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Civil Procedure: Discover in Eminent Domain Proceedings as Applied to the Opinions, Conclusions, and Reports of Expert Appraisers

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CASE COMMENTS

CIVIL PROCEDURE: DISCOVERY IN EMINENT DOMAIN PROCEEDINGS AS APPLIED TO THE OPINIONS, CONCLUSIONS AND REPORTS OF EXPERT APPRAISERS*

Carlson v. Pinellas County, 227 So. 2d 703 (2d D.C.A. Fla. 1969)

During the course of eminent domain proceedings brought by Pinellas County, the county attempted to take the deposition[1] of an appraiser previously consulted by appellant landowner's counsel. The trial court, overruling appellant's objection,[2] allowed discovery of the appraiser's opinions and conclusions as to the fair market value of the property in question and subsequently permitted the county to call the appraiser as a witness, again over objection.[3] The landowners appealed, claiming that the information sought came under the protection of the "work product" rule and should have been immune from discovery. The Second District Court of Appeal, reversing, HELD, that information resulting from the work of the appraiser retained by a private landowner condemnee was immune from discovery by the condemnor in eminent domain proceedings.[4]

Work product discovery is an area permeated with confusion and uncertainty, the boundaries of which are "at best nebulous and at worst nonexistent."[5] Even where the rules of procedure are uniform,[6] as within the federal court system, neither the rules themselves[7] nor the cases arising under the rules provide clear guidelines for determining what information is or is not immune from discovery.[8] The Supreme Court[9] has announced that the test of whether to allow discovery of work product material is whether the moving party has shown "sufficient cause." This test, however, has been less than helpful. While its use indicates that something more than ordinary good cause must be shown in such a case,[10] the difficulty of determining what constitutes "sufficient cause" has given rise to more litigation and comment than any other single area of the rules of civil procedure.[11]

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*EDITOR'S NOTE: This case comment received the *George W. Milam Award* as the outstanding case comment submitted by a junior candidate in the fall 1969 quarter.

1. FLA. R. CIV. P. 1.410 (b).
2. FLA. R. CIV. P. 1.310 (b).
3. 227 So. 2d 703 (2d D.C.A. Fla. 1969).
4. *Id.* at 706.
5. Note, *Discovery of Experts: A Historical Problem and a Proposed FRCP Solution*, 53 MINN. L. REV. 785, 793 (1969).
6. *Cf.* Oceanside Union School Dist. v. Superior Court, 58 Cal. 2d 180, 189, 373 P.2d 439, 444 (1962).
7. FED. R. CIV. P. 26-37.
8. LaFrance, *Work Product Discovery: A Critique*, 68 DICK. L. REV. 351, 371-79 (1964).
9. *See* Hickman v. Taylor, 329 U.S. 495 (1947).
10. Cooper, *Work Product of the Rulesmakers*, 53 MINN. L. REV. 1269, 1273 (1969).
11. Note, *Discovery — The Work Product Protection*, 13 U. KAN. L. REV. 125 (1964).

The instant case concerns the application of discovery rules to expert appraisers' opinions and conclusions in land condemnation proceedings. Because there are no Florida cases on point,[12] the court relied on *Shell v. State Road Department*,[13] in which the condemnee landowner sought discovery of worksheets prepared by state appraisers. The Florida supreme court stated that in an ordinary case such information would be immune from discovery, but held that work product immunity did not extend to the type of information sought in condemnation proceedings.[14] The court in *Shell* based its departure from ordinary discovery concepts on the relative position of the parties in an eminent domain action, finding that a branch of the state government could have "no justification for . . . being secretive to the possible detriment of a landowner whose property is being taken against his will."[15]

Since the Florida rules governing discovery are substantially the same as the federal rules,[16] the opinions of the federal courts are highly persuasive in this area.[17] Although the decisions are far from unanimous,[18] a clear majority of courts tends to restrict discovery of opinions and conclusions of expert appraisers in land condemnation actions.[19] Within this framework the federal cases fall into three groups:[20] the first holding that in condemnation actions parties are not entitled to any information concerning the use of appraisers by the opposing party.[21] The rationale generally used in these cases is that since condemnation actions present only the issue of determining "just compensation," the function of discovery in narrowing the issues before trial does not exist,[22] and the landowner can advance the necessary proof of his contention without discovery. This rationale appears to be based on the assumption that the condemnee has ample means of presenting his claim as to what constitutes "just compensation" for his land.[23] However, this is frequently not the case, and in these situations the denial of discovery against government appraisers may limit the landowner's opportunity to refute effectively the appraisers' evaluation.[24]

12. 227 So. 2d 703, 705 (2d D.C.A. Fla. 1969).
13. 135 So. 2d 857 (Fla. 1961).
14. *Id.* at 860.
15. *Id.* at 861.
16. *E.g., compare* FED. R. CIV. P. 26, *with* FLA. R. CIV. P. 1.280.
17. Savage v. Rowell Distrib. Corp., 95 So. 2d 415, 417 (Fla. 1957); Delta Rent-A-Car v. Rihl, 218 So. 2d 467, 468 (4th D.C.A. Fla. 1969).
18. For example, a single expert's report has been found to be discoverable in one district court and not in another—where the same litigation was conducted in two districts. *Compare* Cold Metal Process Co. v. Aluminum Co. of America, 7 F.R.D. 425 (N.D. Ohio 1947), *aff'd sub nom.* Sachs v. Aluminum Co. of America, 167 F.2d 570 (6th Cir. 1948), *with* Cold Metal Process Co. v. Aluminum Co. of America, 7 F.R.D. 684 (D. Mass. 1947).
19. Note, *Discovery of Expert Opinions and Conclusions in Condemnation Proceedings in Federal and California Courts*, 20 HASTINGS L.J. 650, 656 (1969).
20. *Id.* at 653.
21. *E.g.*, United States v. 6.82 Acres of Land, 18 F.R.D. 195 (D.N.M. 1955); Hickey v. United States, 18 F.R.D. 88 (E.D. Pa. 1952).
22. United States v. 7,534.04 Acres of Land, 18 F.R.D. 146 (N.D. Ga. 1954).
23. United States v. 900.57 Acres of Land, 30 F.R.D. 512, 521 (W.D. Ark. 1962).
24. Note, *Pre-trial Discovery in Condemnation Proceedings: An Evaluation*, 42 ST. JOHN'S

The second group of federal cases allows discovery of facts upon which appraisal reports are based, but not the reports themselves or the opinions of the appraisers contained therein.[25] Courts in this group appear to follow a general rule of nondiscoverability of opinionative material,[26] applying this rule with especial strictness in condemnation actions.[27] These courts either deny discovery of the reports or opinions absolutely[28] or deny disclosure in the absence of special circumstances,[29] such as the uniqueness of the material[30] or the unavailability elsewhere of the information sought.[31] Some courts in this group include comparable sales data in the category of discoverable facts,[32] characterizing such data as the best means of ascertaining the fair market value of the property being condemned.[33]

Taking a more liberal view of the rules, the third group of cases tends to allow discovery of the opinions and conclusions of the government's expert appraiser by deposition[34] and, in at least one case, by disclosure of the government's appraisal report itself.[35] Courts in this group generally see little value in making a distinction between expert witnesses and lay witnesses for purposes of discovery.[36] The recent case of *United States v. Meyer*,[37] which applies a concept of full discovery in a condemnation action, may be indicative of a trend in the federal court system toward a more liberal interpretation of discovery rules in such actions.[38]

This problem has been dealt with less frequently in state jurisdictions. Several states[39] have explicitly placed the opinions or conclusions of experts beyond discovery in all cases.[40] On the other hand, Maryland provides no

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L. REV. 52, 57 (1967).

25. *E.g.*, United States v. 19.987 Acres of Land, 27 F.R.D. 420 (E.D.N.Y. 1961).

26. Note, *supra* note 19, at 654.

27. *See* United States v. Certain Parcels of Land, 25 F.R.D. 192, 193 (N.D. Cal. 1959).

28. United States v. 284,392 Square Feet of Floor Space, 203 F. Supp. 75, 77-78 (E.D.N.Y. 1962).

29. United States v. 4.724 Acres of Land, 31 F.R.D. 290, 292 (E.D. La. 1962).

30. Brown v. New York, N.H. & H.R.R., 17 F.R.D. 324 (S.D.N.Y. 1955).

31. United States v. Certain Parcels of Land, 25 F.R.D. 192, 193 (N.D. Cal. 1959).

32. *E.g.*, United States v. 3595.98 Acres of Land, 212 F. Supp. 617, 618-19 (N.D. Cal. 1962).

33. United States v. 5139.5 Acres of Land, 200 F.2d 659, 662 (4th Cir. 1952). In United States v. 3595.98 Acres of Land, 212 F. Supp. 617 (N.D. Cal. 1962), the court went so far as to require the exchange of lists of comparable sales data between the parties prior to trial.

34. *E.g.*, United States v. Meyer, 398 F.2d 66 (9th Cir. 1968); United States v. 23.76 Acres of Land, 32 F.R.D. 593 (D. Md. 1963).

35. United States v. 50.34 Acres of Land, 13 F.R.D. 19 (E.D.N.Y. 1952).

36. *See* United States v. Meyer, 398 F.2d 66 (9th Cir. 1968).

37. 398 F.2d 66 (9th Cir. 1968).

38. *See* Note, *supra* note 19, at 672-73.

39. *E.g.*, IDAHO R. CIV. P. 26 (b); IOWA R. CIV. P. 141; LA. CODE CIV. P. art. 1452 (West 1960); MO. R. CIV. P. 57.01; NEV. R. CIV. P. 186a; N.J. R. CIV. P. 26 (b); PA. R. CIV. P 4011; TEX. R. CIV. P. 186 (a); UTAH R. CIV. P. 30 (b); WASH. R. PLEADING, PRAC. & PROC. 26 (b); W. VA. R. CIV. P. 30 (b).

40. Goldstein, *The Discovery Process in Highway Land Acquisition*, 14 AM. U. L. REV. 38, 54 (1964).

protection for experts against discovery.[41] The Arizona supreme court[42] has ruled that the opinions and conclusions of an appraiser consulted by condemnees was not "work product" and was discoverable[43] by the government as a matter of right.[44] Making no distinction between the respective positions of the state and the private landowner in a condemnation case as opposed to an ordinary suit, the Arizona court applied the same liberal discovery concept as would have been used in ordinary litigation. Iowa[45] and Wisconsin[46] have allowed discovery of opinions and conclusions of government appraisers on motion by private landowners. Conversely, the Illinois rule is that the work of state appraisers is privileged.[47]

One or more of five rationales are generally used in justifying the denial of discovery in condemnation cases. *Hickman v. Taylor*[48] provided one justification by holding that a lawyer, in his role as an advocate and an officer of the court, demands a certain degree of privacy in performing his duties and that requiring production of the lawyer's work product would lead to inefficiency and curtailment of trial preparation.[49] Discovery procedures, however, are unlikely to cause any attorney to forego necessary trial preparation, because an attorney must be completely familiar with the facts in order to evaluate the case realistically and advise his client accordingly.[50] In view of the vital nature of the evidence given by expert appraisers and the often highly technical nature of the material presented, the *Hickman* rationale for denying discovery of work product material is particularly not persuasive when applied to condemnation cases.[51] In any case, the sufficient cause requirement of *Hickman*[52] for allowing discovery would seem to be satisfied by the nature of the condemnation action itself and the central part appraisers' opinions play in the proceedings,[53] at least when the landowner is the party seeking discovery.[54]

The second reason usually advanced for denying discovery in eminent domain proceedings is that information such as appraisers' reports falls within the attorney-client privilege and is thus immune from discovery.[55]

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41. MD. R. CIV. P. 410.

42. State *ex rel.* Willey v. Whitman, 91 Ariz. 120, 370 P.2d 273 (1962).

43. A contrary ruling by the lower court, however, was held to be nonprejudicial and the decision was affirmed, 91 Ariz. 120, 125, 370 P.2d 273, 277 (1962).

44. Arizona's discovery rules are identical with the federal rules and thus, are substantially the same as the Florida rules. *See* Comment, 111 U. PA. L. REV. 509, 510 (1963).

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

46. State *ex rel.* Reynolds v. Circuit Court, 15 Wis. 2d 311, 112 N.W.2d 686 (1961).

47. City of Chicago v. Harrison- Halsted Bldg. Corp., 11 Ill. 2d 431, 143 N.E.2d 40 (1957).

48. 329 U.S. 495 (1947).

49. *Id.* at 510-11.

50. F. JAMES, CIVIL PROCEDURE 206 (1965).

51. 111 U. PA. L. REV. 509, 512 (1963).

52. *See* Hickman v. Taylor, 329 U.S. 495 (1947), and text accompanying note 9 *supra.*

53. Note, *supra* note 24, at 58.

54. *See* United States v. 50.34 Acres of Land, 13 F.R.D. 19 (E.D.N.Y. 1952).

55. *E.g.*, City of Chicago v. Harrison-Halsted Bldg. Corp., 11 Ill. 2d 431, 143 N.E.2d

The broad language used by the Court in *Hickman* in disposing of the claim of privilege, however, makes it difficult to sustain the argument that opinions of an expert such as are contained in an appraisal report are within the attorney-client privilege. If memoranda prepared by counsel himself are not privileged,[56] a fortiori reports prepared for him by experts are not.[57] No reason exists to distinguish expert opinions in the realm of eminent domain from the general rule that experts' opinions are not privileged in federal courts.[58]

The third line of reasoning used to justify denial of discovery has been that while facts are subject to discovery, opinionative material is not.[59] This distinction between fact and opinion is indefensible in most instances involving land condemnation.[60] Where the testimony of experts is considered essential, as in condemnation and patent proceedings,[61] expert opinion *is* fact for purposes of litigation and constitutes evidence in itself,[62] often making up the bulk of the trial material.[63] The distinction between fact and opinion is therefore irrelevant, and the court should instead inquire whether it is practicable to require discovery and whether to do so would serve the purposes of the rules of procedure.[64]

That the material sought is readily available elsewhere is the fourth reason used to block discovery in eminent domain cases.[65] This rationale is not persuasive in the type of proceeding involved in the instant case because the basic facts and appraisers' opinions sought could only be obtained from the appraisers themselves.[66] Discovery of the evaluation of the government's appraiser is often the only way reliable information as to the value of the property in question may be obtained by the small landowner who cannot bear the expense of hiring his own appraiser.

The fifth and most valid justification for denying discovery in land condemnation proceedings is that it may result in unfairness to the party being moved against[67] and provide the moving party a "free ride" at the expense

40 (1957).

56. Hickman v. Taylor, 329 U.S. 495, 508 (1947).

57. 4 J. MOORE, FEDERAL PRACTICE §26.24 (1969).

58. Sachs v. Aluminum Co. of America, 167 F.2d 570 (6th Cir. 1948); Maginnis v. Westinghouse Elec. Corp., 207 F. Supp. 739 (E.D. La. 1962).

59. *E.g.*, United States v. 284,392 Square Feet of Floor Space, 203 F. Supp. 75, 77-78 (E.D.N.Y. 1962).

60. Note, *Discovery of Experts: A Historical Problem and a Proposed FRCP Solution*, 53 MINN. L. REV. 785, 796 (1969).

61. *See* Note, *Discovery Provisions of the Federal Rules of Civil Procedure as Applied to Patent Infringement Proceedings*, 73 DICK. L. REV. 509 (1969).

62. United States v. 39 Cases, More or Less, 35 F.R.D. 357, 364 (W.D. Pa. 1964); C. MCCORMICK, EVIDENCE §§13-14 (1954).

63. United States v. Meyer, 398 F.2d 66, 69 (9th Cir. 1968).

64. *Id.* at 73; State *ex rel.* Willey v. Whitman, 91 Ariz. 120, 124, 370 P.2d 273, 277 (1962).

65. *E.g.*, United States v. Certain Parcels of Land, 25 F.R.D. 192 (N.D. Cal. 1959); United States v. 6.82 Acres of Land, 18 F.R.D. 195 (D.N.M. 1955).

66. United States v. Meyer, 398 F.2d 66, 72 (9th Cir. 1968).

67. *E.g.*, Lewis v. United Air Lines Transp. Corp., 32 F. Supp. 21 (W.D. Pa. 1940); *cf.* Smith v. Hobart Mfg. Co., 188 F. Supp. 135 (E.D. Pa. 1960).

of his opponent's diligence.[68] Conversely, a finding of lack of unfairness in allowing discovery[69] or a feeling that withholding discovery will result in unfairness to the moving party,[70] has been explicitly used by judges in granting motions to discover appraisers' opinions. Making "unfairness" the test of whether discovery should be allowed in a given case may initially seem a vague standard. However, because much of the discovery process, especially regarding the forced production of documents under rule 1.410 of the Florida Rules of Civil Procedure,[71] is discretionary with the trial judge[72] and public policy is inextricably intertwined in this clash of state and individual interests,[73] this rationale may be seen as no more than a recognition of the many variables that will enter into a decision in this area.

In applying the *Shell*[74] decision to the facts in the present case, the court appeared to adopt this unfairness rationale as the test of whether discovery was to be allowed against the landowner. Undoubtedly aiding the court in its determination was a realization of the unique form of a condemnation suit and the relative roles of the parties in such a suit. Since the right of the government to take the land is rarely at issue,[75] usually the landowner contests only the amount to be paid him as full compensation.[76] The landowner, in effect, is in the position of an innocent party dragged into court without fault on his part, bearing the burden of proving that the government's evaluation of full compensation is incorrect.[77]

Considering all the factors above, the instant case is seen to be extremely close. On the one hand are strong arguments for broad discovery in land condemnation proceedings, with the logical corollary that discovery principles should apply equally to both sides.[78] On the other hand, the inherent inequality of position between the state and the private landowner, and the unique character of condemnation proceedings bring out the equally strong contention that broad discovery of appraisers' opinions and reports should not be as readily applied against a landowner as against the government.[79]

The facts of a particular case and the identity of the landowner will often determine whether discovery should be allowed against a private land-

68. Note, *supra* note 19, at 659.
69. Shell v. State Road Dep't, 135 So. 2d 857 (Fla. 1961).
70. United States v. 23.76 Acres of Land, 32 F.R.D. 593 (D. Md. 1963).
71. This Florida rule corresponds to FED. R. CIV. P. 45.
72. *See* Oceanside Union School Dist. v. Superior Court, 58 Cal. 2d 180, 192-93, 373 P.2d 439, 447 (1962).
73. Note, *supra* note 24, at 53.
74. 135 So. 2d 857 (Fla. 1961).
75. *See* State Road Dep't v. Chicone, 158 So. 2d 753, 756-57 (Fla. 1963).
76. FLA. CONST. art. X, §6(a).
77. Note, *supra* note 19, at 673.
78. Goldstein, *supra* note 40, at 55-56.
79. 227 So. 2d 703, 706 (2d D.C.A. Fla. 1969).