Spring 1966

Discovery of Expert Opinion in Land Condemnation Proceedings

Follow this and additional works at: https://www.repository.law.indiana.edu/ilj

Part of the Civil Procedure Commons, and the Land Use Law Commons

Recommended Citation


This Note is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in Indiana Law Journal by an authorized editor of Digital Repository @ Maurer Law. For more information, please contact rvaughan@indiana.edu.
DISCOVERY OF EXPERT OPINION IN LAND CONDEMNATION PROCEEDINGS

In the past federal district courts in applying the Federal Rules of Civil Procedure have generally refused to permit discovery of the opinions of expert real estate appraisers employed by the Government in land condemnation proceedings.1 This is not to say that all discovery has been categorically denied. Several courts have allowed discovery of lists containing comparable sales of property which the parties intended to utilize as evidence,2 while others have permitted access to factual criteria such as governmental safety regulations which were essential to proper valuation.3 Yet, efforts to obtain the expert's appraisal report have met with infrequent success. These decisions have resulted largely from interpretations of the Supreme Court holding in Hickman v. Taylor4 and the Federal Rules of Civil Procedure. However, in a recent case, United States v. 364.82 Acres of Land,5 the court permitted complete opinion discovery on the basis of policy considerations which it found inherent in the right of eminent domain and the condemnation proceeding by which that right is exercised.

Although expert opinion discovery is a procedural problem requiring analysis within the context of the Federal Rules of Civil Procedure, policy issues certainly should not be divorced from a consideration of the problem. As stated by Judge Kirkpatrick:


3. See, e.g., United States v. 62.50 Acres of Land, 23 F.R.D. 287 (N.D. Ohio 1959), in which the court permitted the condemnee to inquire as to the existence of governmental safety regulations on the ground that such regulations could affect the value of the property which had not been condemned.


5. 38 F.R.D. 411 (N.D. Cal. 1965). Specifically, the Government was resisting discovery of (1) the appraiser's opinion of the value of the property; (2) the appraiser's opinion of the highest and best use of the property; (3) any matter of opinion or conclusion reached upon consideration of facts ascertained by the appraiser; (4) any written reports that the appraiser may have submitted to any agency of the United States Government; and (5) any matter presumably within the knowledge of the defendants.
DISCOVERY OF EXPERT OPINION

There is nothing mandatory about the discovery provisions of the Rules. On the contrary, the purpose and intent is evident throughout to leave their application to the discretion of the trial court—not of course an absolute discretion but one controlled and governed, not only by statutory enactments and the well established rules of the common law, but also by considerations of policy and of necessity, propriety and expediency in the particular case at hand.6 (Emphasis added.)

I. TRADITIONAL ARGUMENTS

The Federal Rules of Civil Procedure prescribe a policy of liberal allowance of discovery. Therefore, any argument for non-allowance must be persuasive to prompt an exception from that policy. Most of the decisions denying opinion discovery rest on one or more of six arguments, none of which has escaped criticism.7

Attorney-Client Privilege.

The attorney-client privilege has been extended by some courts to encompass conclusions of experts employed by counsel in trial preparation.8 The rationale of the privilege is that disputes resulting in litigation can be most adequately handled by attorneys who have been fully advised of the facts by their clients and that complete disclosure will be facilitated by a guarantee that the client's communications cannot be elicited from his attorney over the client's objection.9 It is difficult to see how this policy is furthered by an extension of the immunity to opinions of experts. Apparently the courts view the client, attorney and expert as a “team” wherein the client reveals the factual criteria to the expert, who determines which factors are relevant to valuation, translates these facts into monetary values, and communicates the results to the attorney in the form of an appraisal report.10 This argument incorrectly assumes that the attorney-client privilege protects an individual's knowledge as well as his communications; it does not protect the client's knowledge and certainly should not immunize that of his expert.11 One who is aware of

10. See Friedenthal, Discovery and Use of an Adverse Party's Expert Information, 14 Stan. L. Rev. 455, 463-68 (1962), for a review of state court decisions applying the attorney-client privilege to expert witnesses on the ground that the expert is a mere interpreter without whom neither the attorney nor his client could understand the significance of the client's information.
11. Id. at 463.
relevant matters cannot, merely by communicating them to his attorney, preclude their discovery.\textsuperscript{12} The expert's opinions gathered through his independent observations have no relationship to the privilege, and the expert cannot alter this merely by revealing his findings to the attorney in his appraisal report. Therefore, the expert's subjective analysis should not be protected on attorney-client privilege grounds.

\textit{Work Product.}

The doctrine of work product which some consider an extension of the attorney-client privilege\textsuperscript{13} and others regard as a separate rule of public policy\textsuperscript{14} grew out of the Supreme Court's decision in \textit{Hickman v. Taylor}.\textsuperscript{15} In that case, discovery was sought of reports in the attorney's possession which concerned interviews with eyewitnesses to the event. The Court held that, although not within the attorney-client privilege, the reports were immune from discovery on the ground that they were the private memoranda and personal recollections prepared by counsel in the course of his legal duties, which, if subject to discovery, would discourage him from adequate preparation of the case. The Court dealt solely with the work product of the attorney, and no reference was made to agents or third party witnesses.

Subsequently the scope of work product immunity was extended in \textit{Alltmont v. United States}\textsuperscript{16} to include work done by his agents for counsel's use. The justification was that work product was created to insure adequate trial preparation by the attorney and that allowance of discovery of his agent's reports might compel the attorney to perform the trivial work in order to protect it as work product, which would limit the time he could otherwise spend on work requiring legal expertise. This would adversely affect his preparation of the case and would, therefore, conflict with the primary purpose of the work product doctrine.

The natural consequence of \textit{Alltmont} was a further expansion of work product to encompass expert witnesses.\textsuperscript{17} Again the policy consideration was adequate trial preparation by counsel. However, the justification for protecting agents is not applicable to experts. The attorney

\textsuperscript{12} Ib. A party who has in his possession documents which he could be compelled to produce cannot make them privileged against production by putting them in the custody of his attorney. Falsone v. United States, 205 F.2d 734, 739 (5th Cir.), cert. denied, 346 U.S. 864 (1953).


\textsuperscript{14} See, e.g., Snyder v. United States, 20 F.R.D. 7, 8 (E.D.N.Y. 1956).

\textsuperscript{15} 329 U.S. 495 (1947).

\textsuperscript{16} 177 F.2d 971 (3d Cir. 1949).

obviously cannot perform the expert's duties as he can the agent's tasks, so there is no danger that he will neglect his primary duties in order to immunize the expert's conclusions from discovery. Therefore, even if Allmont were a natural and appropriate response to Hickman, it offers no justification for the immunity of experts.

Although one can consistently include agents and exclude experts from the scope of work product, some courts\textsuperscript{18} have analyzed the expansion on a more fundamental ground by interpreting Hickman as extending work product coverage only to matters requiring the attorney's professional skill and experience rather than to all matters prepared by the attorney. This interpretation seems more consistent with the policy of work product for it was not intended to suppress evidence but only to protect those materials which were of little evidentiary value, that is, matters clothed with the attorney's legal interpretation. Although there is little appellate authority on the issue, the Sixth Circuit has adopted this interpretation and has held that Hickman does not apply to information obtained by an expert engaged by counsel.\textsuperscript{19}

\textit{Facts v. Opinions.}

One of the most frequent arguments advanced concerning the permissible scope of discovery is the distinction between facts and opinions.\textsuperscript{20} The scope of permissible discovery is set forth in the Federal Rules of Civil Procedure. Although Rule 26(b) appears to be confined to depositions, it seems fair to say that it is now generally considered as defining the limits of the entire discovery procedure. Under Rule 26(b) discovery is permitted of any party having knowledge of relevant unprivileged matters. No distinction is made between facts and opinions. In 1946, the Advisory Committee on the Federal Rules of Civil Procedure proposed an amendment to exempt from discovery all reports containing expert opinions.\textsuperscript{21} The amendment aroused a great deal of controversy, and the Supreme Court declined to adopt it, choosing rather to grant certiorari in Hickman and, thereby, express its views.\textsuperscript{22} Consequently when Hickman came before the Court there was no distinction in the Rules.

The Supreme Court in discussing Rule 26(b) substituted the word

\textsuperscript{19} Sachs \textit{v.} Aluminum Co. of America, 167 F.2d 570 (6th Cir. 1948).
\textsuperscript{22} Ibid.
“facts” for the word “matters” on three occasions while retaining “matters” several times. If it were the Court’s intention in so doing to adopt indirectly the proposed amendment, the cases are correct in denying opinion discovery. However, this interpretation is doubtful when the following factors are considered collectively. (1) The Court could have accepted the amendment immediately prior to its decision, but it refused to do so. (2) In Hickman, the subject matter of discovery was facts, and not opinions. (3) In light of the Court’s self-imposed jurisdictional limitation that it will not decide issues unless necessary to a determination of the case, it is apparent that the word “facts” was used solely because it was the subject matter in issue. The question of opinion discovery was not before the Court, and was not decided.

The Court emphasized that all matters were not immune as work product.\textsuperscript{23} If relevant and unprivileged, matters which could be admissible as evidence might properly be discoverable.\textsuperscript{24} Herein lies the distinction between the work of the attorney and that of the expert, for while the attorney’s work product is not evidence, since it is colored by his legal opinions, the conclusions of an expert witness often constitute evidence in themselves. This is particularly the case in condemnation where the facts are often meaningless when divorced from the conclusions which they generate. The work product doctrine sought to protect the attorney by immunizing his trial strategy, not to protect his client by suppressing evidence useful to his adversary. Thus if an expert’s observations and conclusions are only collectively meaningful, it would be inconsistent with Hickman to permit discovery of the former while excluding the latter.

As previously mentioned,\textsuperscript{25} the Sixth Circuit has ruled that Hickman does not apply to information obtained by an expert. Although no specific reference was made to opinions, subsequent cases citing it as authority have permitted discovery of the expert’s opinions and conclusions.\textsuperscript{26}

Confusion.

The confusion argument which has been adopted by several courts in condemnation cases\textsuperscript{27} was articulated in Lewis v. United Air Lines Transport Corp.\textsuperscript{28} as follows:

\begin{itemize}
  \item \textsuperscript{23} Hickman v. Taylor, 329 U.S. 495, 511 (1947).
  \item \textsuperscript{24} Ibid.
  \item \textsuperscript{25} See note 19 \textit{supra}.
  \item \textsuperscript{26} See, \textit{e.g.}, United States v. Nysco Laboratories, Inc., 26 F.R.D. 159 (E.D.N.Y. 1960).
  \item \textsuperscript{27} See, \textit{e.g.}, United States v. 900.57 Acres of Land, 30 F.R.D. 512 (W.D. Ark. 1962); Lewis v. United Air Lines Transport Corp., 32 F. Supp. 21 (W.D. Pa. 1940).
  \item \textsuperscript{28} 32 F. Supp. 21 (W.D. Pa. 1940).
\end{itemize}
To permit parties to examine expert witnesses of the other party in land condemnation and patent actions, where the evidence clearly all comes from expert witnesses, would cause confusion and probably would violate that provision of Rule 1 which provides that the rules 'shall be construed to secure the just, speedy, and inexpensive determination of every action.'

Two of the primary purposes of discovery are to narrow the issues and to ascertain relevant matters. Consequently the confusion argument is two-fold. First, since discovery is intended to narrow the issues, there is no need for discovery in condemnation cases where there is only one issue, just compensation. Second, since expert testimony is the only evidence involved, it will all be revealed at the trial, so there is no danger of an incomplete determination of the case. Because the parties may cross-examine their adversaries' witnesses, there will be no unfair advantage, and the trial will be expedited in accordance with Rule 1. The latter proposition presupposes that cross-examination of expert witnesses is a sufficient substitute for discovery. If both parties are fully apprised of the facts and the issue is not in doubt, one might conclude that the expert's opinion of value is of secondary importance and may be adequately examined at trial. However, this contention overlooks the hazardous element of surprise. The discovery procedures were created on the assumption that issues could be most equitably resolved by preventing surprise. The same set of facts may lead two experts to very divergent conclusions. Their opinions are based, not only upon the objective facts, but more importantly upon their assessment of the facts in terms of dollars and cents, and a factor of relative importance to one appraiser may seem insignificant to another. In this sense the facts are still in dispute at the time of trial, and the element of surprise is a real threat. Consequently, discovery would serve, not to create confusion, but to prevent it by an early disclosure of those facts on which there is disagreement. This would permit the parties to concentrate on those issues in dispute thereby aiding the jury's determination.

**Information Equally Available to Both Parties.**

The statement that information which is equally available to both parties is not a proper subject of discovery has appeared in several cases.

29. Id. at 23.

tion is being sought in these condemnation cases. If the condemnee is inquiring as to factual criteria for the Government's valuation, and these facts are readily available to him (perhaps as a matter of public record) there is obviously little need for discovery. If he is seeking the opinion of an expert who is otherwise available to him, discovery serves no purpose. However, it would be rare indeed for an expert to avail both parties of his services, so this is certainly not the situation contemplated in the argument. Those who oppose opinion discovery maintain that the information sought to be discovered is an appraised valuation of just compensation which the discovering party could obtain merely by employing any real estate appraiser. However, the district court in United States v. 23.76 Acres of Land challenged this proposition as follows:

There is no basis to believe that the information [expert's opinion] sought to be elicited, since it is subjective in nature, might be obtained by the defendants except by questions being answered by the only person, the expert, who has such information.

In other words, it is not merely any theory of appraisal which the condemnee wishes to discover, it is the particular theory which the Government has adopted and which it will rely on at trial. Reliance on the adversary system presumes that controversies can be best resolved by the give and take of challenge and rebuttal. As stated by the Supreme Court in Hickman v. Taylor:

No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.

Unfairness.

The argument that permitting discovery is unfair to the opposing party consists of two propositions which deserve separate consideration. First, complete discovery would promote laziness and impede proper representation of the litigants' interest in that attorneys would hesitate to obtain expert testimony knowing that they would have to disclose it to their opponents. If discovery, which is intended to aid in the proper resolution of cases, in fact hinders it, this argument is persuasive. A

32. Id. at 596.
policy of playing a "waiting game" would result in a trial of complex issues with no expert testimony and would obviously serve no one's interests. Furthermore, with the knowledge that no qualified technician would be present to challenge their contentions, both parties would be encouraged to submit unreasonably biased theories of compensation, thus diminishing the probability of a just resolution of the case. The assertion that discovery promotes laziness is inapplicable in condemnation cases in which expert testimony is indispensable. Aware that expert evidence must often be utilized in order to prevail at trial, attorneys will employ testimony which is subject to discovery by their adversaries rather than risk losing the case.35

Second, complete discovery constitutes taking an opponent's property without just compensation.36 This argument must be measured against the fact that discovery in condemnation is intended to insure that the condemnee's property will not be taken without just compensation. The resulting conflict suggests the need for an examination of the policy considerations emphasized by the district court in United States v. 364.82 Acres of Land.37 That court held that unfairness to the adversary could be resolved by requiring mutual discovery38 or, if necessary, by conditioning discovery upon a sharing of the adversary's expenses.39

II. OTHER POLICY CONSIDERATIONS

In United States v. 364.82 Acres of Land the court declared that the exercise of the right of eminent domain "carries with it the correlative duty to protect individual rights to the fullest possible extent."40 If such a policy of maximum protection is inherent in eminent domain, it would seem that the Government should not be permitted to withhold relevant information which would, if discovered, enable the condemnee to obtain that protection.

Two fifth amendment sources for such a policy can be suggested: the specific provision that prevents the property of a citizen being taken for any purpose except a public use upon the payment of just compensation and the general guaranty that prevents taking even for a public use without due process. The specific provision prescribes the requirements

37. 38 F.R.D. 411 (N.D. Cal. 1965).
38. Id. at 415.
39. Id. at 416.
40. Id. at 413.
of substantive due process, and the general guaranty insures procedural due process. The questions are, therefore, what is due process in eminent domain and what are the requirements of just compensation?

At early common law, property was appropriated by the Crown through the proceeding of inquest of office. An officer of the county was directed to inquire by a jury the damage which would result to the Crown or others from the taking. However, the jury was not a common law jury of twelve presided over by a judge, but was a jury of no determinate number presided over by a sheriff, coroner, or escheator. More importantly the proceeding was entirely ex parte; condemnees were not required to be served with process or notified in any manner. Thus at common law no concern for maximum protection is evident.

The first general condemnation statute, enacted by Congress in 1888, provided that the procedure should conform as nearly as possible to that existing in the state within which the district court was located. Attempted conformity led to such confusion that by 1931 there were 269 different methods of judicial procedure and 56 methods of administrative procedure for condemnation. In 1951 uniformity was established by the adoption of Rule 71A of the Federal Rules of Civil Procedure. In one sense the Supreme Court's adoption of Rule 71A is suggestive of a concern for maximum protection in eminent domain since individual rights can be more adequately safeguarded by uniformity than by diversification. A single procedure affords opportunity for the creation of "a due process of eminent domain." However, the confusion which existed prior to 1951 is some evidence that the present uniform procedure was adopted, not out of a concern for maximum protection, but simply to avoid delay and uncertainty. Moreover, under Rule 71A the Federal Rules apply to condemnation proceedings in the same manner as they do to all other civil actions unless otherwise provided. Therefore, no additional safeguards were incorporated for the protection of individual rights in eminent domain.

Although the district court in United States v. 364.82 Acres of

42. Chesapeake & Ohio Canal Co. v. Union Bank, 5 Fed. Cas. 570, 572 (No. 2653) (C.C.D.C. 1830).
44. Chesapeake & Ohio Canal Co. v. Union Bank, 5 Fed. Cas. 570, 572 (No. 2653) (C.C.D.C. 1830).
45. 25 Stat. 357.
DISCOVERY OF EXPERT OPINION

_“Land”_ cited _United States v. Jones_ for the proposition that the right of eminent domain "carries with it a correlative duty to protect individual rights to the fullest possible extent" it is difficult to draw that conclusion in light of the following language by Justice Field in _Jones_:

There is nothing in the nature of the matter to be determined which calls for the establishment of any special tribunal by the appropriating power. . . . The proceeding for the ascertainment of the value of the property . . . is merely an inquisition to establish a particular fact as a preliminary to the actual taking; and it may be prosecuted before commissioners or special boards or the courts with or without the intervention of a jury, as the legislature may designate. _All that is required is that it shall be conducted in some fair and just manner._ . . .

(Emphasis added.)

Nowhere in the opinion is there language indicative of maximum protection, and conducting the proceeding in "some fair and just manner" is obviously not equivalent to protecting the condemnee's rights to the fullest possible extent.

The Court has continually emphasized the broad discretionary power of the legislature to establish any procedure consistent with ordinary processes of law. Of course legislative action is subject to judicial review, but not apparently to the extent of guaranteeing maximum protection. The Court does not concern itself with whether the procedure is the one best supported by reason or authority since the condemnee has no right in any particular mode of procedure. Succeeding legislatures may establish different procedures as long as the essential elements of protection discussed below are preserved. Nor will the Court concern itself

---

49. 38 F.R.D. 411 (N.D. Cal. 1965).
50. 109 U.S. 513 (1883).
51. Id. at 519.
52. See, e.g., _Backus v. Fort Street Union Depot Co.,_ 169 U.S. 557, 569 (1898); _Bauman v. Ross,_ 167 U.S. 548, 593 (1897); _County of Mobile v. Kimball,_ 102 U.S. 691, 703 (1880); _Secombe v. Railroad Co.,_ 90 U.S. 108, 117-18 (1874).
54. _Backus v. Fort Street Union Depot Co.,_ 169 U.S. 557 (1898). Here the state supreme court had held that the proper tribunal under the condemnation statute was a common law jury presided over by a judge. The condemnee argued that all prior rulings of the state courts had been to the effect that a jury of inquest, not a common law jury, was the proper tribunal. The Supreme Court ruled that the fact that one construction had been placed upon a statute did not make that construction beyond change. A legislature which has established a certain rule of procedure may subsequently repeal the act and establish an entirely different procedure. Similarly, courts may hold that their previous construction of a statute was error and thereby provide a different mode of procedure.
with every error in computing damages even though the result is to give
the condemnee less than he deserves.\textsuperscript{55}  

It is well established that due process is satisfied in eminent domain
if the condemnee has reasonable notice and reasonable opportunity to be
heard and to present his claim or defense.\textsuperscript{56}  To violate due process an
error must be “gross and obvious, coming close to the boundary of arbitrary action.”\textsuperscript{57}  Had the Supreme Court deemed additional protection
requisite in condemnation, such safeguards could have been incorporated
into Rule 71A. As previously mentioned, however, the rule provides no
significant departure from the procedure governing all civil actions in the
federal courts.\textsuperscript{58}  

If a duty of maximum protection exists there is little evidence of it
either in the procedural history of eminent domain or in the Supreme
Court’s pronouncements on due process in condemnation. However, in
addition to the general due process guaranty, the Constitution contains a
specific provision regarding eminent domain. Therefore, a duty of max-
imum protection may be found in the guaranty of just compensation.

Not unique to the Constitution, the substantive requirement of just
compensation was recognized in the natural law theories of Grotius\textsuperscript{59} and
Puffendorf.\textsuperscript{60}  Indeed, according to natural law advocates, the require-
ment of just compensation existed prior to Magna Charta and was
guarded by article 39 which provided that no individual should be de-
prived of his property, but by the law of the land, and by the judgment
of his peers.\textsuperscript{61}  Perhaps the natural law theory suggests a requirement of
maximum protection since it regards just compensation as an inalienable
right which would exist even without constitutional provisions.\textsuperscript{62}  Under

\textsuperscript{55} Roberts, Receiver v. New York City, 295 U.S. 264, 277 (1935); Marchant v.
Pennsylvania R.R., 153 U.S. 380 (1894). “We are permitted only to inquire whether
the trial court prescribed any rule for the guidance of the jury that was in absolute dis-
regard of the company’s right to just compensation.” Chicago, Burlington & Quincy

\textsuperscript{56} Dohany v. Rogers, 281 U.S. 362, 369 (1930); Appleby v. City of Buffalo, 221
U.S. 524, 532 (1911); Backus v. Fort Street Union Depot Co., 169 U.S. 557, 569 (1898);

\textsuperscript{57} Roberts, Receiver v. New York City, 295 U.S. 264, 277 (1935). There must
be “absolute disregard” of the condemnee’s rights. Appleby v. City of Buffalo, 221 U.S.
524, 531 (1911); Backus v. Fort Street Union Depot Co., 169 U.S. 557, 565 (1898);
Chicago, Burlington & Quincy R.R. v. Chicago, 166 U.S. 226, 247 (1897). Due process
is not lacking unless “plain rights” have been ignored. McGovern v. City of New York,
229 U.S. 363, 373 (1913).

\textsuperscript{58} See note 48 \textit{infra}.

\textsuperscript{59} \textit{De Jure Belli et Pacis} bk. VIII, ch. 14, \S 7 (1625).

\textsuperscript{60} \textit{De Jure Naturae et Gentium} bk. VIII, ch. 5, \S 7 (1672).

\textsuperscript{61} Parham v. The Justices, 9 Ga. 341, 349 (1851); Young v. McKenzie, 3 Ga. 31,
42 (1847); Gardner v. Village of Newburgh, 2 Johns. Ch. R. 162, 166 (N.Y. 1816).

\textsuperscript{62} Henry v. Dubuque & Pacific R.R., 10 Iowa 540, 543-44 (1860); Young v.
this theory just compensation is not simply a limitation upon the power of eminent domain, it is an essential element of its meaning, since there is an implied agreement to make just compensation inherent in the exercise of eminent domain.63

Although the natural law theory was prevalent in early state court decisions, it has been generally abandoned since the passage of the fourteenth amendment and the adoption of specific provisions for compensation in the state constitutions, both of which afford the courts a constitutional basis for their decisions. It seems reasonable to expect a renewed emphasis upon natural law as a justification for maximum protection in light of the contemporary concern for individual rights. At present, however, the sovereignty theory of eminent domain has gained wide acceptance, particularly in decisions of the Supreme Court.64 Under this theory which recognizes eminent domain as an inherent power necessary to the very existence of government, there is no requirement of compensation in the absence of specific constitutional language.65 As a sovereign power it would exist without limitation; therefore, compensation is simply a condition upon, rather than an essential element of, eminent domain.66 This theory suggests a concern for insuring maximum public welfare in a manner least damaging to the individual.

Regardless of which theory is accepted as authority, it does not necessarily follow that there is a duty of maximum protection to the condemnee, for in eminent domain there are conflicting considerations for which the policy argument fails to account. The Government has an obligation to the public which it represents as well as a responsibility to the condemnee. First, it has a duty as trustee of public funds to see that the compensation is just to the public as well as to the individual,67 and the resulting tension has been thus described:

On the one hand it (the fifth amendment) contemplates that the monies paid into the common treasury by the taxpayers shall be jealously guarded as a public trust against unfounded and unjust claims. On the other, it guarantees that the Govern-

---

67. Searl v. Lake County School District, 133 U.S. 555, 562 (1890); Garrison v. City of New York, 88 U.S. 196, 204 (1874).
ment, having regard for the rights and welfare of its citizens . . . shall deal fairly and equitably with each of them.\textsuperscript{68}

Second, it has a responsibility to the public arising from the nature of the power of eminent domain:

When the existence of a particular power in the Government is recognized on the ground of necessity, no delegation of the legislative power by the people can be held to vest authority in the department which holds it in trust to bargain away such power or to so tie up the hands of government as to preclude its repeated exercise, as often and under such circumstances as the needs of government may require. . . . It must follow that any legislative bargain in restraint of the complete, continuous, and repeated exercise of the right of eminent domain is unwarranted and void. . . .\textsuperscript{69}

It may be that a policy affording maximum protection to the condemnee would result in an imbalance of fairness adverse to the public interest. If in granting concessions to condemnees the procedure encouraged them to litigate spurious claims,\textsuperscript{70} condemnation funds could be subjected to possible abuse. This might certainly influence taxpayer interest in condemnation projects and, in this respect, would constitute an unwarranted restraint on the right of eminent domain. Therefore, in providing fairness to the condemnee, the public interest must also be safeguarded.

A concern for the public interest is evident in several rules announced by the courts. Even though the condemnee may not contest the taking as long as it is for a public use, he is, nonetheless, required to accept as a set-off to his compensation any benefits accruing to his remaining land from the proposed public use.\textsuperscript{71} If the jury should fail to set-off such benefits, its award would not constitute the just compensation intended by the fifth amendment.\textsuperscript{72} Furthermore, although the condemnee is an innocent party who may be compelled to litigate due to error in the Government's appraisal, he is not entitled to reimbursement either for the loss of time spent in prosecuting his claim or for his attorney's fees and

\textsuperscript{70} If, for example, the condemnee could discover the Government's expert without securing his own expert or paying the Government's expenses or being liable for court costs, he might be encouraged to litigate an unfounded claim on the chance that he might succeed by assailing the Government's appraisal and confusing the jury.
\textsuperscript{72} Chesapeake & Ohio Canal Co. v. Key, 5 Fed. Cas. 563, 564 (No. 2649) (C.C.D.C. 1839).
DISCOVERY OF EXPERT OPINION

expenses. Finally, notwithstanding the fact that condemnation trials are often technical and complex, Rule 71A permits the saving of public funds by allowing joinder of parties and properties in a single cause of action.

Although an historical analysis of due process and just compensation indicates that there is no duty of maximum protection the question remains whether such a duty should exist. The taking of private property for public use is not in derogation of common right since the right of the public has been recognized in the Constitution and is as much common right as that of the individual. Nonetheless, the public certainly owes some duty of fairness to the condemnee. Unlike the power of taxation which is levied upon an entire populace or class according to some rule of apportionment, the power of eminent domain involves a forced contribution beyond the individual's proportional share to the general welfare. This suggests good reason for fair play in eminent domain to guard against inequities in the cost of supporting government. Consequently, the fifth amendment guaranty of just compensation might indicate a mitigation of this inequity by distribution of the expense throughout the community. On the other hand, the power of eminent domain exists for the public benefit, and condemnation funds must be carefully guarded as a public trust. In light of this conflict of governmental interests it seems appropriate to qualify the policy of maximum protection by holding that the exercise of the power of eminent domain carries with it a correlative duty to protect individual rights to the fullest possible extent consistent with the Government's responsibility to the public interest. The most that can be said is that the fifth amendment provides an underlying policy of fairness—not necessarily maximum protection—which because of the peculiar nature of the condemnation proceeding (which will be discussed below) may justify discovery of an opponent's report.

While the argument of maximum protection addressed itself to the right of eminent domain, the court in United States v. 364.82 Acres of Land also made a policy statement concerning the nature of the condemnation proceeding by which the right is exercised. The court, in assuming arguendo that expert witnesses were within the scope of the work

77. See note 67 supra.
78. 38 F.R.D. 411 (N.D. Cal. 1965).
product privilege of *Hickman v. Taylor*,\(^7\) emphasized that work product was not an absolute immunity but merely a qualified privilege which could be overcome by a showing of "necessity or justification"; and, said the court, "such necessity or justification is inherent in every eminent domain case."\(^8\) Indirectly, this stands for the proposition that expert opinions are discoverable as of right in every condemnation proceeding, for under the Federal Rules of Civil Procedure allowance of discovery is the general rule in the absence of a recognized exception. As applied to the Rules, a showing of "necessity or justification" would permit the condemnee to take the expert's deposition under Rule 26 and to obtain the appraisal report by means of a subpoena *duces tecum* under Rule 45.\(^9\)

Although the court in *United States v. 364.82 Acres of Land* did not develop its policy argument, there are several aspects to the condemnation proceeding which suggest that "necessity or justification" requisite for discovery. The expert witness in condemnation proceedings occupies a position of significance unequalled in other areas of litigation, with the possible exception of patent litigation. Expert opinions are employed in other fields of litigation, but the verdict is the result of additional testimony by other witnesses and the conversion of the expert's conclusions into dollars and cents. However, in the condemnation case where the right to condemn is unquestioned, the sole issue is just compensation, and, for all practical purposes, the sole witness is the expert appraiser. Therefore, the power traditionally vested in the trier of fact is "delegated" to the witness himself. He speaks to the jury directly in terms of dollars and cents. Indeed, it remains the prerogative of the trier of fact to accept his theory or reject it in favor of that of the adversary expert, yet, in either event, the compensation is established by the witness.

The presentation of direct testimony is merely a part of the expert's importance in condemnation. Due to the complexity of the issue, one set of facts may result in two widely contrasting opinions of value. Different formulas might be employed, different comparisons relied upon, and a factor of significance to one expert might be minimized by another. This poses an obvious problem since the trier of fact probably lacks the ability to recognize errors in such technical testimony. As a result the trier of fact must depend upon adversary experts to refute theories when it lacks the requisite knowledge to challenge them. Cross-examination in condemnation, therefore, assumes particular significance and refutation of seemingly obvious defects in the adversary's theory may be as im-

---

DISCOVERY OF EXPERT OPINION

important to success as adequate preparation of one's own case. Clearly the discovery procedure is evidence of a concern for well prepared cross-examination, and the need for pre-trial disclosure seems most immediate when experts, as opposed to lay witnesses are involved, in light of the difficulty in cross-examining technicians on complex issues. One party's expert may honestly disagree with the adversary expert, but complete refutation of the adversary expert's appraisal often requires detailed research by one's own technician.\(^2\) Moreover, competent cross-examination requires sufficient time for consultation and for education of the examining attorney by his own expert.\(^3\) The need for discovery for the purpose of cross-examination, therefore, seems obvious in the condemnation proceeding.

Another policy consideration is that discovery will encourage out-of-court settlements. While the encouragement of settlements is generally regarded as one beneficial concomitant of discovery, settlements due to discovery of appraisal reports in condemnation proceedings are most likely to occur because of the pre-eminent position of the expert testimony.

In England the importance of pre-trial discovery in condemnation is recognized by a specific provision for mandatory discovery. Under the Lands Tribunal Rules adversaries are required to submit their appraisal reports to the tribunal for mutual exchange at the pre-trial stage.\(^4\) If one party attempts to place in evidence reports which have not been disclosed to his adversary, the tribunal must adjourn the proceeding unless satisfied that no party will be prejudiced.\(^5\)

In condemnation, the jury must rely upon experts, not only to present educated testimony on highly technical issues, but also to refute unsound theories of valuation on rebuttal. Well prepared cross-examination affords the jury an objective standard for resolving an extremely speculative issue. Denial of discovery certainly diminishes the reliability of that standard. In this sense there would seem to be inherent in every condemnation case the "necessity or justification" requisite for discovery.

---

82. Winner, Procedural Methods to Attain Discovery, 28 F.R.D. 97, 103.
83. Ibid.
85. Id. at 176.