

Commissioners: Who Can Serve and Who Cannot?
Eminent Domain
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People think we are pulling their leg when we tell them that in our fine state a landowner's friends and business associates may be selected to hear the landowner's condemnation case and award just compensation. In a Virginia condemnation case, a landowner has three options to determine his or her just compensation: a bench trial, a jury trial, or commissioners. If the landowner elects to have commissioners determine just compensation, then prior to trial the landowner and the condemning authority each submit their own list of proposed commissioners. The commissioners who will hear the case are then selected out of the pool created by the two lists. The commissioners must be property owners who reside in the jurisdiction where the case is pending.

Then things start to get odd. The case is heard by five commissioners, which is a small number, but even more peculiarly, the commissioners do not have to reach a unanimous decision. Any three or more of the five commissioners may act. However, that is not the strangest part. The strangest part is who can serve as the commissioners.

Briefly, here is what the statutes state:

All commissioners shall be disinterested freeholders and residents of the county or city wherein the property or the greater portion of the property to be condemned is situated. No person shall serve as a commissioner for more than one full week within any three-month period, unless agreed to by the parties.

Va. Code 25.1-227.1(B). The selection process can be performed one of two ways, per Va. Code 25.1-227.2:

A. The parties to the eminent domain proceeding may agree upon five or nine persons qualified to act as commissioners, as provided in subsection B of [Section 25.1-227.1](#).

B. If the parties cannot agree upon five or nine qualified persons to act as commissioners, then each party shall present to the court a list containing the names of at least eight qualified persons. If any party fails to submit such a list of names, the court may, in its discretion, submit such a list on such party's behalf.

C. From the lists submitted pursuant to subsection B, the court shall select the names of thirteen potential commissioners and at least two alternates. At least 30 days prior to their service, such persons shall be summoned to appear.

D. If nine qualified persons are selected, the petitioner and the owners shall each have two peremptory challenges and the remaining five shall serve as commissioners. If five qualified persons are agreed upon as provided in subsection A, they shall serve as commissioners.

E. If an owner has filed no answer to the petition, and the court finds that the owner is not represented by counsel, the court may, in its discretion, and subject to the right of the petitioner to challenge for cause, subpoena five persons who shall serve as commissioners.

F. Any three or more of the five commissioners may act.

G. In condemnation proceedings instituted by the Commissioner of Highways, a person owning structures or improvements for which an outdoor advertising permit has been issued by the Commissioner of Highways pursuant to [Section 33.2-1208](#) shall be deemed to be an "owner" for purposes of this section.

That is the full extent of the statutory explanation of how commissioners are empaneled and it leaves a lot of questions unanswered.

Q: Can a party or their attorney contact the potential commissioners?

A: No. The attorneys' role is limited to providing the names of commissioners.

In *Va.-W. Power Co. v. Kessinger*, 122 Va. 135, 146-47 (1917), the court took up the issue of counsel notifying the commissioners that they had been appointed, and stated as follows:

[W]e think the practice of counsel in a case notifying the commissioners of their appointment in condemnation proceedings should be discontinued. It is a position in which counsel should not be put or put themselves. It is a difficult position to fill with absolute absence of some expression which may have or seem to have the ulterior object or effect of inducing a special feeling of favor on the part of the commissioner communicated with toward counsel having the communication and his client, especially when the communication is verbal, and only in a less degree when it is in writing. The notice of their appointment and of the date fixed for the view, should be communicated to the commissioners, (or to the minimum number authorized to act, if only such number is desired to act), by the clerk or other disinterested person, as the order of court may specially direct by consent of all parties to the case, or, in the absence of such consent, by a certified copy of the order being delivered to the commissioners by the sheriff of the county or sheriff or sergeant of the city in the court of which the proceedings are had.

In *May v. Crockett*, 202 Va. 438 (1961) the court struck a potential commissioner because he had a financial interest in the property since he owned adjoining property, but the court also noted that the fact that he had been approached by the condemnee to act as a commissioner was further evidence to strike him.

In *Commonwealth Transp. Comm'r v. Du Val*, 238 Va. 679 (1989), the court made it clear that parties are not to communicate with potential commissioners about the case and that any communication, whether done for an improper purpose or not, would result in the commissioner being struck. During voir dire, one of the prospective commissioners testified that before he was summoned as a commissioner, one of the landowner's attorneys asked him if he "would be willing to serve as Commissioner in a land dispute. That's all that was said." The landowner argued that the statutory changes allowing the parties to submit lists of potential commissioners to the court "put the commissioner selection process in the hands of the parties to the condemnation." The court did not agree and stated,

The statute limits [the parties'] role to the nomination of commissioners. If the legislature had intended the parties to contact prospective nominees before submitting their names, thus modifying the effect of our rulings in *Crockett* and *Kessinger*, we believe it would have done so expressly. Although the record discloses nothing improper beyond mere contact by counsel, for the reasons expressed in *Crockett*, and because any such contact by any party or his representative presents the possibility of abuse, we conclude that the contact should have resulted in Savage's disqualification for cause.

I think this provides us with an idea of our interaction with potential commissioners. It appears that no matter which method we choose to adopt in choosing a panel, our efforts are limited to providing names only and leaving the rest up to the court. We cannot contact the people we recommend, much less discuss the case or eminent domain with them.

Q: What is the standard for striking a commissioner?

A: Whether or not to strike a commissioner is in the discretion of the trial court. The Virginia Supreme Court has provided various general language over the years for this process, some of which is cited below, primarily from *May v. Crockett*, 202 Va. 438, 440-41, 117 S.E.2d 648, 649-50 (1961) and *Commonwealth Transp. Comm'r v. Chadwell*, 254 Va. 302, 305, 491 S.E.2d 723, 725 (1997).

The maintenance of public confidence in the integrity of reports of commissioners, acting under the statute in the assessment of damages in condemnation proceedings, who are in truth in effect performing the duties of a jury in an ad quod damnum proceeding, is of such importance that the same rule applicable to juries should be applied; and such reports should be kept free from the suspicion that the commissioners may have been improperly influenced.

Every precaution should be taken by the commissioners and by the courts to preserve public confidence in the findings of commissioners.

"The power of eminent domain is a high prerogative and the prescribed methods of its exercise are to be carefully observed. Great weight is attached to the award of the commissioners and it is important that their judgment be not affected by relationship to the parties or other extraneous matters."

May v. Crockett, 202 Va. 438, 440-41, 117 S.E.2d 648, 649-50 (1961) (internal citations omitted).

The commissioners must be "upright and capable, ...without bias or prejudice." *Chairman of the Highway Comm'n v. Fletcher*, 153 Va. 43, 46-47, 149 S.E. 456, 457 (1929). The commissioners, like a jury, hear the evidence, evaluate the credibility of witnesses, and make factual determinations in ascertaining the proper award due the landowner. *Commonwealth Transp. Commonwealth v. Thompson*, 249 Va. 292, 295, 455 S.E.2d 206, 207 (1995).

To maintain public confidence in the integrity of condemnation proceedings, the selection of condemnation commissioners is subject to the same rule applicable to the selection of jurors, namely, that any person who may be improperly influenced in the proceedings must be stricken for cause from the panel. *See May v. Crockett*, 202 Va. 438, 440-41, 117 S.E.2d 648, 649-50 (1961). The trial court is given discretionary authority to determine whether a prospective commissioner should be stricken for this reason. *State Highway and Transp. Comm'r v. Dennison*, 231 Va. 239, 243, 343 S.E.2d 324, 327 (1986). Under its discretionary authority, the trial court must decide, among other things, whether any members of the venire have a financial interest so intimately related to the issue at trial that they cannot sit indifferent in the cause. *Id.*

Commonwealth Transp. Comm'r v. Chadwell, 254 Va. 302, 305, 491 S.E.2d 723, 725 (1997). However, the general language above may seem more aspirational than anything once one examines

the specific case examples on why commissioners have and have not been struck in the Commonwealth.

I. Commissioners have been struck for cause for, *inter alia*, the following reasons:

1. Where landowner entertained the commissioners and privately discussed his financial condition. *Va.-W. Power Co. v. Kessinger*, 122 Va. 135, 147, 94 S.E. 186, 190 (1917);
2. Where the landowner fed and entertained commissioners. *Griffin v. Tomlinson*, 155 Va. 150, 151, 154 S.E. 483, 483 (1930);
3. Where one commissioner had been previously paid to appraise the property. *Collins v. Pulaski Cty.*, 201 Va. 164, 171, 110 S.E.2d 184, 189 (1959);
4. Where several commissioners read a newspaper article describing negotiations made to buy the property, including the amount offered by the city. *Siegfried v. Charlottesville*, 206 Va. 271, 277, 142 S.E.2d 556, 560 (1965);
5. Where one commissioner was in his own fight with VDOT over property valuation. *Commonwealth Transp. Comm'r v. Du Val*, 238 Va. 679, 686 (1989);
6. Where the landowner's attorney had a "mere" contact with a commissioner before trial, *id.*;
7. Where the commissioner owned two adjoining parcels to the one being condemned and one of his parcels was subject to condemnation on the same project. *May v. Crockett*, 202 Va. 438, 117 S.E.2d 648 (1961);
8. Where the commissioner was a client of the landowner's attorney and had used the landowner's appraiser in a previous condemnation. *City of Va. Beach v. Giant Square Shopping Ctr. Co.*, 255 Va. 467, 472 (1998); and
9. Where the proposed commissioner owned property in very close proximity to the land taken. *Commonwealth Transp. Comm'r v. Chadwell*, 254 Va. 302, 306, 491 S.E.2d 723, 725 (1997).

II. Conversely, courts have refused to strike commissioners for, *inter alia*, the following reasons:

1. Race. Batson challenges apply to the selection of commissioners in eminent domain cases, and a Batson challenge can be made by either the landowner or the condemnor. *See Commonwealth Transp. Comm'r v. Thompson*, 249 Va. 292, 295 n.*, 455 S.E.2d 206, 207 (1995) ("We simply find no merit in the landowner's argument that the Transportation Commissioner lacked standing to assert a Batson motion.").

2. Where the commissioners had certain business relationships with the landowner's expert witness. *State Highway & Transp. Com. v. Cardinal Realty Co.*, 232 Va. 434, 440 (1986);
3. Where the commissioner had an "ongoing" business relationship with a party (performed utility work). *Cardinal Realty, supra*;
4. Where prospective commissioner had sold the landowner some personal insurance policies before the taking. *State Highway and Trans. Commr. v. Dennison*, 231 Va. 239, 343 S.E.2d 324 (1986);
5. Where prospective commissioner had done some construction work for the landowner three years before the taking. *State Highway and Trans. Commr. v. Dennison*, 231 Va. at 243, 343 S.E.2d at 327.
6. Where commissioners were customers of the business being condemned (bank). *First Bank & Tr. Co. v. Commonwealth Transp. Comm'r*, 263 Va. 451, 456 (2002);
7. Where the commissioner was the landowner's pastor and friend. *State Highway & Transp. Comm'r v. Garland*, 223 Va. 701, 705 (1982);
8. Where commissioners ate lunch with the landowner in a busy restaurant where no other tables were available. *Commonwealth Transp. Comm'r v. Branch*, 16 Va. Cir. 50 (Chesterfield Cir. Ct. 1989).
9. Where commissioner testified that both he and the landowner were active members of a trade association and the landowner was a paid part-time employee of the trade association. *Highway Comm'r v. McIntyre*, 16 Va. Cir. 428, 431 (Clarke County Cir. Ct. 1973).