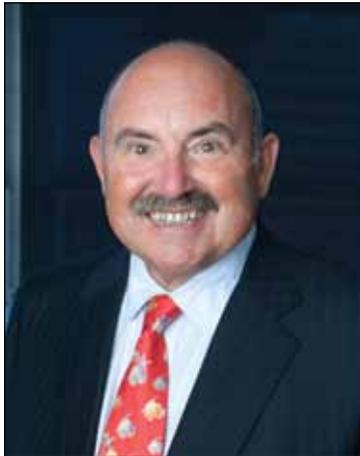


Ten Rules For Condemnors' Counsel



Michael Rikon

is a partner in the New York City law firm Goldstein, Rikon & Rikon, P.C., which limits its practice to condemnation cases. He is the New York member of Owners' Counsel of America. He is designated as a "Best Lawyer" and "Super Lawyer" for condemnation and eminent domain matters and is rated "AV" by Martindale-Hubbell. He can be reached at mrikon@ggrgpc.com.

Michael Rikon

These rules can save you time and money — and lead to fairer results.

ALTHOUGH MOST of our practice is devoted to representing claimants in condemnation matters, we also represent condemnors. We think based on our experience that the following is a litany of do's and don'ts when acting as condemnor's counsel.

Rule 1: Be Fair

We all took an oath to uphold the Constitution when we were sworn into the Bar of our respective States. The Fifth Amendment requires the payment of just compensation to a former owner in an eminent domain case. If you are representing a condemnor, you do not do a service to your client by retaining an appraiser known to make "low ball" appraisals. It will cost the condemnor more money in the long run and make it virtually impossible to settle the case. An unreasonably low appraisal will also provide the basis for an award of legal and appraisal fee reimbursement following trial. If counsel for condemnor finds that an appraiser is unfair or cannot support the appraisal — discharge the appraiser quickly and hire someone who understands that a condemnation trial is not a game.

Rule 2: Settle Early

An early settlement of a case will save a condemnor money. Most property owners are not interested in a long, drawn-out legal dispute. Rather, they want the cash equivalent of the property lost so it can be reinvested. Most attorneys representing claimants will favorably consider a quick settlement, as turnover of litigation cases is important. Both sides will save from unnecessary litigation and expert expense. But this sometimes highlights a possible conflict because condemnor counsel usually generate fees on an hourly rate. The condemnor and its counsel should make settlement recommendations based on the best interests of the government body.

The longer a case remains open, the less possibility there is for settlement. Former Justice Abraham G. Gerges, the Supreme Court Judge for Brooklyn and Staten Island condemnation cases, recommends an early conference to see if the case can be resolved quickly. He also recommends that condemnors have their appraisals of the property before it is condemned. The former owner no longer has an incentive to settle after waiting for that proverbial day in court. Its appraisers and expert opinions may actually prevail. In addition, interest continues to accrue and may amount to a substantial sum of money. Then, there is also the additional time, expense, and uncertainty of appeal. A settlement means an amount certain that motivates a former owner taking a discount from its appraised damages. Former Justice Stanley Parness, who presided over condemnation cases in Manhattan, also recommends early conferences which will help focus and narrow the issues. He also notes that an early settlement may not only save the condemnor money, but could also work to effect quicker vacant possession of the property.

Rule 3: Do Not Take An All-Or-Nothing Position

We see this often. Many condemnors' counsel gamble with their clients' money, believing that a court will adopt an argument or theory of valuation that will result in a complete victory. The chances of this happening are slim. The fundamental reason is because condemnation differs from other types of lawsuits. First, it is a constitutionally protected claim. Second, it, a condemnation proceeding, is not private litigation. Many appellate court decisions stress that if anyone has a burden of proof in a condemnation trial, it is the trial court — the court must assure that “just compensation” is awarded. A comment by one of New York's leading condemnation justices, the Honorable John R. LaCava who presides over condemnation and tax certiorari cases in New York's 9th Judicial District of New York, is that parties to a condemnation case must be realistic on the “highest and best use” of a property which will be the single most important premise of valuation.

A recent example is *Gyrodyne Company of America, Inc. v State of New York*, 2011 NY Slip Op 08562, where the State of New York valued a 245.5 tract of land in Long Island as having a highest and best use as light industrial. The court found that the highest and best use of the property was residential and awarded the full amount of claimant's appraisal, \$125 million plus legal and expert fees for \$1,500,000. The State's rejected appraisal was for \$26,315,000.

Rule 4: Stipulate To Facts At Trial

Trial judges appreciate attorneys who simplify the issues for determination. Too often, lawyers insist on litigating every issue, including those that will probably have no bearing on the ultimate issue of fair market value. There is a related principle: do not object to every offer of evidence. It's not about who has more objections sustained, it's about moving a case quickly. You do not do the condemnor

any favors by attempting to prevent the claimant's case from coming in. Justice John C. Bivona, the condemnation judge for the 10th Judicial District, Suffolk County, New York, recommends the submission of a pre-trial memorandum to summarize the issues in the case. He also suggests that lawyers let their appraisers tell the story.

Rule 5: Be Respectful

It is shocking to observe counsel talking to a colleague when a judge is speaking to them. We have observed condemnor's counsel making faces if a judge does not sustain their objection. Be absolutely respectful even if you think you are clearly correct. In rare instances, ask if you can have permission to make further argument or a sidebar. Courtesy should also be extended to your opponent.

Rule 6: Use The Best Experts

A condemnation case lives or dies by its expert witnesses. Condemnors often retain experts based on the lowest bid. Often condemnor's counsel will use the same appraiser for all its cases. And, just as often, this same appraiser has never made an appraisal for a property owner. This reveals a definite propensity to provide a low appraisal. Go back and read Rule 1.

Condemnation cases often involve more than appraisers. The complexity of the issues will require other experts. For example:

- If the property is subject to environmental regulations, like wetlands, hire a competent wetlands scientist;
- If your real estate appraiser has the opinion that a particular site had a rezoning issue, the appraiser's opinion will not be enough to sustain a trial court's determination. Counsel should also retain a zoning expert, perhaps an architect, who will study zoning applications in the neighborhood. It might also be wise to subpoena someone from the relevant city planning

department and the actual zoning applications;

- If your real estate valuation expert believes that the site would be difficult to develop, retain a professional engineer.

Condemnors should remember when selecting the additional experts that bigger does not mean better. Having a land planner from a national engineering company who is completely unfamiliar with the local building code requirements is a terrible idea. So is having a wetlands scientist who prepares a report but never bothered to look at the property.

Use real people, experts who do this work on a daily basis and come to court with mud on their boots.

Rule 7: Don't Depend On A Strict Interpretation Of The Rules

A condemnor who refuses to extend normal courtesies is foolish. Most of the time, it is condemnor's counsel who needs some extra time, for example, to complete an appraisal. Refusal to grant a two-week extension necessitates a motion that just serves to highlight unreasonableness. This is not how a condemnor should appear; it delays disposition of the claim and costs the condemnor money.

Rule 8: Do Not Assume That Any Case Cannot Be Proven

Condemnees are entitled to be paid just compensation based upon the highest and best use potential at the time of taking. A recent decision by the Honorable Jaime A. Rios in a Queens Supreme Court decision, *Matter of Metropolitan Transportation Authority (East Side Access Project)*, Index No. 176/80 dated November 28, 2011, stated the highest and best use of property has to satisfy a four-part test. The use must be:

- Legally permissible;
- Physically possible;
- Financially feasible; and

- Maximally productive.
- Since it is irrelevant what the property is actually being used for on the date of acquisition, it is dangerous for a condemnor to take a no development potential position. A recent case from Richmond County illustrates this proposition. The property condemned was a two-acre retention basin. The basin was necessary for storm water and was to remain as such by recorded declaration until such time as the condemnor would construct a storm water sewer. The City valued the property at zero claiming that since the declaration forbids development until the sewer was constructed and one was not built as of the vesting date, it should be valued as permanently restricted. The court did not agree. Claimant had established by a competent professional engineer that a storm sewer was authorized and planned. But, more importantly, the court stated that the more relevant question was whether a willing buyer, on the date of vesting, would have purchased the property based on the fact that, absent the condemnation, there was a reasonable probability of a higher or more productive use of the property. The court found there was and denied the motion for summary judgment dismissing the claim. *Matter of City of New York (Grantwood Retention Basin)*, Saitta, J., 2011 NY Slip Op 21319; 2011 NY Misc Lexis 4358, Sept 7, 2011. The case was thereafter settled for a substantial amount.

Rule 9: Do Not Take Positions Inconsistent With The Well-Established Law

Condemnor's counsel risks losing all credibility when a position is taken that is contrary to the well-

established law. The case will be lost if there is no reasonable basis for not following the law. Instructing an appraiser to value parcels of land separately when there is common ownership or control of an assemblage is folly.

Instructing the condemnor's appraiser to disregard an obvious highest and best use will result in the complete dismissal of condemnor's appraisal since the valuation will have been predicated on comparable sales for a different use that cannot be considered.

Legal instructions to an appraiser on how to value property eliminates the appraisal from being an independent assay of fair market value on title vesting. Modifying, changing, or eliminating parts of an appraisal expose an appraiser to severe impeachment on cross-examination.

Rule 10: Obtain Authority To Settle Or Otherwise Dispose Of The Case

Condemnor's counsel should explain the risks of litigating a condemnation case. As long as the decision of award is within the range of evidence or explained, it is almost impossible to modify on appeal.

An award after a trial with an award that is substantially more than the pre-vesting offer will trigger a subsequent application for reimbursement of legal, appraisal, and expert fees. Additionally, further interest will accrue. Condemnor's counsel should schedule a meeting with the authority not only to explain the above, but to obtain authorization to settle. What may make a settlement occur is not only the amount of money, but the representation of when it will be paid, if accepted.

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