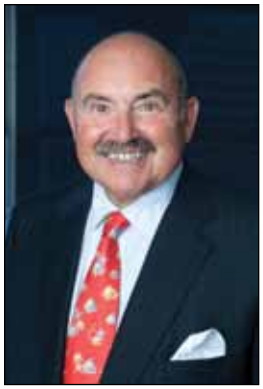
Ethics In Condemnation Cases



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For a fair condemnation case, ethical issues have to be kept in mind throughout.

ETHICS ISSUES can arise in any kind of case and condemnation cases are no exception. Given the nature of condemnation cases, however, some kinds of ethical issues are more likely to arise than in other cases. In this article, we will examine some of those scenarios.

YOUR EXPERT IS COMMITTING PERJURY. WHAT SHOULD YOU DO? • I was recently cross-examining an expert witness who had never testified before. I asked him whether he had made any prior reports to the one in evidence. He hesitated for a long time. His body language indicated evasiveness. Finally, he said, "I don't think so." I tried to pin him down and asked him again if he ever submitted any other report, draft report, or written or oral opinion to counsel. Again he said "no." But he lied under oath. The lie was made evident when cross-examining another witness who relied on the previous expert's report. The honest expert testified that he made a prior report and produced his earlier draft, which contained lower costs identified as having been created by our perjurer.

Obviously, this does not reflect well on our first witness. But the issue here is why didn't the other lawyer (the lawyer for the condemnor) say something? He knew that his witness made prior reports. He also knew that

his expert was testifying falsely. So the question becomes: what are a lawyer's ethical obligations when he knows his witness is testifying falsely?

The New York State Bar Association has taken a clear stance on the issue by promulgating the New York Rules of Professional Conduct ("NYRPC"), which were adopted by the Appellate Division of the New York State Supreme Court and published as Part 1200 of the Joint Rules of the Appellate Division (22 N.Y. Comp. Codes R. & Regs. Part 1200). NYRPC Rule 3.4(a)(4) directs that a lawyer shall not knowingly use perjured testimony or false evidence. Additionally, NYRPC Rule 3.3(a)(3) states that a lawyer shall not knowingly "offer or use evidence that the lawyer knows to be false." The rule continues, "[a] lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false."

Comment [2] to this rule cautions: "the lawyer must not allow the tribunal to be misled by false statements of law or fact or by evidence that the lawyer knows to be false." Thus, after reviewing and probably suggesting revisions to a report, it was unethical for the condemnor's lawyer to stand mute while his expert lied on the witness stand.

In *People v. Salquerro*, 433 N.Y.S. 2d 711 (N.Y. Sup. Ct. 1980), the New York Supreme Court held that if an attorney knowingly presents perjured testimony, he would be practicing fraud on the tribunal. *Salquerro* involved a defendant indicted for attempted murder and robbery who placed his defense attorney in a troubling ethical dilemma: The day before the trial was to begin, the defendant unequivocally informed his defense attorney that he intended to lie when he was called to testify on his own behalf. *Id.* at 712. The defense attorney then immediately informed both the court and the Assistant District Attorney of his client's intention (without disclosing the substance of any anticipated false testimony). Thereafter, the defense counsel expressed concern over the effect of his disclosure on his relationship with his client, and in his motion to withdraw as counsel he wrote that he felt the disclosure may have "destroyed totally the necessary confidence that a client must have in his attorney in order to receive the effective assistance of counsel which the Sixth Amendment guarantees." *Id.*

The court denied the motion to withdraw, noting that "there can never be a real conflict between the attorney's obligation to provide a zealous defense and his moral duties to himself and the court." *Id.* After citing the ethical canons mentioned above (requiring that a lawyer not knowingly use perjured testimony or false evidence), the court explained, "[f]raud on the court … can be characterized as a scheme to interfere with the judicial machinery performing the task of impartial adjudication," and concluded that "[a]n attorney who knowingly presents perjured testimony is practicing a fraud on the tribunal." *Id.* at 712-13. *See also People v. DePallo*, 714 N.Y.S.2d 755 (N.Y. App. Div. 2000), *aff'd*, 754 N.E.2d 751 (N.Y. 2001) (N.Y. App. Div. 2000) (defense counsel did not deny defendant effective assistance when he informed court that defendant intended to perjure himself on the stand); *People v. Diaz*, 605 N.Y.S. 276 (N.Y. App. Div. 1993) (defense counsel's actions in discharging ethical duties after learning during trial that client intended to commit perjury did not deny client effective assistance of counsel); *In re: Matter of Malone*, 492 N.Y.S. 2d 947 (N.Y. App. Div. 1984) (attorney disciplined for directing witness to provide false testimony).

What Remedial Measures Should Be Taken?

NYRPC Rule 3.3(a)(3) directs that "If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal." Comment [10] to NYRPC Rule 3.3 elaborates:

"[A] lawyer may be surprised when the lawyer's client or another witness called by the lawyer offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations, or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. The advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal, and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence."

If this approach fails, the comment to the rule explains "the advocate must take further remedial action." If withdrawal from the representation is not permitted or "will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal confidential information that otherwise would be protected by Rule 1.6." (Of course, withdrawal of the lawyer may be appropriate in certain circumstances as governed by NYRPC Rule 1.16.)

In regards to Rule 3.3, Comment [15] explains that the "lawyer's compliance with the duty of candor imposed by this Rule does not automatically require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure." It continues, "the lawyer, however, may be required by Rule 1.16(d) to seek permission of the tribunal to withdraw if the lawyer's compliance with the Rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client."

WHAT IF A LAWYER INSISTS ON PUTTING SOMETHING IN AN EXPERT REPORT THAT HAS NO BASIS IN LAW OR FACT? • Here is a good example from a case. When property is taken by the powers of eminent domain it must be valued based on its highest and best use, regardless of the property's actual use. In other words, an appraiser may consider a different use other than the current one when evaluating a piece of property. USPAP Standards Rule 2-2(c)ix.

But, for example, if an appraiser opines that a different highest and best use exists (for example a 12-story condominium on a current gasoline service station site), that highest and best use must be proven by reasonable evidence. Most appraisers accomplish this by using a land residual approach, which estimates all of the expenses of a building, such as a condominium, and its sales price. The land residual technique calls for a separate estimation of the value of the proposed building. It allows an appraiser to test the highest and best use of the land or site for proposed construction. The Appraisal of Real Estate 512 (Appraisal Institute, 13th ed. 2008). If the land residual is less than the value found by comparable sales of a condominium development site, the different highest and best use is sustained. (It is actually a little more complicated than this, but you get the idea.)

The land taken is valued on the comparable sales approach (market data). This is accomplished by considering and adjusting comparable land sites for that use which are then adjusted for the usual reasons.

So why, after reviewing an appraisal which contains this analysis, would the condemnor's counsel instruct his appraiser to state that "the land residual approach" may not be used to value property in condemnation? Of course this is only true if it is the only approach used.

NYRPC Rule 3.4(d)(1) directs that a lawyer shall not, in appearing before a tribunal on behalf of a client, "state or allude to any matter that the

lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence." To make a false assertion that claimant's appraiser valued the property on the land residual approach when the appraisal carefully explains that the value of the subject property was determined by the comparable sales approach is clearly improper and disingenuous.

Comment [4] to NYRPC Rule 3.3 explains, "legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal." Comment [5] goes further, stating that the lawyer must refuse to offer or use evidence that the lawyer "knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence."

Clearly, insisting on submitting false evidence violates an attorney's ethical duties to the court. Insisting that an expert add information to his report that has no basis in law or fact violates the disciplinary rules that prohibit lawyers from engaging in dishonesty, fraud, deceit, or misrepresentation, prohibiting lawyers from engaging in conduct prejudicial to the administration of justice, and prohibiting lawyers from knowingly making false statements of law or fact in the representation of a client. *See Matter of Kramer,* 664 N.Y.S. 2d 1 (N.Y. App. Div. 1997) (attorney who intentionally made several false statements to federal district court in affidavit in opposition to summary judgment motion violated disciplinary rules.)

IS IT A VIOLATION OF THE ETHICAL RULES TO ARGUE THAT A CASE APPLIES WHEN IT CLEARLY DOESN'T? • Very often — perhaps too often — one hears an adversary make an objection that proffered evidence is barred under the holding of a specific case. For example, when offering excerpts of an environmental study prepared for a project as required by law, my adversary objected stating that the introduction of the report was barred by *United States v. Miller.*

United States v Miller, 317 U.S. 369 (1943), is the most misunderstood condemnation case ever decided. The facts of the case were fairly simple; the United States condemned a strip across property owners' land for tracks of a railroad that had to be relocated because of prospective flooding of the old right-of-way. The project had been recommended in 1934 with funding authorized in 1937. The property owners had purchased and subdivided the property in question in 1936 and 1937. After the condemnation in 1938, claimants sought direct and severance damage. The court held:

"If a distinct tract is condemned, in whole or in part, other lands in the neighborhood may increase in market value due to the proximity of the public improvement erected on the land taken. Should the government at a later date, determine to take these other lands, it must pay their market value as enhanced by this factor of proximity. … The question then is whether the respondents' lands were probably within the scope of the project from the time the government was committed to it. If they were not, but were merely adjacent lands, the subsequent enlargement of the project to include them ought not to deprive the respondents of the value added in the meantime by the proximity of the improvement. If, on the other hand, they were, the government ought not to pay any increase in value arising from the known fact that the lands probably would be condemned."

Id. at 376-77.

The Supreme Court subsequently affirmed the scope of the project rule in *U.S. v Reynolds,* 397 U.S. 14 (1970):

"[T]he development of a public project may also lead to enhancement in the market value of neigh-

boring land that is not covered by the project itself. And if that land is later condemned, whether for an extension of the existing project, or for some other public purpose, the general rule of just compensation requires that such enhancement in value be wholly taken into account, since fair market value is generally to be determined with due consideration of all available economic uses of the property at the time of the taking."

Id. at 16-17.

Basically, the *Miller* Rule holds that when determining the value of the property taken, a condemnee may not receive an enhanced value for its property where the enhancement is solely due to the property's inclusion within that very public improvement for which it was condemned, i.e., the value cannot be predicated upon a use made possible only by use of the power of eminent domain. As stated in *City of New York v. Sage*, 239 U.S. 57 (1915), "[t]he City is not to be made to pay for any part of what it added to the land by thus uniting it with other lots, if that union would not have been practicable or have been attempted except by the intervention of eminent domain." *Id.* at 61. As is stated in 4 Nichols on Eminent Domain §12B-17[1] at 12B-159 (Matthew Bender, 3d ed. 2012), Sec 12B-17(1) at page 202: "The general rule is that any enhancement in value that is brought about in anticipation of and by reason of a proposed [*public*] *improvement*, is to be excluded in determining the land's market value." (emphasis added).

So, while a lawyer defending a condemnation may ethically advance a defense that can be supported by a "good faith argument for an extension, modification, or reversal of existing law" see ABA Model Rule 3.1 and NYRPC Rule 3.1(b)(1), there must be a basis for such argument that a well-established precedent does not apply. Otherwise, the lawyer is conducting frivolous litigation.

YOUR ADVERSARY MISSED AN IMPORTANT AUTHORITY. WHAT ARE YOU SUPPOSED TO DO? • Trick question. Actually what you are *required* to do is disclose the authority to the Court. NYRPC Rule 3.3(a)(2) requires that a lawyer disclose controlling legal authority known to the lawyer to be directly adverse to the position of the client and which is not disclosed by opposing counsel. *See also* ABA Model Rule 3.3(a)(2).How far does this apply? An article published in the Florida Bar Journal noted:

"For a lawyer, the discovery of adverse case law from other jurisdictions presents a professional challenge. As one judge and scholar recently noted, even when there may be reasons to distinguish the case, there remain practical reasons to disclose the adverse authority: "[p]rinciples of professionalism would suggest the propriety of disclosing decisions of other coordinate courts that are on point, as well …. [The court] is almost certain to find those decisions anyway, and failure to disclose and address them might well cause the court to conclude that the attorney cannot be trusted."

Keith W. Rizzardi, *"Controlling Jurisdiction" and the Duty to Disclose Adverse Authority: Florida's District Courts of Appeal Reign Supreme on Matters of First Impression*, 85 Fla. B. J. 46 (Dec. 2011), quoting Judge Peter D. Webster, *Ethics and Professionalism on Appeal*, 85 Fla. B. J. 16 (Jan. 2011) (discussing Rule 4-3.3(a)(3) and citing *Williams v. State*, 45 So. 3d 14 (Fla. Dist. Ct. App. 2010) (Webster, J., concurring in result only)).

I doubt this broad disclosure would be required in every case, but, at least in New York, some courts have shown a willingness to take this Rule seriously. In *Cicio v. City of New York*, 469 N.Y.S. 2d 467 (N.Y. App. Div. 1983), the City made an argument at the Supreme Court level that was wholly unsupported by controlling authority from the Appellate Division. After losing at the Supreme Court, the City

made the same argument to the Appellate Division. The Appellate Division, in affirming the lower court's ruling, cited a series of cases (nine in all) where the Appellate Division had "emphatically rejected" the arguments made by the city. The Court wrote:

"None of these cases are cited in the city's brief submitted to this court. This is most disturbing and clearly inexcusable because the city was a party [in two of the cases]. Had even a modicum of thought and research been given to this case, it would have been self-evident to the city that its position was untenable and this court and the taxpayer would have been spared the costs of a frivolous appeal."

Id. at 469. In a not-so-subtle conclusion, the court noted that they "trust that this case will serve as a warning that counsel are expected to live up to the full measure of their professional obligation." *Id.*

Rules may vary from jurisdiction to jurisdiction regarding the obligation to disclose adverse legal authority. Of course, one should always check the rules and governing case law in their own state before coming to a conclusion.

CONCLUSION • The importance of knowing and adhering to your ethical responsibilities cannot be understated. It is absolutely critical that lawyers become familiar with their obligations to show respect for the tribunal and preserve the integrity of the judicial process.

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