

Effective Case Planning and Coordination Between Lawyers and Experts

Expert Coordination

- Picking the right experts
- Expert discovery
- Expert exclusion issues
- Specific problems in retaining and working with experts

PICKING THE RIGHT EXPERTS

- Qualifications?
- Testified before?
- Prior opinions relating to the task at hand – “Baggage”
 - Have they previously prepared a report contradicting what they would say here?
- Do they speak “Walking around” English?
 - Jury pool is not PhDs and LLMS
- Do you have enough/too many experts?
 - Can a civil engineer testify to the cost of constructing a house?
 - Can an appraiser testify about market conditions?

LIMITS OF EXPERT TESTIMONY

- Court has discretion to limit number of experts (*Philippon v. Shreffler* 33 So.2d 704) BUT Court also has discretion to exclude expert testimony where it goes beyond their qualifications:
 - “Plaintiff’s expert testified about [] the slipperiness of algae on a boat ramp . . . Plaintiff’s witness was offered as an expert in marine chemistry, with a doctorate and a research background in that field. However, he admitted he had never done any studies whatsoever concerning marine algae growth or its control, the very subject about which he was being offered to testify. For both these reasons, the trial court erred in allowing the witness to testify as an expert.” *Sea Fresh Frozen Prods., Inc. v. Abdin*, 411 So.2d 218, 219 (Fla. 5th DCA 1982), review denied, 419 So.2d 1195
- Is the testimony being proffered inadmissible “supposition without premise of fact” (*Shelter Corp. of Canada, Ltd. v. Bozin*, 468 So.2d 1094, 1098 (Fla. 2d DCA 1985); or “testimony consisting of guesses, conjectures or speculation” (*Durrance v. Sanders*, 329 So.2d 26, 30 (Fla.1st DCA 1976))?
 - Potential for future concessions by permitting agencies
 - Off-site cures

PICKING THE RIGHT EXPERTS

- Specific problems - Engineers
 - Making sense of gobbledygook construction plans for lawyer, other experts, owner and jury
 - Identifying issues on those plans like site circulation, water flow, elevations of constructed improvements, access points
 - Avoid “rabbit holes” They make settling cases (and costs) more difficult.
 - Is this engineer competent to testify to parking/drainage/retention/roadway construction?
 - expert must be an expert in a specific area in which he is being proffered to testify, not as an expert in a general area of science. *Goodyear Tire & Rubber Co., Inc. v. Ross*, 660 So.2d 1109, 1111 (Fla. 4th DCA 1995.)

PICKING THE RIGHT EXPERTS

- Specific problems - Planners
 - First stop – Does this jurisdiction have a ‘nonconforming eminent domain’ ordinance?
 - What type (full waiver, partial waiver, no waiver, or other)
 - What would the code require if there was/is no ordinance?
 - Setbacks
 - Landscaping
 - Sidewalk
 - Walking Cure plans through permitting
 - What will the market accept?
 - Is your testimony “helpful to the trier of fact”?

PICKING THE RIGHT EXPERTS

- Cure plans
 - Need to go through a similar highest and best use analysis
 - Legally permissible? – Can it be permitted?
 - Financially feasible? – Is it more expensive than damages are likely to be (discuss with appraiser)
 - Maximally productive – Will the market allow this cure and will this cure be a ‘cure’ or a ‘partial cure’
 - Narrowed Parking stalls
 - One way circulation

PICKING THE RIGHT EXPERTS

- Specific problems - Marketing Experts
 - Seeing this more and more from condemning authorities – non appraiser marketing experts
 - Rely more on hearsay and 3rd party research than other experts
 - Have a lot of ‘creative’ approaches and opinions
 - Forward looking ‘lot takedown’ approaches
 - ‘No market for this highest and best use’ approach
 - May be inadmissible in whole or in part
 - Is it helpful to the jury?
 - Market has gone down: aren’t you just telling the jury what they already know?
 - The facts testified to were not of such a nature as to require any special knowledge or experience in order for the jury to form its conclusions."
Reinhart v. Seaboard Coast Line R.R. Co., 422 So.2d 41, 44 (Fla. 2d DCA 1982), review denied, 431 So.2d 988 (Fla.1983).

PICKING THE RIGHT EXPERTS

- Specific problems – Appraisers
 - Every juror is a junior appraiser in training
 - Your opinion matters the most, but is probably considered the least
 - USE YOUR OTHER EXPERTS – don't reinvent the wheel instead of relying on others.
 - Approach lawyer where you feel you may need some help shoring up opinion instead of just formulating your own opinion.
 - Items in the take
 - Special use properties
 - Business operations specialists
 - USE THE OWNERS as a resource
 - Caution on non-compensability: An expert may not testify regarding legal conclusions that the jury should be free to reach independently. *Murray v. Delta Health*, 30 So.3d 576

EARLY CASE MEETINGS

What to discuss:

- Provide materials from other side (to the extent you have them)
- Use diagrams and maps, even if preliminary
- Build the case as you would build a report
 - Owner tells you what they know about the property
 - Engineer looks at project plans and impacts
 - Planner examines nonconformities caused by taking and 'saving' ordinances
 - Engineer and Planner formulate cure and run it through local government – more owners requiring certainty
 - Engineer/Contractor estimate items in area of take and cure costs
 - Appraiser takes all this and brings it together
- Discuss if more or fewer experts are needed
- Keep owner in the loop – meetings at each important decision
- Teach the client and lawyers.

LATER CASE MEETINGS

- What to discuss:
 - Attack experts' assumptions and reports BEFORE the reports go final.
 - Apply the smell test to opinions and always look at the big picture and your client/case story.
 - Work on 'theory of the case'
 - "Paved paradise to put up a parking lot"
 - "Mole Crickets"
 - "Trolls under the bridge"
 - 'He's got an interstate running through his front yard – man they think he's got it so good.'

REPORT TIMING

- Don't give the other side free ammunition
 - Problem: All your experts' reports are dated within days of each other.
 - Depo question for appraiser: Did you review and rely on the engineering report?
 - If so, how did you review and incorporate it into your report in under 24 hours?
 - If the appraiser says I saw draft reports, where are those in his file?
 - If he says we discussed, I am asking in depth questions about what was discussed at each and every meeting.
 - Worse Problem: Certain experts have their report dated after the appraisal.
 - Usually the market analyst.

EXPERT DISCOVERY

- What is discoverable?
 - Draft reports?
 - Reports from other cases?
 - “Generally, an expert need only produce those items upon which he/she relied in formulating their opinions.” *Fields v. Cannady*, 456 So.2d 97
- What is relevant and what is ‘likely to lead to admissible information’?
 - Comps they didn’t use?
 - Cures they rejected?
- Expert Depositions
 - When and who should go first?
 - Review Fla. R. Civ Pro. 1.390

EXPERT DISCOVERY

- Preparing your experts for deposition
 - Be your expert's worst enemy
 - Give them the view from 50,000 feet
 - Review their file and make sure they comply with subpoena (almost always forget billing invoices and contract)
 - The more they bring, the less opportunity for a continued deposition.
 - Multiple depositions?
 - Generally, the Court will allow additional depositions to cover new ground or updated opinions.

EXPERT DISCOVERY

- Jettison an expert?
 - Can you have “irreconcilable differences” with an expert after the expert has been disclosed?
 - Can this be brought up by the other side at trial?
 - Can the new expert be questioned about the opinions of the old expert and whether they agree or not?

TIME TO TESTIFY

- Expert Pointers
 - Explain it to a check-out clerk
 - Pick your ‘image’
 - Dress up, dress down – think about what the jury expects of you
 - Teach, but don’t be a professor
 - “Come on down” getting out of the box
- Cross Examination
 - Any lawyer worth his salt will score points
 - Experts aren’t supposed to ‘win’ cross-x, just survive it
 - Beware the traps
 - Being overly stern with young or female lawyers
 - Coming off as aloof
 - Being combative on non-combative questions
 - Sticking to your guns when there is no benefit to doing so.