"Discovery and Rules of Evidence in Eminent Domain"

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I. Introduction:

a. Discovery in eminent domain cases is controlled predominantly by Part 4 of the Rules of the Virginia Supreme Court. Although discovery in eminent domain cases is very similar to other civil actions, there are a number of differences attorneys practicing in this field should be aware of including the limitation in the scope of discovery and the shifting of costs and fees from the landowner to the condemning authority.

b. As with any other case in Virginia, the rules of evidence in an eminent domain proceeding are controlled by Part Two of the Rules of the Virginia Supreme Court. This outline will highlight the rules of evidence pertaining to opinion and expert witness testimony since the majority of evidence in eminent domain cases comes in this form. The outline will also discuss several evidentiary questions that arise from the Virginia Supreme Court's recent decision in Ramsey v. Commissioner of Highways, 770 S.E.2d 487 (2015).

II. Scope of Discovery:

a. The scope of discovery in most civil actions is spelled out in the general rule of Rule 4:1(b)(1); that is, parties may use discovery "regarding any matter, not privileged, which is *relevant to the subject matter* involved in the pending action… It is not ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

b. Rule 4:1(b)(5) is a specific limiting rule, which provides that the scope of discovery in eminent domain, domestic relations, *habeas corpus* and *coram nobis* actions, shall extend "*only* to matters which are *relevant to the issues* in the proceeding and which are not privileged."

i. "Subject matter" under Rule 4:1(b)(1) covers any information related to "the matter of concern over which something is created" and is much broader than "issue" under Rule 4:1(b)(5) which is limited to "a point in dispute between two or more parties." BLACK'S LAW DICTIONARY 1465, 849 (8th Ed. 2004).

ii. Under Rule 4:1(b)(i), information which is relevant or reasonably calculated to lead to the discovery of admissible evidence is discoverable. Under Rule 4:1(b)(5), the word "only" acts as a constraint by confining discovery to information relevant to the issues.

iii. The specific limiting rule of 4:1(b)(5) has priority over the general rule of 4:1(b)(1), so that discovery can be held only on the relevant issues at bar in an eminent domain case.

III. Breakdown of Rule 4:1(b)(4):

a. 4:1(b)(4)(A) Discovery Methods for Expert Witnesses Expected to Testify at Trial:

Discovery of facts known and opinions held by expert witnesses may be obtained "only as follows":

i. Interrogatories. Interrogatories may be used to identify the following: each expert witness expected to testify; the subject matter on which the expert witness is expected to testify; 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. Depositions. Parties may use depositions for any expert witness who has been identified by the opposing side, subject to Rule 4:1(b)(4)(c) concerning fees and expenses.

iii. "[A] litigant cannot use a request for production of documents under Rule 4:9 to circumvent the exclusive method established in Rule 4:1(b)(4) for discovering expert opinions." Flora v. Shulmister, 262 Va. 215, 222, 546 S.E.2d 427, 430 (2001). The condemnor must use interrogatories and depositions to discover the opinions of the landowner's expert witnesses. Contrary to the Federal Rules of Civil Procedure, no report is required under the Virginia Rules.

iv. However, upon motion, the court may order further discovery by other means under Rule 4:1(b)(4)(A)(iii). This may include requests for production of documents and requests for admission.

v. Scope of Disclosure Required under Rule 4:1(b)(4)(A)(i):

1. In John Crane, Inc. v. Jones, 274 Va. 581, 650 S.E.2d 851 (2007), the Virginia Supreme Court examined the degree of specificity required under Rule 4:1(b)(4)(A)(i) and imposed a strict standard regarding a party's duty to disclose. In answers to interrogatories and designation of expert witnesses, the defendant Crane failed to include a specific opinion related to its expert witness' expected testimony concerning levels of asbestos in ambient air. The trial court excluded the opinion and Crane argued that the trial court interpreted Rule 4:1(b)(4)(A)(i) too strictly.

Crane claimed on appeal that the opinion was well known to the plaintiff because plaintiff questioned Crane's expert about his opinions during his deposition. Nevertheless, the Court relied strictly on the disclosure and upheld the finding of the trial court. The Court stated that

> a party is not relieved from its disclosure obligation under the Rule simply because the other party has some familiarity with the expert witness or the opportunity to depose the expert. Such a rule would impermissibly alter a party's burden to disclose [under Rule 4:1(b)(4)(A)(i)] and impose an affirmative burden on the non-disclosing party to ascertain the substance of the expert's testimony.

Id., 274 Va. at 593, 650 S.E.2d at 857.

2. However, the Virginia Supreme Court appeared to narrow this rule somewhat in Condominium Services, Inc. v. First Owners' Association of Forty Six Hundred Condominium, Inc., 281 Va. 561, 709 S.E.2d 163 (2011), a breach of contract action. In Condominium Services, a condominium association sued the managing agent of the condominium for breach of contract for failure to file tax returns on behalf of the association, among other claims. The condominium association disclosed the general opinion of its expert witness, an accountant, who was expected to testify regarding the tax forms that should have been filed by the managing agent, the amount of taxes due, and that the association will accrue interest, penalties and other costs. The opinion failed to disclose the exact amount of interest and penalties, and the defendant claimed that any opinion testimony concerning the amount of interest and penalties should accordingly be struck. The trial court denied the request and the Court, on appeal, upheld the trial court's finding. The Court stated that "[w]hen applying Rule 4:1(b)(4)(A)(i),

this Court begins by determining whether the opinion at issue was disclosed in any form." *Id.*, 281 Va. at 576, 709 S.E.2d at 172, citing Crane, 274 Va. at 591, 650 S.E. 2d at 856. The Court noted that although the opinion did not itemize the specific amount of penalties and interest, it disclosed that defendant's failures would cause the association to incur penalties and interest. The Condominium Services case appears to give the trial court a great deal of discretion in determining whether or not a disclosure of expert witness testimony is sufficient or not under the Rules, so long as the disclosure is made in at least some general form.

b. 4:1(b)(4)(B) Discovery of Experts Retained But Not Expected to Testify at Trial:

Parties to a condemnation case may not use discovery to obtain facts known or opinions held by an expert who has been retained or specially employed by the opposing party in anticipation of litigation or preparation for trial and *who is not expected to be called as a witness at trial*, unless the party seeking such discovery can show "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. 4:1(b)(4)(C) Expert Witness Fee Shifting:

Unless manifest injustice would result, the court shall require the party seeking discovery to pay the expert a reasonable fee for time spent and expenses incurred in responding to depositions, or other means of discovery if allowed under Rule 4:1(b)(4)(A)(iii), or discovery of experts not expected to testify if allowed under Rule 4:1(b)(4)(B). However, the condemning authority cannot enforce this rule against a landowner when the authority initiates discovery under Rule 4:1(b)(4)(D).

d. 4:1(b)(4)(D) Cost of Discovery Fee Shifting:

In cases where the condemnor initiates discovery, the condemnor is responsible for paying "*all* costs thereof, including without limitation the cost and expense of those experts discoverable under subdivision (b) of this Rule." For the purpose of this rule, the condemnor is deemed to have initiated discovery if it uses, or gives notice of the use of any discovery method before the landowner does so, even if the landowner subsequently engages in discovery. Landowner's counsel may therefore elect to defer initiating discovery until immediately after receiving a discovery request from the condemnor.

The Virginia Supreme Court has never addressed this Rule. Virginia Circuit Courts have differed as to whether or not a landowner can recover costs for time spent by expert witnesses in preparing for discovery under this rule. In Commonwealth Transp. Com'n v. Coffey, 31 Va. Cir. 354, 1993 WL 946186 (1993), the Fairfax Circuit Court held that expenses incurred by condemnees' experts in directly responding to the Commonwealth's discovery are recoverable against the Commonwealth. However, it also held that "expenses incurred by defendant's expert in preparing to respond to discovery and to develop his work product are not recoverable."

In a more recent case, Commissioner of Highways v. H.R. Buyrite, LLC, Case No: CL14-893, the Portsmouth Circuit Court required the condemning authority to pay all costs of discovery, including time spent by the expert witness in preparing for and travelling to the deposition, attending the deposition, and expedited deposition transcript fees.

i. Landowner's counsel may wish to consider use of the Virginia Freedom of Information Act to obtain certain information, but avoid requesting discovery. This Act is available to obtain certain documents which would otherwise be obtainable only through discovery in an eminent domain case.

IV. **Pretrial Scheduling Order:**

a. The Uniform Pretrial Scheduling Order ("Uniform PSO") states that "(n)o provision of this Order supersedes the Rules of the Supreme Court of Virginia governing discovery." However, from the condemnor's perspective, in the majority of condemnation cases the landowner will not provide substantive answers to discovery requests concerning opinions of expert witnesses until the deadlines provided in the Uniform PSO. Landowners' attorneys will often respond to discovery requests that the expert witness has not completed his work or the landowner has not determined his expert witnesses pursuant to Rule 4:1 at the time of the initial answer. In most cases, the landowner's substantive answers to discovery are provided pursuant to the deadlines for designation of expert witnesses in the Uniform PSO.

b. Under the Uniform PSO the condemning authority designates expert witnesses 90 days before trial, the landowner designates expert witnesses 60 days before trial, and rebuttal designations are due 45 days before trial. The result is that in most condemnation cases using the Uniform PSO, the condemning authority only finds out about the landowner's claim for just compensation 60 days before trial. This causes an extreme time crunch for the condemning authority to find and hire rebuttal expert witnesses, schedule depositions (since the discovery cutoff date in the Uniform PSO is 30 days before trial), and properly assess the landowner's claims.

c. The Uniform PSO used by the Virginia Beach Circuit Court for eminent domain cases, a copy of which is attached, pushes the deadlines for expert disclosure back to 150/105/60. This schedule allows more time for discovery, to locate and identify experts as needed, and to conduct a meaningful mediation before trial.

V. **Production of Landowner's Appraisal:**

a. Under Rule 4:1(b)(4)(A), a party cannot use requests for production of documents to compel production of written appraisal reports. In many condemnation cases, the appraiser for the landowner will only provide an oral appraisal report. Landowner's counsel should always consider the option of providing an appraisal report to the condemning authority and seeking recovery of expert witness fees pursuant to Va. Code Section 25.1-245. Under existing Section 25.1-245[1], effective 2007, the Court *may* order the condemning authority to pay reasonable costs, other than attorney's fees, and reasonable fees and costs, including travel costs, for *up to three (3) expert witnesses testifying at trial*, under the following conditions:

i. The landowner provides the condemning authority with a complete copy of the owner's written appraisal report in compliance with USPAP;

ii. The award at trial is an amount that is *30% or greater* than the amount of the condemning authority's *final written offer*, which offer is required to be made *within 60 days* after the condemning authority receives the owner's written report.

iii. The trial court has total discretion as to whether or not it will require such a reimbursement, and this Section does not apply to actions involving easements valued at less than $10,000.

b. During the 2016 General Assembly Session, a bill was introduced that would significantly alter the landowners' ability to be reimbursed for expert witness fees. As of the date of this outline, Senate Bill 478 passed both the House and Senate. Attached is a copy of SB 478. If SB 478 becomes law, landowners will have a much easier time getting reimbursed for expert witness fees. The factors in 25.1-245 would remain the same for condemnations by public service companies, railroads, or government utility corporations.

[1] Under this Section, the Court may also order the condemning authority to pay the landowner up to $1,000 for a survey.

However, condemnation cases involving the State or local governments would be governed by a new statute, 25.1-245.1. Under 25.1-245.1, if the award is *25% or greater* than the amount of the condemnor's *initial written offer*, the court may, at its discretion, order the condemnor to pay the owner reasonable fees and costs, including travel costs, for up to three experts *or as many experts as are called by the condemnor, whichever is greater*.

VI. **<u>Discovery Checklist</u>**:

a. Expert Witnesses:

i. Identify all expert witnesses.

ii. The subject matter on which the expert is expected to testify.

iii. The substance of the facts and opinions which the expert is expected to testify.

iv. Summary of the grounds for each opinion.

v. Examine each expert's qualifications, including any resume or curriculum vitae.

vi. All assumptions the expert made or was asked to make.

vii. Identify all information and documents the expert relied upon.

viii. Identify all individuals the expert consulted with and relied upon in reaching his or her opinions.

ix. Identify any report, exhibit, or other document prepared in connection with any opinion to be made.

b. Facts Relevant to the Subject Property:

i. Identify any engineering, planning and development work.

ii. Identify improvements made by the landowner.

iii. Zoning and comprehensive plan for property as of date of take.

iv. Identify all easements, restrictive covenants, leases, or contracts encumbering property on date of take.

v. Identify all leases and tenants on the property on the date of take.

vi. Identify all prior (recent) appraisals done on the property.

vii. Whether the owner has received any offers to purchase property.

viii. Whether the property has been marketed or listed for sale.

ix. Whether owner has ever requested a reduction of the tax assessment.

c. Others:

i. Landowner's opinion of just compensation and all facts and grounds to support his opinion.

ii. Identify individuals having knowledge of facts relevant to the issues in case.

iii. Describe any actions taken to minimize damage, if any.

iv. If lost profits are being claimed, identify the business by name and tax identification number and describe the type of business operation conducted on the property.

v. If lost profits are being claimed, provide and explain the calculations supporting claim, including the type, the amount and the reason for each adjustment using generally accepted accounting principles.

vi. Identify every item which landowner claims should be valued as a fixture for purposes of establishing just compensation.

VII. Part Two – Virginia Rules of Evidence - Article VII. Opinions and Expert Testimony

a. RULE 2:701. Opinion Testimony by Lay Witness (also see Section 8.01-401.3(B)):

i. Allows a lay witness to testify to an opinion if it is reasonably based upon personal experience or observations and will aid the trier of fact in understanding the witness' perceptions.

ii. Testimony from lay witnesses "that amounts to an opinion of law is inadmissible."

iii. In Harman v. Honeywell Intern., Inc., 288 Va. 84, 758 S.E.2d 515 (2014), the Virginia Supreme Court determined that this was a two part test: 1) Whether the witness has sufficient personal knowledge; and 2) whether the opinion testimony is necessary to aid the trier of fact insofar as "the witness's information for some reason cannot be adequately conveyed to the court by a detailed recital of the specific facts upon which the opinion is based."

iv. This Rule supports the general rule in eminent domain that the landowner is considered competent and qualified to render a lay opinion regarding the value of his property. It is not intended to supersede Sections 54.1-2010 and 54.1-2011(A), proscribing lay witnesses, other than the landowner, from testifying regarding opinions of value.

b. **RULE 2:702. Testimony by Experts** (also see Section 8.01-401.3A):

i. In civil cases, "if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise."

ii. All expert witness' opinion testimony must be supported by a sufficient factual basis. Kipps v. Virginia Nat. Gas, Inc., 247 Va. 162, 441 S.E.2d 4 (1994).

iii. For condemnors it is usually good practice to identify any witnesses who will testify in regard to reading and interpreting construction plan sheets as a potential expert witness. Although these witnesses typically will not need to provide opinion testimony, it may be necessary to have the witness qualified as an expert if interpretation of the construction plans is at issue in the case.

c. **RULE 2:703. Basis of Expert Testimony** (also see Section 8.01-401.1):

i. In civil cases an expert witness may give testimony and render an opinion or draw inferences from facts, circumstances, or data made known to or perceived by such witness at or before the hearing or trial during which the witness is called upon to testify.

ii. The facts, circumstances, or data relied upon by such witness in forming an opinion or drawing inferences, if of a type normally relied upon by others in the particular field of expertise in forming opinions and drawing inferences, need not be admissible in evidence.

iii. Adequate Foundation:

1. Opinion testimony from an expert must be based on an adequate factual foundation.

2. "Expert testimony is admissible in civil cases to assist the trier of fact, if the evidence meets certain fundamental requirements, including the requirement that it be based on an adequate foundation. Expert testimony is inadmissible if it is speculative or founded on assumptions that have no basis in fact. In addition, such testimony should not be admitted unless the trial court is satisfied that the expert has considered all the variables bearing on the inferences to be drawn from the facts observed." Tarmac Mid-Atlantic, Inc. v. Smiley Block Co., 250 Va. 161, 166, 458 S.E.2d 462, 466 (1995).

iv. Opinion Testimony Relying on Hearsay:

1. An expert witness may rely on hearsay to form the basis of his opinion testimony and present that testimony on direct examination. Bowers v. Huddleston, 399 S.E.2d 811, 241 Va. 83 (1991).

2. However, the Rule does not make hearsay admissible on direct. "[H]earsay matters of opinion, upon which the expert relied upon in reaching his own opinion, may not be admitted in evidence, upon direct examination of an expert witness, notwithstanding the fact that the opinion of expert witness is itself admitted, and notwithstanding the fact that hearsay is of type normally relied upon by others in the witness' particular field of expertise." McMunn v. Tatum, 237 Va. 558, 379 S.E.2d 908 (1989).
3. Rule 2:705 and Section 8.01-401.1 do provide for the other party to cross examine the expert witness in regard to the factual basis of the expert's opinions.

d. **RULE 2:704. Opinion on Ultimate Issue** (also see Section 8.01-401.3B and C):

i. In criminal cases, opinion testimony is not admissible on the ultimate issues of fact, unless it pertains to the witness' or the defendant's mental disorder and the hypothetical effect of that disorder on a person in the witness' or the defendant's situation. This does not apply in civil cases.

ii. In civil cases, no expert or lay witness shall be prohibited from expressing an otherwise admissible opinion or conclusion as to any matter of fact solely because that fact is the ultimate issue or critical to the resolution of the case.

iii. But in no event shall such witness be permitted to express any opinion which constitutes a conclusion of law.

e. RULE 2:705. Facts or Data Used in Testimony (also see Section 8.01-401.1):

i. In civil cases, an expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise.

ii. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

f. RULE 2:706. Use of Learned Treatises With Experts (also see Section 8.01-401.1):

i. Rule 2:706 is an exception to the hearsay rule in regard to learned treatises.

ii. In civil cases, "statements contained in published treatises, periodicals or pamphlets on a subject of history, medicine or other science or art, established as a reliable authority by testimony or by stipulation shall not be excluded as hearsay" if "called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination."

iii. If admitted, the statements may be read into evidence but may not be received as exhibits.

iv. If the statements are to be introduced through an expert witness upon direct examination, copies of the specific statements shall be designated as literature to be introduced during direct examination and provided to opposing parties 30 days prior to trial unless otherwise ordered by the court.

v. If a statement has been designated by a party in accordance with and satisfies the requirements of this rule, the expert witness called by that party need not have relied on the statement at the time of forming his opinion in order to read the statement into evidence during direct examination at trial.

VIII. Evidentiary Questions Remain After Ramsey:

a. In April 2015, the Virginia Supreme Court handed down its decision in Ramsey v. Commissioner of Highways, 770 S.E.2d 487, holding that VDOT's "pre-settlement appraisal" of the subject property was admissible as a "pre-condemnation party admission." However, the Court limited this ruling somewhat by stating that the "holding is limited to the issue of whether the eminent domain statutes forbid admission

of otherwise admissible evidence of value like the evidence proffered in this case. Given the trial court's contrary holding, it found it unnecessary to address whether the proffered evidence was admissible under the Rules of Evidence."

b. Questions Remain:

i. **Is the amount of just compensation from the initial appraisal admissible or just the valuation of the whole property?** The specific holding from the opinion states that "the trial court erred in finding that the Commissioner's statement valuing the [whole] property at $500,000 was an offer to settle and, as such, was inadmissible at trial." The Court further reasoned that "(w)hile Code Section 33.2-1023(H) bars the admission into evidence of any amount deposited with the trial court with a Certificate of Take, nothing in Code Sections 25.1-204 or – 417 bars the admission of the fair market value of the entire property determination in the pre-settlement appraisal."

ii. **Is the Condemning Authority's "Pre-Condemnation Statement" issued pursuant to Section 25.1-204 Relevant to the Determination of Just Compensation?** In the Ramsey case, the Commissioner of Highways was the condemning authority. The Commissioner of Highways is not an expert in valuing real estate and would never be allowed to testify to his opinion of just compensation at trial. Why would his pre-condemnation statement of just compensation be relevant in a condemnation proceeding to determine just compensation?