and the consideration thereof; together with the date of recordation and the book and page or other identification of any record of such transaction; and such statement shall be in form and content suitable to be presented to the jury as a summary of evidence on the subject. As soon as such statement shall have been lodged by all parties appearing in connection with a particular parcel or parcels of property in issue, the clerk shall unseal the statements, regularly file the originals, and forthwith serve copies of each party's statement by United States Mail on the attorneys for the other parties appearing. Each copy so served shall bear the clerk's stamp showing the filing date of the original;

(2) Not later than the date of filing of the statements required under the foregoing paragraph, each party shall lodge with the clerk, under seal, for examination by the judge in camera, the original and one copy of "Schedule of Witnesses as to Value," setting forth:

(A) The names of all persons, including expert appraisers, owners, and former owners, intended to be called to give opinion evidence as to the value, and

(B) The opinion to be given by each. (3) The provisions of this subsection do not preclude prior or additional discovery as provided in the Federal Rules of Civil Procedure.

Missouri (Eastern District): **Rule 20(D)(2):**

The condemnor shall inform the Court when service has been completed. Within thirty days after the completion of service, the parties shall ex-

exchange of "Appraisal Reports" or "Expert Reports." Even if there is no local rule requiring the exchange of appraisal reports, a letter to the opposing party requesting the mutual exchange of reports will serve at least two useful purposes. In some cases, the opposing party will agree to a mutual exchange of reports. Even if the opposing party does not agree to a voluntary exchange of appraisal reports, a copy of your letter requesting a mutual exchange can be attached to your "Motion to Compel Production of the Appraisal Reports." By attaching a copy of the letter, the motion judge will readily appreciate your sincere efforts to work out a discovery matter without resort to the court and the motion judge will also appreciate the fact that you are not attempting to suppress any of your expert information.

If the appraisal report is not produced pursuant to a local rule or as a result of a voluntary exchange, the amended Rule provides that expert interrogatories must be filed in the first instance. After obtaining answers to the expert interrogatories, a party may file a motion for further discovery, including a motion to produce copies of the appraisal reports.

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change, and file with the Court, all written and oral appraisals to be used at trial, which shall include any comparative sales and the complete basis for the valuation of each appraiser.

Montana: **Rule 235(6)(b)(6):**

If an order has been made requiring the parties to exchange narratives of the testimony of expert witnesses, the narratives shall be exchanged at the time of the Attorneys' Pretrial Conference. The records and statistics relied on by the expert witnesses shall be identified, and a time and place agreed to by the parties for the examination of records and statistics. The Final Pretrial Order shall show the extent of compliance with this subsection.

Oklahoma (Eastern District): **Rule 17(b)(8):** "Furnish opposing counsel names and addresses of all witnesses, the nature of their testimony, copies of all writings, including doctors' reports and like instruments, and complete all other matters which may expedite the trial of the case. (This includes all rebuttal evidence.)"

Oregon: **Rule 235-3(d):** "*Expert Witnesses.* A written statement or report of each expert setting forth qualifications, any opinions to be expressed and the facts and data upon which the opinions are based."

Pennsylvania (Western District): **Rule 5(D)(1)(b):**

A copy of all reports containing the substance of the facts, findings, opinions and a summary of the grounds or reasons for each opinion of any expert whom a party expects to call as a witness at the trial. If timely production of any such report is not made, the testimony of such expert shall be excluded at the trial, except upon consent of the other party or parties, or order of court. The testimony of an expert shall be confined to the scope of his report. The report of an expert shall bear his signature.

In one case, an innovative and creative practitioner attempted an end run around the Rule by requesting the condemnor's appraisal report under the Freedom of Information Act.[10] In that case, the Federal Court held that the report was exempt from production because the report fell within the confines of the executive privilege of the Freedom of Information Act, 5 U.S.C.A § 552a(b)(5). The Court noted that discovery practices concerning expert appraisers, and by implication their reports, were meant to be controlled by the Federal Rules of Procedure. In reaching its decision, the Court pointed out that as a general rule, a party is not entitled to his opponent's expert appraisal report.

In order to obtain copies of an adversary's appraisal report, some courts have held that a party must show "compelling need." In *United States v. 145.31 Acres of Land*,[11] the Court held that a party is not entitled, as a matter of course, to an expert's report. The Court noted that although it had the power under the Federal Rules of Civil Procedure to order the production of an expert's report, production was not appropriate because there was no showing of "compelling need."[12] More recently, in *American Steel Products Corp. v. Penn Central Corp.*,[13] the Court noted that ". . . although Rule 26(b)(4)(A)(ii) is normally used to obtain an expert's deposition, courts that have considered the issue have found no reason to refuse to apply the rule to a request for documents from an adversary's expert."[14] At least one court has articulated a very simple and liberal

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[10] Hoover v. United States Dept. of the Interior, 611 F.2d 1132 (5th Cir. 1980).

[11] 54 F.R.D. 359 (M.D. Pa. 1972).

[12] *See also* Breedlove v. Beech AirCraft Corp., 57 F.R.D. 202, 205 (N.D. Miss. 1972), the Court held that the plaintiff was not entitled to copies of expert reports because the plaintiff failed to show any "special circumstances." The Court stated:

> The discovery of expert testimony is specifically limited to information of this type and (4)(A)(i) does not envisage the production of written documents or reports on which expert opinions professedly rely. Plaintiffs have failed to show unique or exceptional circumstances making it equitable to require the production of expert reports at this stage of the controversy, and they have been unable to demonstrate that they cannot elicit the basis and scope of the expert opinions and supporting data of each opinion by simply following the rule as set forth in (4)(A)(i).

[13] 110 F.R.D. 151 (S.D.N.Y. 1986).

[14] The Court cited the following cases in support of its reasoning: *In re* IBM Peripheral EDP Devices Antitrust Litigation, 77 F.R.D. 39, 41 (N.D. Cal. 1977) (agreeing with propriety of expert document request, but denying actual request as over broad); Quadrini v. Sikorsky Air Craft Division, 74

test to be applied to motions for expert depositions and the production of expert reports. It is not a test of "compelling need" or "extraordinary circumstances;" "[t]he Court's task in ruling on a motion for further discovery of an expert is, therefore, to satisfy itself that the procedure is not being abused."[15]

Despite an apparent trend towards the liberal production of expert reports, it should be noted that there are also some recent cases which hold that there must be a showing of necessity before the reports must be produced.[16]

In *Quadrini v. Sikorsky Air Craft Division*,[17] the court ordered the production of expert reports, including preliminary reports without requiring a showing of compelling need or exceptional circumstances. The court rejected the plaintiff's contention that expert reports were discoverable only upon a showing of substantial need and undue hardship.

> Though the usual application of (b)(4)(A)(ii) is in ordering a deposition of an expert[18] . . .. I see no reason not to apply the rule in the context of a Rule 34 document production request as well. Expert testimony will undoubtedly be crucial to the resolution of the complex and technical factual disputes in this case, and effective cross examination will be essential. *Discovery of the reports of experts, including reports embodying preliminary conclusions, can guard against the possibility of a sanitized presentation at trial, purged of less favorable opinions expressed at an earlier date.*[19] [Emphasis added]

F.R.D. 594, 595 (D. Conn. 1977) (granting a similar document request); United States v. International Business Machines Corp., 72 F.R.D. 78, 81–82 (S.D.N.Y. 1976) (granting request for documents relied upon by experts in forming their opinions and conclusions); Carter-Wallace, Inc. v. Hartz Mountain Indus., 553 F. Supp. 45, 52 (S.D.N.Y) 1982; Mann v. Newport Tankers Corp., 96 F.R.D. 31, 33 (S.D.N.Y. 1982).

[15] *In re* IBM Peripheral EDP Devices Antitrust Litigation, 77 F.R.D. 39, 41 (N.D. Cal. 1977).

[16] Bell v. General Electric Co., 38 Fed. R. Serv. 2d 671 (E.D. Pa. 1984), the United States Magistrate refused to allow the production of expert reports relating to the cause of a fire because the plaintiffs had failed to make the requisite showing of "necessity" (testifying experts) and "exceptional circumstances" (nontestifying experts); Boselli v. Southeastern Pennsylvania Transport Authority, 108 F.R.D. 723 (E.D. Pa. 1985) the Court refused to order the production of expert reports because the plaintiff did not show any particular need or necessity for the reports.

[17] Quadrini v. Sikorsky Air Craft Division, 74 F.R.D. 594 (D. Conn. 1977).

[18] *See, e.g.*, Herbst v. International Tel. & Tel. Corp., 65 F.R.D. 528 (D. Conn. 1975).

[19] *Quadrini*, 74 F.R.D. at 595.

Similarly, in *Hewlett Packard Co. v. Bausch & Lomb, Inc.*,[20] the court held that the interrogating party was entitled to expert reports and *drafts* of those reports. "[I]t is difficult to imagine there being more important documents for the trier of fact to see than drafts of the expert's opinion that were written or edited by someone else, *e.g.*, by the lawyer who retained him."[21]

In the context of an eminent domain case, the concept of being compelled to produce drafts of an appraiser's report is a sobering thought. In most cases, the appraiser will work closely with the attorney in an attempt to refine (not sanitize) the report so that it accurately reflects current market data as well as acceptable methods of appraisal in a particular jurisdiction. Not every attorney is fortunate enough to have an experienced MAI as his expert. Therefore, it is not uncommon for an appraiser's preliminary report to be somewhat technically flawed. With the help of experienced counsel, the technical problems can be worked out and the report is then put in final form. Under the reasoning of the *Hewlett Packard* case,[22] opposing counsel would be entitled to copies of every preliminary report and it is likely that those reports would be used to impeach the appraiser at trial. This author believes that the production of preliminary reports clearly encroaches on the attorney work product doctrine and should be discouraged.[23]

Courts frequently order additional discovery such as expert depositions or the production of expert reports in an effort to combat evasiveness during discovery.[24] Therefore, a complete and detailed answer to the standard expert interrogatories may provide the best defense to a motion to depose your appraiser or a motion to compel copies of his appraisal report.

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[20] 116 F.R.D. 533 (N.D. Cal. 1987).

[21] *Id.* at 540.

[22] *Supra* n.18.

[23] The opposite view was forcefully articulated by the *Hewlett Packard* Court: "The Court is not interested in furthering the corruption of the truth finding process by announcing doctrine that has the effect of approving and reinforcing the practice of lawyers formulating and writing opinions that are presented to the outside world as the independent opinions of technical experts." *Id.* at 539.

[24] Hayes & Ryder, *Special Topics in the Law of Evidence: Rule 26(b)(4) of the Federal Rules of Civil Procedure: Discovery of Expert Information*, 42 U. Miami L. Rev. 1101, 1108 (March-May 1988), citing Mann v. Newport Tankers Corp., 96 F.R.D. 31 (S.D.N.Y. 1982) and Beverage Marketing Corp. v. Oglivy & Mather Direct Response, Inc., 563 F. Supp. 1013 (S.D.N.Y. 1983).

A further amendment to the Rule or the adoption of a local rule requiring a mutual exchange of appraisal reports would eliminate the need and undue expense of motions for additional discovery. At least one commentator has noted that in recent years, the bar has evinced an increasing acceptance of applying liberal discovery practices to expert information developed in anticipation of litigation. Often, counsel will bypass the rigors of Rule 26(b) (4) and exchange the reports of their experts and allow the opposing party to freely depose the expert. Yet, not infrequently, a party will resist discovery of its expert, believing that such discovery would be prejudicial to his cause.[25]

Until the Rule is amended or clarified, trial attorneys must deal with the patchwork of cases dealing with the discoverability of appraisal reports. As with many discovery issues, the issue of discoverability is often left to the sound discretion of the motion judge.

[2]—Appraisers Retained or Specially Employed in Anticipation of Trial but Not Expected to Testify

Whether a party can obtain the identity of an adversary's nontestifying appraisers and whether a party is entitled to any information concerning appraisal reports prepared by nontestifying appraisers is open to debate. The term "nontestifying appraisers" includes those appraisers who prepared appraisals which for a variety of reasons were unacceptable to trial counsel. For example, if one of the condemnor's appraisers submits a report with an unreasonably high damage figure, it is likely that the condemnor's attorney will reject the appraisal and obtain another report from a second appraiser. Appraisers who use unacceptable appraisal methods and even appraisers who would not make favorable impressions at trial may find themselves classified as nontestifying experts.

Although some might conclude that the nondisclosure of these nontestifying experts constitutes the "suppression" of evidence, it can be strongly argued that disclosing the identity of these experts would be unfair and prejudicial to the trial attorney who zealously prepared his case and carefully selected the "best" trial witnesses.

The first question that must be answered is whether a party is entitled to learn the "identity" of his opponent's nontestifying experts. Unfortunately, the Rule and the Advisory Committee Notes do not provide a simple answer.

The Advisory Committee Notes state: "As an ancillary procedure, a party may, on a proper showing, require the other party to name

[25] *Discovery of Expert Information Under the Federal Rules,* 10 Univ. Rich. L. Rev. 706, 722 (1976).

experts, retained or specially employed, but not those informally consulted."[26] The Advisory Committee Notes do not define the terms "proper showing" or "ancillary proceeding." The noted commentators, Wright and Miller, interpret the Advisory Committee Notes to mean that a party can obtain the identity of these nontestifying experts. Wright and Miller conclude that the "ancillary procedure" is an interrogatory under Rule 33 of the Federal Rules of Civil Procedure. "It is unclear what 'proper showing' is required. Presumably the party to whom the interrogatory is directed may object if he thinks the names of these experts are irrelevant or privileged or can move for a protective order if there is some other reason why he does not wish to reveal their names."[27]

The court in *Sea Colony, Inc. v. Continental Insurance Co.*,[28] adopted the views of Wright and Miller and held that the identity of these nontestifying experts *must* be disclosed.[29]

The court in *Sea Colony* did not require the interrogating party to establish "exceptional circumstances" to obtain the experts' names, but the court went on to state that the test of "exceptional circumstances" would apply to the discovery of the experts' reports. However, in *Ager v. Jane C. Stormont Hospital & Training School for Nurses*,[30] the Court concluded that a party must show exceptional circumstances before the nontestifying experts must be identified.[31] The Court identified four specific problems in identifying these nontestifying experts. First, the expert may be contacted or his records obtained and information revealed which normally would not be discoverable under the Rule. Second, a party may seek to compel the trial testimony of the nontestifying expert.[32] Third, the opponent may call the party to the stand and question him about nontestifying experts in an effort to place an inference in the minds of the jurors that the party may have suppressed adverse facts or opinions. Fourth, disclosure of the identities of nontestifying experts may create a

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[26] Proposed Amendments, 48 F.R.D. at 504.

[27] 8 C. Wright and A. Miller, Federal Practice and Procedure § 2032 (West 1984).

[28] 63 F.R.D. 113 (D. Del. 1974).

[29] *See also* Baki v. BF Diamond Const. Co., 71 F.R.D. 179 (D. Md. 1976), for the proposition that a party is entitled to the identification of nontestifying experts.

[30] 622 F.2d 496 (10th Cir. 1980).

[31] *See also* Perry v. W.S. Darley & Co., 54 F.R.D. 278, 280 (E.D. Wis. 1971).

[32] *See* § 7A.03 *infra* "Compelling Testimony at Trial of an Adversary's Appraiser."

chilling effect in the field of consulting experts. In a subsequent decision, one Federal District Court Judge concluded that the more restrictive view set forth in the *Ager* case is the "prevailing viewpoint."[33]

Even if a party is successful in obtaining the identity of his adversary's nontestifying experts, it will be extremely difficult to obtain any information concerning the substance of the nontestifying experts' reports. The moving party must show exceptional circumstances under which it is impractical to obtain facts or opinions on the same subject by other means. In almost every eminent domain case, each party can retain its own appraiser to render an opinion of value or damages. Accordingly, it will be "rarely possible" to make the required showing of exceptional circumstances.[34]

[3]—Appraisers Informally Consulted but Not Retained

The Advisory Committee Notes expressly preclude any discovery of experts who have been "informally consulted" but not retained or specially employed.[35] If a party can state with a straight face that all of his unfavorable appraisals were prepared by appraisers who were merely "informally consulted," there would never be an obligation to provide any information concerning "rejected" or "problem" appraisals. Therefore, it is crucial to determine if the nontestifying appraiser was "retained or specially employed" or if the appraiser was "informally consulted." Unfortunately, the Rule does not clearly define the distinction between a "retained or specially employed" expert and an "informally consulted" expert. In the *Ager* case,[36] the court specifically addressed these definitional issues. The plaintiff urged the court to define an "informal consultant" as any expert who was not considered to be of any assistance.[37] The trial court determined that informal consultants did not include those experts with whom a party had made an appointment to discuss the case or

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[33] Kuster v. Harner, 109 F.R.D. 372 (D. Minn. 1986). "Defendants assessment of the weight of authority may be accurate in terms of the gross number of reported cases supporting the respective views. Nevertheless, it is clear that the view expressed in Ager has become the prevailing one in the years since Ager was decided." *See, e.g.*, Durflinger v. Artiles, 727 F.2d 888, 891 (10th Cir. 1984); Gidlewski v. Bettcher Industries, Inc., 38 Fed. R. Serv. 2d 664 (E.D. Pa. 1983); *In re* Sinking of Barge Ranger, 92 F.R.D 486, 488-489 (S.D. Tex. 1981).

[34] United States v. Meyer, 398 F.2d 66, 76 (9th Cir. 1968).

[35] Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery, 48 F.R.D. 487, 504 (1970).

[36] 622 F.2d 496 (10th Cir. 1980).

[37] *Id. at 501.*

examine records or give advice or opinions for which a fee was paid or promised.[38] The trial court noted that an informal consultation would be at a social event or on a golf course.[39] The Court of Appeals then established a four factor test to determine if the expert was "retained" or merely "informally consulted."[40]

First, the court must determine the manner in which the consultation was initiated. Second, the court must identify the nature, type and extent of the information or material provided to or determined by the expert in connection with his review. Third, the court must ascertain the duration and intensity of the consultant's relationship. Fourth, the court must identify the terms of the consultation, if any, such as payment and confidentiality of the test data or opinions. Since the test is somewhat amorphous, it is likely that further litigation will be needed to clarify these issues.

If trial counsel obtains any type of written report or appraisal from an expert, it would be difficult to argue that the expert who prepared the appraisal was merely informally consulted. Therefore, it may be prudent in each case to request an oral, preliminary report from all of the experts and appraisers. If for any reason the attorney is not satisfied with the preliminary report, the attorney will be on more solid ground in classifying that appraiser as an "informal consultant."

[4]—Appraisals Not Prepared for Trial Purposes

The Rule does not protect the identity or opinions of experts unless the information or opinions were developed or acquired in anticipation of litigation or for trial.[41] Accordingly, a party would be entitled to discovery of appraisals which were not prepared in anticipation of the "taking" or for trial. For the condemnor, this means that appraisal reports prepared by the staff appraisers for tax assessments or for other municipal purposes would be discoverable. Similarly, for the condemnee, any appraisals previously prepared for home equity loans, tax abatement petitions or for calculating an individual's net worth would be discoverable. Whether these appraisals are relevant will depend on the dates of the appraisals. If the appraisals were prepared shortly before or soon after the taking, the valuations may be quite relevant in determining the true value of the property that was taken in the eminent domain proceeding.

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[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] 8 C. Wright & A. Miller, Federal Practice and Procedure § 2029 (West 1984).

§ 7A.03 Compelling Trial Testimony of an Adversary's Appraiser

This section of the chapter addresses the issue of whether a party can compel the trial testimony of one of his adversary's appraisers. It is generally conceded that the trial of an eminent domain case is not often filled with drama or suspense. The surprise witness and the "smoking gun" are more often found in high stakes criminal cases. However, the prospect of subpoenaing and compelling testimony from one of your adversary's appraisers will enliven any eminent domain trial. Imagine the following scenario. A week before trial, the landowner discovers that the taking authority obtained an appraisal from a well respected appraiser whose opinion of damages was so high that his appraisal was "rejected" and the taking authority promptly retained another appraiser. Two days before trial, the landowner serves a subpoena on the "rejected" appraiser to compel his appearance and testimony at trial. The subpoena is a subpoena *duces tecum* specifically requiring the production of "any and all appraisal reports for the subject property." The landowner intends to call the appraiser to the witness stand to elicit his opinion of damages and to inform the jury that the appraiser is the best and most believable expert because this appraiser was selected by the taking authority, retained by the taking authority, and paid by the taking authority. The impact of the "rejected" appraiser's testimony is likely to be devastating to the government's case. One court has concluded that the actual jury verdicts in these cases come in very close to the "rejected" expert's appraisal.[1] "In each case the jury returned a verdict to the penny of the figure testified to by the expert who had initially been hired by the other side to the controversy. The jury in each case evidently ignored the testimony of all others feeling that the condemning authority was attempting to pull a fast one."[2]

After the taking authority's attorney is notified of the landowner's intent to call one of his "rejected" experts, it is likely that the government's attorney will fire back a motion to quash the subpoena, asserting the attorney-client privilege, the work product doctrine, prejudice, unfairness, the availability of other witnesses and ethical considerations. Although the reaction of the taking authority's attorney is predictable, the decision of the motion judge is not so predictable.

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[1] State *ex rel.* Smith v. Wilkinson-Snowden-McGehee, 571 S.W.2d 842 (Tenn. Ct. App. 1978).

[2] *Id.* at 843.

If the "rejected" expert objects to testifying, some courts have held that his testimony cannot be compelled.[3] However, some courts have held that an expert witness can be required, without the payment of expert fees, to give an opinion already formed,[4] while other courts have held that the expert must be paid an appropriate fee.[5]

In those cases where the trial judge has admitted the compelled expert testimony, the appellate courts have upheld the ruling because of the judge's discretionary power.[6] Similarly, in those cases where the trial judge has excluded the compelled testimony, the appellate courts have upheld the exclusion on the grounds that the exclusion was not an abuse of discretion.[7]

The trial judge's ruling on a motion to exclude the compelled testimony of an expert may be dispositive of the entire case. At least one court has stated that to allow the compelled testimony of an adversary's appraiser and to allow the examining party to identify the appraiser as his opponent's "rejected" expert, "tips the scales of justice too heavily."[8] The court further noted: "such a revelation is such a powerful nugget of information it is anything but routine."[9]

The majority position appears to be that a party may compel the testimony of one of his adversary's experts.[10] A few courts have held

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[3] Pennsylvania Co. for Ins. v. Philadelphia, 262 Pa. 439, 105 A. 630 (1918) (the private litigant has no more right to compel a citizen to give up the product of his brain, than he has to compel the giving up of material things. In each case it is a matter of bargain, which, as ever, it takes two to make, and to make unconstrained.).

[4] Ramacorti v. Boston Redevelopment Auth., 341 Mass. 377, 170 N.E.2d 323 (1960) (the Court noted that such discretionary power should not be exercised unless necessary for the purposes of justice).

[5] Washington Metropolitan Area Transit Auth. v. One Parcel of Land, 450 F. Supp. 122 (D.C. Md. 1978).

[6] Levitsky v. Prince George's County, 50 Md. App. 484, 439 A.2d 600 (1982).

[7] *Hawaii:* Honolulu v. Bonded Investment Co., Ltd., 54 Hawaii 385, 507 P.2d 1084 (1973).

Massachusetts: Fifty-five Market Street, Inc. v. Lynn Redevelopment Authority, 354 Mass. 758, 235 N.E.2d 806 (1968); Ramacorti v. Boston Redevelopment Auth., 341 Mass. 377, 170 N.E.2d 323 (1960).

Washington: State v. Washington Horse Breeders Assoc., 64 Wash. 2d 756, 394 P.2d 218 (1964).

[8] Sun Charm Ranch, Inc. v. City of Orlando, 407 So. 2d 938, 941 (Fla. 5th DCA 1981).

[9] *Id.* at 940.

[10] *Arkansas:* State Highway Comm'n v. Phillips, 252 Ark. 206, 479 S.W.2d 27 (1971).

that an adversary's testimony cannot be compelled because communications between the appraiser and the adversary's attorney are protected by the attorney client privilege.[11] However, the majority of cases rejects the attorney client privilege as a basis for exclusion of the compelled testimony.[12]

California: People *ex rel.* Department of Public Works v. Cowan, 1 Cal. App. 3d 1001, 81 Cal. Rptr. 713 (1969).

Connecticut: Thomaston v. Ives, 156 Conn. 166, 239 A.2d 515 (1968).

Florida: Sun Charm Ranch, Inc. v. City of Orlando, 407 So. 2d 938 (Fla. 5th DCA 1981).

Georgia: Logan v. Chatham County, 113 Ga. App. 491, 148 S.E.2d 471 (1966).

Iowa: Crist v. Iowa State Highway Comm'n, 255 Iowa 615, 123 N.W.2d 424 (1963).

Kentucky: Urban Renewal & Community Development Agency v. Fledderman, 419 S.W.2d 741 (Ky. 1967).

Maine: Rancourt v. Waterville Urban Renewal Auth., 223 A.2d 303 (1966).

Maryland: Levitsky v. Prince George's County, 50 Md. App. 484, 439 A.2d 600 (1982).

Massachusetts: Ramacorti v. Boston Redevelopment Auth., 341 Mass. 377, 170 N.E.2d 323 (1960).

Missouri: State *ex rel.* State Highway Comm'n v. Kalivas, 484 S.W.2d 292 (Mo. 1972).

New Mexico: State *ex rel.* State Highway Comm'n v. Steinkraus, 76 N.M. 617, 417 P.2d 431 (1966).

Ohio: Masheter v. Cleveland Bd. of Ed., 17 Ohio St. 2d 27, 46 Ohio Ops. 2d 197, 244 N.E.2d 745, *cert. denied,* 396 U.S. 878, 24 L. Ed. 2d 135, 90 S. Ct. 152 (1969).

South Dakota: State Highway Comm'n v. Earl, 82 S.D. 139, 143 N.W.2d 88 (1966).

Tennessee: State *ex rel.* Smith v. Wilkinson-Snowden-McGehee, Inc., 571 S.W.2d 842 (Tenn. Ct. App. 1978).

Texas: State v. Biggers, 360 S.W.2d 516 (Tex. 1962).

Utah: Board of Education v. Barton, 617 P.2d 347 (Utah 1980).

Virginia: Cooper v. Norfolk Redevelopment & Housing Authority, 197 Va. 653, 90 S.E.2d 788 (1956).

[11] *Delaware:* State *ex rel.* State Highway Dept. v. 62.96247 Acres of Land in Newcastle County, 57 Del. 40, 193 A.2d 799 (1963).

Oregon: Brink v. Multnomah County, 224 Or. 507, 356 P.2d 536 (1960) (court notes that "work product" doctrine may provide additional protections).

[12] *California:* People *ex rel.* Dept. of Public Works v. Donovan, 57 Cal. 2d 346, 19 Cal. Rptr. 473, 369 P.2d 1 (1962); People *ex rel.* Department of Public Works v. Cowan, 1 Cal. App. 3d 1001, 81 Cal. Rptr. 713 (1969).

Some courts have held that the concept of fairness should prevent an adversary's expert from being compelled to testify at trial.[13] Other courts have held that since the landowner is able to retain another expert, the landowner should not be allowed to compel the testimony of his adversary's expert.[14] Finally, some courts have excluded such

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Connecticut: The Stanley Works v. New Britain Redevelopment Agency, 155 Conn. 86, 230 A.2d 9 (1967) (court also dismisses the contention that the testimony is privileged as work product).

Florida: Sun Charm Ranch, Inc. v. City of Orlando, 407 So. 2d 938 (Fla. 5th DCA 1981) (The weight of authority presently allows the condemnee to call the' condemnor's expert witness at trial and present to the jury that witness' opinion on value. The traditional barriers to this practice, *i.e.*, work product privilege, attorney client privilege and unfairness have been substantially eroded).

Georgia: Logan v. Chatham County, 113 Ga. App. 491, 148 S.E.2d 471 (1966).

Iowa: Crist v. Iowa State Highway Comm'n, 255 Iowa 615, 123 N.W.2d 424 (1963).

Maine: Rancourt v. Waterville Urban Renewal Authority, 223 A.2d 303 (1966).

Maryland: Levitsky v. Prince George's County, 50 Md. App. 484, 439 A.2d 600 (1982).

Massachusetts: Ramacorti v. Boston Redevelopment Auth., 341 Mass. 377, 170 N.E.2d 323 (1960).

New Mexico: State *ex rel.* State Highway Comm'n v. Steinkraus, 76 N.M. 617, 417 P.2d 431 (1966).

Ohio: Masheter v. Cleveland Bd. of Ed., 17 Ohio St. 2d 27, 45 Ohio Ops. 2d 197, 244 N.E.2d 745, *cert. denied,* 396 U.S. 878, 24 L. Ed. 2d 135, S. Ct. 152 (1969).

South Dakota: State Highway Comm'n v. Earl, 82 S.D. 139, 143 N.W.2d 88 (1966).

Virginia: Cooper v. Norfolk Redevelopment & Housing Auth., 197 Va. 65, 90 S.E.2d 788 (1956).

[13] Brink v. Multnomah County, 224 Or. 507, 356 P.2d 536 (1960) (It has been said that one litigant should not be permitted to make use of his opponent's preparation of his case and that do so would penalize the diligent and place a premium on laziness).

[14] *Delaware:* State *ex rel.* State Highway Dept. v. 62.96247 Acres of Land, 57 Del. 40, 193 A.2d 799 (1963).

Hawaii: Honolulu v. Bonded Invest. Co., 54 Hawaii 385, 507 P.2d 1084 (1973).

Massachusetts: Ramacorti v. Boston Redevelopment Auth., 341 Mass. 377, 170 N.E.2d 323 (1960).

New Mexico: State *ex rel.* State Highway Comm'n v. Steinkraus, 76 N.M. 617, 417 P.2d 431 (1966).

evidence because of a potential ethical conflict of placing the appraiser in the position of "serving two masters."[15]

In those jurisdiction which admit the compelled testimony of an adversary's appraiser, there is a strong line of authority for the position that a party who calls his adversary's appraiser cannot ask the appraiser if he was originally employed by the opposing party.[16] These courts have concluded that such testimony is simply too prejudicial; "the admission of such evidence could easily result in such mischief as to promote a situation whereby, in reality, the 'least' expert witness becomes the 'most' expert in the eyes of the jury."[17]

New York: In re Brooklyn Bridge Southwest Urban Renewal Project, 50 Misc. 2d 478, 270 N.Y.S.2d 703 (1966).

Washington: State v. Washington Horse Breeders Assoc., 54 Wash. 2d 756, 394 P.2d 218 (1964).

[15] Delaware; State *ex rel.* State Highway Dept. v. 62.96247 Acres of Land, 47 Del. 40, 193 A.2d 799 (1963).

New York: In re Brooklyn Bridge Southwest Urban Renewal Project, 50 Misc. 2d 478, 270 N.Y.S.2d 703 (1966).

Pennsylvania: Pennsylvania Co. for Ins. v. Philadelphia, 262 Pa. 439, 105 A. 630 (1918).

Rhode Island: L'Etoile v. Director of Public Works, 89 R.I. 394, 153 A.2d 173 (1959).

[16] *Florida:* Sun Charm Ranch v. City of Orlando, 407 So. 2d 938 (Fla. 5th DCA 1981).

Georgia: Logan v. Chatham, 113 Ga. App. 491, 148 S.E.2d 471 (1966).

Missouri: State *ex rel.* State Highway Comm'n v. Kalivas, 484 S.W.2d 292 (Mo. 1972).

South Dakota: State Highway Comm'n v. Earl, 82 S.D. 139, 143 N.W.2d 88 (1966).

Tennessee: State *ex rel.* Smith v. Wilkinson, 571 S.W.2d 842 (Tenn. Ct. App. 1978).

Texas: State v. Biggers, 360 S.W.2d 516 (Tex. 1962).

See:

Georgia: Department of Transportation v. Willis, 165 Ga. App. 271, 299 S.E.2d 82 (1983) (admission of evidence concerning prior employment is so prejudicial that it constitutes grounds for reversal).

But see:

Utah: Board of Education v. Barton, 617 P.2d 347 (Utah 1980) (failure to allow questioning concerning "prior employment" constitutes grounds for reversal).

[17] State *ex rel.* Smith v. Wilkinson-Snowden-McGehee, 571 S.W.2d 842 (Tenn. Ct. App. 1978).

Although some courts have held that the employment status of the appraiser cannot be brought out on direct examination, it should be noted that if the appraiser is challenged on cross examination as to his expertise or knowledge of the properties in the area (as opposed to an attack on his conclusions, the basis for the conclusions and the structure of the report), the party who originally called the appraiser will be able to elicit on redirect the fact that the appraiser was originally retained by the opposing party.[18]

As these cases point out, the stakes are high when an attorney attempts to compel the testimony of one of his adversary's appraisers. The issue should be brought to the court's attention as soon as possible. By waiting until the eve of trial to raise the objection, the trial judge may overrule the objection on the rationale that the party who now intends to call the appraiser to the stand may have spent considerable time and effort in preparing his case based solely on that expert's appraisal.[19]

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[18] *United States:* Washington Metropolitan Area Transit Authority v. Maryland, 450 F. Supp. 122 (D. Md. 1978).

Texas: State v. Biggers, 360 S.W.2d 516 (Tex. 1962).

[19] Granger v. Wisner, 134 Ariz. 377, 656 P.2d 1238 (1982).

§ 7A.04 Sample Discovery Requests in an Eminent Domain Case

The following sample discovery requests are specifically designed to elicit as much detail as possible concerning the substance of an adversary's appraisal reports.

[1]—Sample Interrogatories*

DEFENDANT'S INTERROGATORIES TO PLAINTIFF

Pursuant to Rule 33 of the Federal Rules of Civil Procedure, the Defendant hereby requests that the Plaintiff respond to the following interrogatories.

General Instructions

1. These Interrogatories are continuing and require supplemental responses.

2. In the event that it is claimed that any document or communication responsive to any Interrogatory is privileged, such document or communication should be fully identified in writing, except that the substance thereof need not be described to the extent it is privileged.

General Definitions

Except as otherwise expressly indicated, as used in these Interrogatories, Definitions, and Instructions:

1. "Document" means any recorded information or recorded communication in whatever form, including any memorandum or report of a meeting or telephone or other conversations, diary, telegram, report, record, contract, agreement, study, draft, handwritten or other note, working paper, sketch, picture, plan, chart, paper, graph, index, tape, data sheet or data processing card, or any other written, recorded, transcribed, punched, taped or filmed matter, however produced or reproduced, and regardless of origin or location, in the possession, custody or control of the Plaintiff or its agents, accountants or attorneys. "Document" also means all copies of documents, by whatever means made, if the copy bears any other marking or notation not found on the original.

2. "Person" or "Persons" means any natural person, corporation, firm, partnership, unincorporated association, joint venture, proprietorship, governmental body (including any administrative agency and including state, federal or local government) or other organization or legal entity.

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* The author wishes to thank Burton Berg, Esquire, Berg & Laipson, Worcester, Massachusetts and Gerald Moody, Esquire, Milford, Massachusetts for providing the author with these sample interrogatories.

3. "Identify" when used with reference to a person, means give the following information with respect to that person:

(a) The person's full name;

(b) The person's complete present (or last known) residential address;

(c) The person's complete present (or last known) business address; and

(d) The person's occupation or principal business.

4. "Identify" when used with respect to a document, means provide the following information with respect to the document:

(a) A description of the type of document (*e.g.*, letter, diary, etc.);

(b) A summary of the substance of the document;

(c) The identity of the author or originator of the document;

(d) The identity of the addressee or addressees (if any) of the document;

(e) The date indicated on the document as being the date thereof, or if no date is shown upon it, the date (as exactly as possible) when the document was written, executed or produced;

(f) The number of pages of the document;

(g) The title of the document;

(h) The identification number of the document (if any);

(i) The present location and custodian of the original of the document, the present location and custodian of any copy thereof, and the present (or last known) address of each such custodian;

(j) The manner and date of disposition of the document if it is no longer in the possession or subject to the control of the Plaintiff; and

(k) The identity of all recipients of the document.

5. "Identify" when used with respect to anything other than a person or document, means list by name, define, and explain as fully and in as much detail as possible, with specific reference to all documents and persons relating to the thing or things identified.

6. The term "relating to" means constituting, concerning, mentioning, discussing, pertaining to, connected with, relied upon, or in any way relevant to the indicated item.

Additional Definitions

1. "Plaintiff" shall mean the Plaintiff, ..., and any and all agents, employees, officers or persons otherwise affiliated with . . . . . .

2. "Defendant" shall mean the Defendant, The Town of . . . . . ., and any and all employees, officers, agents, agencies, or persons otherwise affiliated with the Town of . . . . . .

3. The "Takings" shall mean the takings of real property of the Plaintiff by the Defendant, which takings were recorded on . . . . . ., and which takings are the subject of the present civil action.

4. The "Property" shall mean the property of the Plaintiff which has in any way been affected by the Takings.

5. The "Project" shall mean all construction and related work performed by or on behalf of the Town of . . . . . ., or any of its departments, which in any way relates to the taking.

INTERROGATORIES

1. Please state your name, residential address, business and business address.

2. Please set forth the area in square feet and the legal description of:

(a) The entire property of the Plaintiff from which the takings were made;

(b) The property taken; and

(c) The remainder of the Plaintiff's property left after the Taking.

3. Relative to the property taken as alleged in the Complaint, please state in detail:

(a) Whether or not your interest on the date of the Taking was in all or part of the property taken;

(b) If such interest was in part of the property, please identify which part;

(c) The nature of your interest in the property;

(d) How and when you acquired your interest; and

(e) If such interest is by Lease, please attach a copy of the Lease and all amendments.

4. Please describe any and all appraisals of the Plaintiff's Property from January 1, ... to date, including as part of your description;

(a) The date it was commenced;

(b) The name, address, occupation, place of business and business experience of each appraiser;

(c) The date of valuation;

(d) The appraised value of the whole property;

(e) The appraised value of the untaken portion;

(f) The appraised value of the taken portion, and the portion of the value attributed to:

(i) Real property taken;

(ii) Improvements taken;

(iii) Severance damage to remaining land;

(iv) Severance damages to remaining improvements; and

(v) Other items of compensation, identifying each;

(g) The factors considered and the manner in which they were used to compute the answers to the preceding subdivisions of this Interrogatory;

(h) The date the appraisal report was submitted; and

(i) The name, address, job title or capacity and duties of the person(s) to whom the report was submitted.

5. Please state whether any of the appraisals listed in Plaintiff's answer to the preceding Interrogatory were amended or changed subsequent to the date of their initial submission to the Plaintiff; and if so, for each subsequently amended or changed appraisal, state:

(a) The date of the change;

(b) The substance of the change;

(c) The reasons for the change; and

(d) The name, address and job title or capacity of the person who made the change.

6. Please set forth Plaintiff's contention as to the highest and best use of (a) the entire property and (b) the untaken portion of the property, including in your answer the grounds on which Plaintiff bases these answers.

7. Please set forth any information in Plaintiff's possession, other than as indicated above, regarding values of any properties comparable to Plaintiff's property which have been sold within the past five years.

8. If any such information is available, for each comparable sale, please state:

(a) The date of each sale;

(b) The description and location of the property sold;

(c) The name, address and occupation of the seller;

(d) The name, address and occupation of the purchaser;

(e) The purchase price;

(f) Other terms of the sale;

(g) The use to which the property was put at the time of the sale; and

(h) The use to which the property has been put since the time of the sale.

9. Please state whether or not the plaintiff has any photographs of the property, and if so, for each photograph, please set forth its present location, along with:

(a) The date and time of taking;

(b) What is depicted; and

(c) The name, address and occupation of the photographer.

10. Please state whether or not your appraiser(s) consulted with anyone, including the owner, regarding the valuation of this property. If the answer is affirmative, please state the substance of each conversation and when and where they took place.

11. If there are any Leases in any way applicable to the property taken or to the property remaining after the Taking, please state:

(a) The name and address of the Lessee;

(b) The term of the Lease(s);

(c) The portion(s) of the property subject to the Lease(s); and

(d) The name and address of the custodian of the Lease(s).

12. If any governmental approvals, permits or licenses were necessary for the Plaintiffs, their predecessors, or any of their Lessee(s) to occupy and utilize any of the Plaintiff's property taken or remaining after Taking, as to each such, please state:

(a) The nature of such approval, permit or authorization;

(b) The official, board or agency issuing or authorizing such;

(c) The date of issuance and/or authorization; and

(d) The party to whom such was issued or on whose behalf such was authorized.

13. If you have knowledge of the existence of any written statement, report, record or any other document pertaining to the taking or this litigation (other than documents filed with this Court), please state:

(a) The name, address, and occupation of the person(s) who prepared each document;

(b) The name, address and occupation of the person(s) who has custody of such document; and

(c) The general nature or description of each such document.

14. State the names, addresses and occupation of any person other than as previously stated herein who has knowledge or information pertaining to this litigation.

15. With respect to any expert witnesses which Plaintiff expects to call at trial, please set forth:

(a) The names of such experts;

(b) The substance of the facts and opinions to which the experts are expected to testify;

(c) A thorough and explicit summary of the grounds for each opinion of the experts;

(d) The educational and professional background and experience of such experts; and

(e) The identity and location of any reports, documents, or other tangible items upon which any such experts are expected to base their testimony.

16. Please list all witnesses which Plaintiff intends to call at trial, including in your answer the following:

(a) Name of witness;

(b) Business address of witness;

(c) Residential address of witness;

(d) The relationship between the witness and the Plaintiff; and

(e) A brief summary of the testimony which you expect the witness to give at trial.

17. With respect to any expert witnesses who were (i) retained or specially employed in anticipation of trial but not expected to testify; and/or (ii) informally consulted but not retained; please set forth:

(a) The names of such experts;

(b) The substance of the facts and opinions to which the experts are expected to testify;

(c) A thorough and explicit summary of the grounds for each opinion of the experts;

(d) The educational and professional background and experience of such experts; and

(e) The identity and location of any reports, documents, or other tangible items upon which any such experts are expected to base their testimony.

18. Please state whether the appraiser(s) inspected the land and building(s) in question. If the answer is in the affirmative, state on what occasions, for how long a period of time, and whether or not the inside of the building was viewed; describing in detail the investigations which were made.

19. If the appraisers employed the capitalization of net income method, state whether or not actual income and expenses or estimated income and expenses were employed within the appraisal.

(a) If actual income was used, please state the income.

(b) If estimated income was used, please state the basis of such estimated income and the dollar amount.

(c) If actual expenses were used, please state the expenses.

(d) If estimated expenses were used, please state the basis of such estimated expenses and the dollar amount.

[2]—Sample Request for Production of Documents

PLAINTIFF'S REQUEST FOR PRODUCTION OF DOCUMENTS

The Plaintiff, pursuant to the provisions of Rule 34 of the Federal Rules of Civil Procedure, requests that the Defendant, ..., produce the following documents for inspection and copying at the offices of [Attorney for Plaintiff] within thirty days after receipt of this request.

1. All documents constituting, commemorating or relating to any oral or written appraisals of the subject property, including but not limited to any preliminary appraisals, draft appraisals or final appraisals which were prepared by or on behalf of:

(a) any appraisers who are expected to testify at trial;

(b) any appraisers retained or specially employed in anticipation of trial but not expected to testify;

(c) any appraisers informally consulted but not retained; and

(d) any staff appraisers.

2. Any and all documents which were reviewed by any appraisers in connection with the preparation of any oral or written preliminary appraisals, draft appraisals or final appraisals.

3. All documents constituting, commemorating or relating to any oral or written communications between the defendant and/or the defendant's attorneys and:

(a) any appraiser who is expected to testify at trial;

(b) any appraiser retained or specially employed in anticipation of trial but not expected to testify;

(c) any appraiser informally consulted but not retained;

(d) any staff appraiser for the taking authority.

4. All documents constituting, commemorating or relating to any plans, diagrams or sketches of the subject property.

5. All documents constituting, commemorating or relating to the formal taking of the subject property.

6. All documents constituting, commemorating or relating to any "comparable sales" relied on by any of the appraisers; including but not limited to deeds, purchase and sale agreements and photographs.