ALTERNATE DISPUTE RESOLUTION IN CONDEMNATION CASES: AN EMINENTLY AGREEABLE SOLUTION

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All cases end. Condemnation cases are no different. All cases have a life-cycle. They begin, either when the government initiates a direct condemnation case or when the landowner sues in inverse condemnation. They proceed through the court processes of the forum state or federal district. And they end.

They end after trial with a verdict, or on motion with a judgment, or after appeal with an opinion, reaching whatever conclusion and terms the jury or court decides. Or the case ends when *you* decide, with conclusions and terms that *you* agree to. Of course, the hitch in that bold statement is that to settle a case, the other side has to come to conclusions and terms that they can agree to, and they have to decide to end the case with you.

Now, there are a lot of ways to get to this ideal situation where both sides agree to settle and come to terms. Many savvy eminent domain lawyers are fully capable of advising their clients to reach mutually agreeable terms. But very often, serving in the dual role of advocate and conciliator is a difficult task. On the one hand, an attorney is expected to advocate the client's interest to the nth degree. On the other hand, an attorney must manage client's expectations, and convey information from the other side that the client may not want to hear, let alone accept. Mediation can be an ideal way to remove this tension from the settlement process. By working with a skilled neutral problem solver, an attorney can work to bring litigation to a close: obtaining acceptable just compensation for a landowner; minimizing the risk of litigation expenses for both sides; and providing finality and closure.

Positioning yourself in litigation so that mediation is always on the table will leave your client in a powerful

position. As lawyers, the job is to advocate for the client's interests which means to fearlessly represent them in a court of law. But it also means that you won't get in the way of a good deal. Eminent domain presents an ideal area of law for mediation, because in direct condemnation cases the parties start from the position that the condemning entity fully intends to pay just compensation to the condemnee. The parties' differing expectations on what that just compensation should be is uniquely amenable to the application of mediation.

BEGINNING WITH THE BASICS

What is Mediation?

Typically, mediation is a process where a neutral third party (a mediator) assists the parties in crafting a voluntary resolution to a dispute. For purposes of this article we are discussing an eminent domain matter that has either been filed or is expected to be filed.[1]

Why Mediation? Because it works…and it's useful for several reasons.

Mediation is one of the standard forms of alternative dispute resolution for a simple reason. It works. Not all of the time, of course. But it works often enough that it should be at the top of your list for possible dispute resolution.

An objection is often raised that because mediation lacks "teeth," there's little incentive for the parties to participate.

Mediated agreements, properly reduced to writing, and/or placed on the record, *do* have teeth. And the fact that the pre-agreement process does not contain punitive aspects is a *good* thing. It means that *you* have no risk in trying. Mediated agreements are enforceable and governed by general principles of contract law. However, let's assume for the sake of argument that it doesn't have teeth. In the worst-case scenario, what have you lost? You previewed your case for a neutral, road-tested your theory of the case, and you still have all remedies available. In the best-case scenario, you learn additional information about your case and you resolve the litigation.

Mediation can also help the parties resolve their specific concerns. Governmental entities are tasked with keeping projects on budget and on time. Litigation can be a surefire way to ensure budgets get blown and timelines get stalled. While typically the government can continue with its projects while litigating just compensation a growing trend has emerged for the landowners to at least attempt at delaying the occupancy. Putting settlement ahead of litigation should be considered as a way to keep costs and fees low. This will benefit a government client, and ultimately ensure that projects are being built on time. Conversely, landowner clients can also reduce fees and the time associated with litigating against the Government while significantly reducing the stress associated with litigation.

Additionally, having a mediation can really help your clients see matters clearly. If you're having trouble with a client who simply won't hear the risks in the positions they've decided to advance, mediation can be a good way to bring in the angel of reality (the mediator). You stay on good terms with the client and the mediator does the dirty work.

Further, many times condemnees feel that they have been treated unjustly. Whether because the offer is "too low" or because the condemnee feels that the process for selecting their slice of heaven for public use was unfair, eminent domain actions can be uniquely emotional. Mediation offers a forum for the airing of grievances, which can take some of the contentiousness out of the dispute and allow the parties to move forward on reaching agreeable terms.

Once you've decided to mediate, it can be the last stop if you prepare correctly. Preparation begins when you start looking for a neutral.

FINDING A NEUTRAL

Understand the styles that mediators employ and decide what style or styles are best for your case and client.

This is a separate point of consideration than deciding what type of neutral to select (i.e. judge vs. full-time mediator vs. attorney who mediates). A fairly common—though not universal—way to think about mediation is to divide it into three general "styles": a facilitative mediator is one who engages in the process of mediation to guide the parties to resolution; an evaluative or directive mediator will often help the parties asses the strengths and weaknesses of their case and suggest or "direct" the terms of the resolution; and transformative mediators who utilize the

process to repair relationships. While most mediators will suit their approach to the situation, ask what style or process they use if you haven't used them before. The last thing you want is to expect someone who will put a lot of pressure on the parties when there's no movement and end up with a mediator who only uses a transformative style. That mediation will likely end without resolution and may make future resolution more difficult. Conversely, if the parties need to be guided through the process and unpack emotions and interests that are non-monetary, having a mediator who tells everyone what the "right" number is an hour into the conference might result in a blown deal, or an agreement that everyone sulks about.

What other things should you be considering when selecting your neutral?

Parties commonly express that they want a closer. That seems simple enough but have you really looked at what a successful mediation looks like? Getting a deal done is always the priority. However, keeping that in mind, the best practice is to select a neutral that has the ability to quickly build trust and credibility with your client. That will give you the most mileage in regard to getting your case resolved. Remember that while closing is always the goal, it is not the only beneficial outcome. Partial resolution can reduce the scope of the issues at trial. Even exchanging offers to bring the parties closer together on valuation can plant the seeds for future resolution. If early mediation is attempted and that parties narrow their gap from five million to one million, then subsequent discovery might be the tool that helps the parties cover that last spread.[2]

It can be a worthwhile exercise to ask your potential mediator about how they conduct the session. Do they open with a "group hug"? Do they start with the parties in separate rooms? Do they prefer the entire mediation be face-to-face? Do they kick off the process with a pre-mediation session phone call?

Often attorneys don't ask these questions and are surprised (and dismayed) by the actual process of the mediation session. Mediators, like attorneys, have a wide range of styles and personal preferences, it is important to make sure that the mediator's style will jibe with yours (and your clients).

What is in a name? (Attorney, Non-Attorney, Retired Judge)

Attorneys can make great neutrals if they have been trained in the process. They often have the subject matter expertise that you may need to get a deal done. An experienced non-attorney matter is also valuable when they have closed a number of deals. Being experienced in the process as well as those who do have subject matter expertise will give you the combination of getting a deal done and also getting the perspective of a non-attorney which equals a preview of your case to the type of person who will likely be on your jury. Non-attorney mediators typically are more successful in creative problem solving as they haven't practiced within the same confines as a lawyer. An attorney who has resolved "thousands of eminent domain cases" using Method X, might be completely out of sorts when presented with a Method Y problem. Hiring a retired judge provides cover to attorneys and can have an impact on clients when they need to hear exactly what is wrong with their case. In the end, the best practice is to select a neutral that you are comfortable with and one who can build a quick rapport with the client.

Full Time Neutral vs. Part Time Neutral

Most neutrals are full time practitioners, which is beneficial. Mediating is a skill and continually putting that skill to use means you will likely get a better, more comfortable and efficient neutral.

Judge vs Mediator

Many court systems make judicial officers available for no cost to litigants, as each case settled is one fewer case for trial. Having a free judicial officer for resolution can be an attractive option. Additionally, in cases where there may be a bit of a client control issue judges can sometimes carry more weight with the client. A judge can also provide good cover for the attorney representing a client in the mediation. One downside is that judges have a tendency to be directive in nature, because they frequently view the matter as "What would I do if this were before me on motion or trial?" If you have a client that does not like "being told what to do," a judge might not be the best option. Further, many judges see eminent domain cases very rarely. It may be better to bring in a mediator from another city or state that has substantive knowledge, than to convene a settlement conference with a judge

who infrequently encounters the heavy constitutional, emotional, and economic issues presented in takings cases.

Of course, plenty of sitting judges have excellent mediation skills, and plenty of sitting judges know a lot about eminent domain. As always, the key is to know who the neutral is, and to understand how they approach their role.

How important is it for your neutral to have subject matter expertise?

This can go a few different ways. Most trained neutrals will tell you that they are executing a process and that process will work regardless of their expertise in a certain subject matter which is true. Good lawyers will fully brief the issues for the mediator but it still helps to have a basic understanding of the area of law. But, a neutral with substantial expertise may help you catch missed ideas. And a neutral with subject matter expertise can often shorten the mediation process, because you do not need to spend much time educating them on the underlying law. Once they are presented with the facts, they can begin assessing strengths and weaknesses with you and begin leading the parties to resolution.

PRIOR PROPER PLANNING PREVENTS . . . BAD OUTCOMES

Once you've worked with the other side to select the correct neutral—prepare. You wouldn't go into a trial without hiring your experts or preparing your case. Entering a mediation without preparing is a mistake and will almost always end in a failed mediation session. Here are a few things neutrals may use to set the right tone in a mediation.

Prepare for a pre-mediation phone call

A pre-mediation phone call is an opportunity for each party (with their counsel) to have a discussion with the mediator regarding their concerns, strengths and weaknesses of the case, and in complex cases it gives the neutral an opportunity to begin discussing productive offers ahead of the mediation session. Mediators can also use this time to talk to the parties and discuss realistic offers to start the mediation.

Prepare your client

Meet with your client in advance of the pre-mediation phone call and in advance of the mediation session to outline the goals (this is a road map only).

Prepare your case posture and client

Timing is everything. Be sure that the case is in a settlement posture (i.e., clients are willing to least hear options, discuss potential resolution) entering into a mediation too soon and without a proper discussion with the clients can sour their taste for dispute resolution. Mediating too late can have your client "pot committed" to a certain outcome. Keep in mind that mediation is a process that may take more than one session. But if you go into a session with the case completely unprepared, you might only have one shot, and blow it.

Prepare for success

Assume you'll get a deal done. It seems like the favorite phrase to say to a neutral is "this case won't settle". Remaining optimistic about the opportunity for resolution can help set the tone for a productive mediation. If you don't believe in it- who will?

Prepare to actually settle

Bring the authority. If you are trying to resolve a case that has $50 million in exposure for your client, saving $1200 on a flight and hotel (and ultimately busting your deal) because they don't have a vested interested in the outcome is a mistake. Investing in the process is an investment in resolution. The best practice to avoid having an objection to your authority being present is telling them early enough that they can make proper plans and explaining why it is important that they are there. You want/need the client to be in the room where it happens.

Prepare for contingencies

What non-monetary items, if any, are required to get the deal done? Discussing this in advance with your client (and sharing it with the mediator) can help ensure that negotiations run smoothly. It can also help "make the pie bigger" and allow the mediator to look at additional options that could get the deal done.

Prepare for derailing annoyances

The apocryphal tail that wags the dog—you've likely been there, dealing with the small thing that threatens to derail your negotiations. Prepare so that you can understand what the likely "tails" are so that you are prepared to resolve them.

In real property cases, who will pay the Real Property Transfer Tax? It never fails that after settling a multi-million dollar case, parties quibble and threaten to bag the whole deal over the transfer tax. Or, it never gets brought up and has to be dealt with post-negotiation.

Are there entities that need to be reinstated and/or created to perform the deal? Are there entities that need to be reinstated? How much will that cost, should that be part of your negotiations?

Board/government approval. In eminent domain, the government frequently must ratify any settlement deal. Prepare your client for the fact that shaking hands on Tuesday, January 1, 2019 will not get them a check on Wednesday, January 2, 2019.

Prepare your substantive case

The best practice here is to have support for your case. If you need an expert to prove damages, hire them. If there are documents that support your case, or that your client needs to reach a decision, bring them. If there is case law that supports your argument(s), bring a copy.

Prepare to make an offer

Of course, everyone would prefer to see the other side's cards first. But what if the choice isn't yours? Inexperienced negotiators will often refuse to open. However, there are reasons to consider when making that decision. Opening the negotiations can anchor them. Specifically, if you are viewing the resolution from a distributive bargaining point of view. If you do make the opening move, be sure that your offer is aggressive but not offensive. If your first move is a counter, be sure that it fairly responds to the offer the other side made. You can always discuss strategy and offers with the mediator. They likely have valuable information that can help you craft the right offer and/or response.

Prepare to be brave

At some point, someone has to "move." Someone has to make the big step to induce the other side to make a similar big step. This requires bravery. Because you need to explain to your client that you're not selling out their interests but using it as a device to make the other side move with you. The brave counter is usually the "moment of truth" and the ultimate gut check in the mediation. Be prepared to explain to your client why you are going to make such a big jump. Then, be brave and do it. And if you need a quick mantra to help you make this brave jump, remember: "Audentes Fortuna Juvat"—Fortune favors the bold.

Prepare to actually settle with an actual settlement

It's great to reach an agreement in principle, but if you've done the leg-work before hand, you can actually reach a real binding agreement at the end of a mediation session.

Once you've fully prepared your case, you're ready to get into the thick of it and actually work the mediation process to resolve the case. So, what tools can you bring with you to help? And which tools might be more trouble than they're worth? And, how should you interpret offers from the other side?

TACTICAL CONSIDERATIONS AND CAUTIONS

Properly deploying negotiation and mediation techniques is as much an art as a skill. It requires that you understand the techniques themselves, understand their applicability to your case, and to understand the parties on the other side.

Bracketing

Bracketing is a tool used to close large gaps and there are two formulations. The first is common and looks like this: "If I can get them up to $1.5 million will you come down to $4.5 million?" This tool can be effective but only if the mediator *and* the parties are familiar with this style. If they are not, it only serves to confuse matters, as a party might think that the other side is agreeing to settle anywhere within the bracket. A less common form of bracketing, is the single-side bracket, in which a party unilaterally announces that they want: "Between $500K and $600K." This tactic is generally used by lay people in negotiations, but can be difficult in litigated cases, because you've generally announced the lower limit that you're willing to

accept. Understanding the differences between forms of bracketing is essential in analyzing an offer you might be willing to make and understanding an offer from the other side.

Distributive Bargaining

This type of bargaining is also known as "zero sum" negotiating. There is a set amount of money and all we need to figure out is who gets how much of that set pie. This type of negotiating often looks like "they came down $1,000 so we'll come down $1,000." Recall that getting out of this phase requires one side to be brave. This is an aggressive type of negotiating and has its successes. But it has its drawbacks.

A key consideration here is to determine whether the other side is mirroring your offers because they intend to, or because they don't know what else to do. Sometimes taking a bold step can be met with an equally bold step from the other side. It can often be useful to discuss this possibility with the mediator, who may be able to provide some insight into the motivation of the offers come from the other room. If the other side is dead-set on incremental offers, the key here is to be patient and do the horse trading. Trying to short circuit the process will not end well. Be sure you know what game the other side is playing and settle in for a long day of negotiating.

Integrative Bargaining

Integrative bargaining focuses on interests not positions. In this type of negotiating parties figuratively move to the same side of the table and work on resolving the problem together. This type of negotiating is often most useful when paired with distributive bargaining—it allows parties to get results faster and can expand the pie. This type of bargaining can be difficult in business litigation and is typically successful when interests are accurately identified.

Caution: Offensive offers

Your offer sends a message. It can convey what you're willing to settle for. It can convey what you think about the strength of your case. It can convey what you think about the strength of the other sides' case. It can convey what you think about the other side. You can see how easily an "offer" can be perceived as a moral judgment. Sending an offensive offer is always discouraged as it can set back progress that has already been made. Think about the offers you are sending to the other room and remember that you hired a neutral for a reason; if they caution you that this could backfire, listen.

SETTLEMENT CRAFTING

You've prepared, and you've been brave. You've made offers, and waded through the other sides' posturing and tactics, and you have a number. You're ready to settle. Now what? What makes a good deal?

Draft An Agreement

Many parties think it sufficient to verbally agree to a deal and to draft a more robust agreement in the following days. This is a bad idea. Inevitably, one party starts to back up on the agreed to deal or people re-write history and a disagreement as to what the material terms are or if they are being expanded has a higher likelihood of becoming a reality in your case.

Pro tip: Having a draft agreement nearly finished the way you'd like to see it done is the best practice. As the mediation draws to an end parties and counsel are exhausted—it's usually late and details get missed when you try to muscle ahead and get the agreement done. Positioning yourself so that you have only the material terms to add significantly reduces time after the mediation swapping drafts with the other side and ensures that you get a draft out that you're comfortable with. It will also help you think through resolution as you get ready to enter into mediation.

You can also elect to have a court reporter on standby to assist with the getting the material terms on the record.

Be specific

The more detail you can put in your agreement the better. It will result in fewer disputes in the future. Do not skimp on details: who will draft, who is reviewing, when are the drafts due, when is money due, how is the money to be paid, to whom is the money to be paid, when are the deeds due, who is recording, etc.

Think about failure

If you and your client are concerned about the mediated agreement falling apart, consider entering into a binding arbitration over those issues. In that case, the parties agree that any dispute over the agreement will come before the neutral in an expedited hearing for

ruling. The benefits to this are not only the speed at which the matter can be heard and resolve the issue, but also that the neutral is already familiar with the deal since they facilitated it. Additionally, a consideration when taking this route is that the confidentiality of the agreement stays intact. Consider what happens when you move enforcement proceedings in a Court. i.e., the record is public and now so is your deal.[3]

Let your client be heard

Perhaps this is more for the mediation session itself, but it often resurfaces in agreement writing. It is not uncommon for attorneys to say, "This is business—hand holding isn't going to get us anywhere." And while it *is* business and parties have a higher likelihood of success in mediation when they focus on level headed decision making, everything has a personal component. The best practice is to understand this and allow your client to be heard. Satisfying this component will lead to an agreement that is sustainable. Research has shown that parties are more likely to comply with their agreements when they've actively participated in their creation. A good deal gets inked when parties feel fully heard and comfortable letting the dispute go. Unresolved feelings often come back up during the agreement phase so it's best to be sure that they've said all they needed to say during the mediation.

Know what items are required for the agreement to be finalized

Does this settlement have to be approved by a City Council or some other board? If so, know when you can get before them to recommend the deal. Do assets need to be sold? Deeds need drafting?

THE TAKINGS CASE TAKE-AWAYS

Mediation is a valuable tool available for litigators to help clients mitigate risk. But it is not a panacea. As advocates and counselors at law, eminent domain attorneys must be mindful in preparing their client that all cases must end, and that voluntary endings are often better than litigating to the death.

To ensure a productive mediation, the skilled practitioner must be mindful in understanding what options exist, and must understand the differences between various types of neutrals. The practitioner must be mindful in selecting the right neutral for the case. Not every case calls for the same skill set. The practitioner must be prepared. Understanding the various negotiation strategies the other side may employ in a mediation can help nullify advantages, and can even turn the other side's tactics into benefits for your client. The practitioner must also be ready to handle the nuances of the actual case. Just because the ultimate deal might be drawn in broad strokes, mastery of the minutiae is mandatory. This is especially important in making sure that the parties avoid agreement pitfalls. You can't draft an agreement with all the material terms if you don't know what terms are material to your client.

At the end of a mediation session, you may find that no deal can be struck…*yet*. Don't use terminal ultimatums that close the door on further opportunities to strike a deal. Every interaction is an opportunity to work towards resolution. And when the opportunity to actually resolve the deal opens, don't get in the way of your own success. Remember, when counsel and client show up prepared and with the understanding that mediation means that no one will get everything on their list, great progress is usually made.

The goal everyone should be working toward in resolving eminent domain cases is just compensation—no more and no less.

Notes

1 Yes, you CAN mediate a dispute that has not been filed yet.

2 Of course, subsequent discovery and motion practice can also completely reset the parties' positions and expectations.

3 Depending on the sunshine laws of the forum state, confidentiality is often unavailable in eminent domain cases, but as most mediations and private arbitrations do not record or transcribe proceedings, keeping things within the mediator's purview can still assist with those cases where publicity may be detrimental.