Cross examination of an expert witness may be the single most important element of an eminent domain trial. There is little doubt that the appraiser is the principal, and quite often the only, witness in the trial. As a result, cross examination of the adverse appraiser in an eminent domain case is particularly critical. A good job can win cases; a bad job will almost certainly lose them.

In order to effectively cross examine an expert appraiser, as with any expert, thorough preparation is the key. Preparation is conducted on a variety of different levels, in a variety of different ways, beginning on the day you are retained as counsel. Of course, the most important, but certainly not the only, means of preparation is the pretrial deposition.

This paper reviews a range of preparation techniques, including the discovery deposition, leading up to effective cross examination at trial, and then outlines time tested and proven principles of cross examination and the usual areas that are fertile for impeachment of the opposing expert.

Preparation From Day One

Cross examination of the appraisal expert is a critical part of the overall mosaic of the trial, and must be viewed at the outset within the context of that bigger picture. It is thus impossible to prepare effectively for cross examination unless one does so in the context of effective preparation for the trial as a whole. In order to prepare for the trial as whole, one must develop, as early in the process as possible, the key themes for the trial. In that sense, an eminent domain case is like every other case, and must have a theme.

Disparities between appraisers must necessarily reflect some fundamental difference in their methodologies, techniques, and/or understanding of the facts. Once the key points of distinction between competing appraisers are identified, the theme of the case will come into focus, as will the theme of one's cross examination.

The following are suggested techniques for gathering relevant information, analyzing the issues, learning what you can about the opposing expert and his/her opinions and methodologies, isolating the fundamental points of divergence between the experts, and ultimately developing the theme for trial and cross examination.

1. Spend Enough Time With the Client to Understand the Client's Goals, Strategies, Issues and Facts. Far too many lawyers spend far too little time thoroughly debriefing the client and coming to understand the client's point of view on all the critical issues and facts in the case. It is essential as an initial step, both for client relations purposes and, ultimately, for purposes of preparing
the most effective case for trial, to make sure you understand your client and have assimilated all necessary facts, documents and ideas that the client has.

2. Put Your Walking Shoes On. Practicing law in the eminent domain context requires physical effort as well as mental. One should be prepared to spend substantial time, depending on the circumstances, walking the affected property, getting a feel for the surrounding area, and driving from one location to the other.

3. Stay Close To Your Enemy. If at all possible, it is typically advisable to join the adverse appraiser on his inspection tour. It is important for a trial attorney to know precisely what the opposing expert has done to prepare his/her report, and there is no better way than to start by accompanying that expert at step one – the site visit. A trial attorney can thus learn first hand what the appraiser did do and did not do in the initial formulation of opinions. It is also prudent to exert some control over the information exchange between the opposing expert appraiser and the client or clients' representatives during such a tour. Finally, one never knows what the opposing expert will say in a loose moment.

4. Homework In Connection With the Appraisal Report Itself. After the appraisal report of the opposing expert is received, one should obtain as much information as possible with respect to any transactions cited or relied on by the adverse appraiser. It may be worthwhile, for example, to obtain the deeds that relate to such transactions, as they may prompt further investigation or bear on the relevance of the transactions themselves.

One particularly fertile area of investigation of comparable transactions relied on by the expert could be information regarding a subsequent resale of a comparable property at a significantly different price. It is quite possible, indeed probable, that such resales would be overlooked by the condemnor's appraiser.

5. Public Sources of Information. It can be helpful to explore public records relating to the subject property and to speak to local municipal officials, such as the local tax assessor or municipal engineer. In this manner, one might learn of factors, such as location of a subject property within a flood plain, that might cast doubt upon the reliance of the condemnor's appraiser on a particular piece of property. One might also learn, in this manner, about easements or other burdens on property that were not taken into account by the opposing expert.

6. Become an Expert on The Opposing Expert. One should learn everything possible about the opposing expert's professional background. One must investigate his/her qualifications and find out what that expert knows about the subject geographic area, type of property under appraisal, etc. Trial counsel should read any publications written by the expert and, if possible, any appraisals prepared by the same expert in similar cases. Inconsistencies between such appraisals, or between an appraisal and a publication or speech by the expert, are fertile ground for cross examination. These and other inquiries are particularly appropriate and necessary during the opposing expert's
deposition, a subject to which I now turn.

The Deposition

The purpose of a deposition, of course, is to obtain information, whereas the purpose of cross examination at trial is to use the information obtained to attack the opposing expert and/or that expert's opinions. The latter cannot easily be accomplished without doing a thorough job with the former.

The expert's deposition should be used to obtain every piece of relevant information in the possession of the expert.

As a threshold matter, no expert deposition should be taken without requiring the deponent to produce his entire file. That file should include all evidence of the expert's communications with opposing counsel, any instructions he has been given, facts he has been asked to assume, and the expert's investigation, analysis, opinions and conclusions. The file may also contain notes regarding the expert's perceived weaknesses or areas of vulnerability, and may contain evidence of how opposing counsel has helped to shape the expert's opinions.

During the deposition, the goals generally may be stated as follows: (1) to obtain as much information as possible; (2) to learn and thoroughly explore the expert's methodology, basis and facts relied on; (3) to attempt to limit the expert with respect to the opinions and bases for those opinions; (4) to elicit whatever admissions one can with respect to unsupported assumptions, weaknesses, the lack of adequate factual basis, and the like; (5) find out everything one can about the witness's background, training, qualifications and prior experience and engagements; and (6) assess the expert's demeanor and susceptibility to different cross examination techniques and strategies.

It is critically important, in taking the expert's deposition, not to forget that this is a deposition, and not trial. In other words, the purpose of the deposition is to discover all of the information necessary to be able to conduct an effective cross examination at trial; it is not to attempt to destroy the expert by using all your best ammunition. Some very good trial lawyers believe that taking depositions of experts may not be the right thing to do in all cases, as the downside might be the education of the expert and opposing counsel as to the weaknesses in their case. I concur that this is a danger that must be avoided at all costs.

With the foregoing caveat as a warning, the following is a useful template for deposing the expert appraiser:

- Educational background, and any particular areas of academic concentration.
- Professional designations, awards or other indicia of standing in the field.
• Relevant post-college academic work.

• Initial general statement of subject matters in which the expert has been engaged to render opinion. Is the expert prepared to render an opinion in those subject matters?

• Has expert been engaged to render an opinion in any subject matter where the expert has not yet formed an opinion?

• Recitation of work experience generally, but with particular attention to subject matters of testimony.

• Professional society or industry association work in the relevant areas. Papers written, books published, articles, speeches, or other contribution to professional literature and/or programs.

• Chronological recitation of prior expert engagements (and testimony) as an appraiser. Other expert consultation or engagements that did not lead to testimony. Press for particulars regarding clients, subject matters, opinions, opposing counsel, etc.

• When engaged in this case? What were you asked to do? What documents were given to you? What subject matters were you asked to opine on?

• Have you brought all relevant documents and files with you as requested? Identify on record all documents brought by expert to avoid confusion. If expert or counsel refuses to produce documents, develop sufficient record to take to the court.

• With respect to the documents brought to the deposition, how were they utilized? What has the expert read and not read? What was relied on and not relied on?

• Identify the specific documents that were relied on in forming opinions. Identify documents used as background or for informational purposes.

• Identify each opinion reached by the expert. Try to get as concise a statement as possible of each such opinion.

• With respect to each opinion,
  – On what professional standard is the opinion based?
  – On what professional experience is the opinion based?
  – On what professional literature is the expert relying in forming the opinion?
  – On what facts is expert relying in forming the opinion?
Having gathered the relevant materials, prepared as thoroughly as possible for trial, developed trial and cross examination themes, and hopefully having taken a useful deposition, it is time now to turn to cross examination at trial.

Cross Examination of the Adverse Appraiser

Many lawyers write and speak prolifically on the goals, strategies and tactics of cross examination, as if cross examination were an end unto itself. It is not. Rather, it is a very important part of a much larger whole (i.e., the trial), and the single most important goal, tactic and strategy is to win. I must, therefore, note at the outset that one of the most important decisions a trial attorney can make is **whether** to cross examine the expert, and if so, how long and precisely to what end. Some of the best cross examinations I have seen have consisted of two or three questions, lasting five minutes at the outside. There may be one critical question or issue in the case, and if one can cut through the smoke to get to that issue or question in a direct, effective and entertaining way, then one can give further proof to the age old adage that "less is more." Did I say entertaining? Yes, that is one of the most important components of a successful cross examination. Whether one is before a judge or jury, one must start with the realization that a condemnation case is not likely to have the same riveting effect as, say, the O.J. Simpson trial did. Accordingly, a skilled trial lawyer must make his/her points in an effective and entertaining way in order to keep the attention of the trier of fact and make sure that the points scored are remembered.

Assuming one proceeds with a reasonably detailed cross examination, one would theoretically wish to obtain several things from the other side's appraiser. At a minimum, one should at least get the opposing expert to concede that appraisals are highly subjective and that reasonable people can differ regarding questions of valuation. At the next level it would be nice to obtain certain concessions relating to the property itself, that is well located or well maintained or that it enjoys other advantages which, at the appropriate time, may be urged upon the jury as elements of value. More ambitious cross examination can hopefully elicit damaging admissions, such as that the adverse appraiser has failed to study various aspects or facts which are or may be critical to his opinion regarding value. Beyond that, to the extent the cross examination establishes bias, lack of candor, excessive partisanship, or other such impeachment, the trial lawyer will have hit a home run by discrediting the adverse appraiser to the point where the judge or jury will pay little attention to his/her opinions regarding value.

The first step in preparing for cross examination, in order to accomplish the foregoing goals, is to prepare a detailed cross examination file on the witness. Such file would include, at a minimum, the following:

- The expert's written report, if any, together with exhibits and work papers.
• Expert's biographical information.

• Expert's deposition in the instant case along with a summary of testimony and listing of deposition exhibits.

• Expert's past publications, speeches or other writings regarding valuation.

• Opposing side’s responses to interrogatories, answers to requests for admissions, and any other discovery responses that relate to the expert's report and, more generally, the question of valuation.

• Witness's prior depositions, prior court room testimony, and any prior reports in other cases that relate to valuation.

• A critique by your own expert of the opposing expert's anticipated testimony and report.

• Your cross examination outline and exhibits that you plan to use.

**Questioning Techniques**

The general techniques for cross examining an expert generally do not differ from the techniques a skilled trial lawyer would use in examining any witness, or any expert outside the appraisal area. The following are the time honored techniques for conducting an effective and entertaining cross examination:

1. **Start Strong.** At the conclusion of his/her direct examination, the appraiser is likely feeling pretty good, the opposing side is likely feeling pretty good, and the jury/judge is likely leaning toward the other side, as it has just put on presumably the strongest part of its case. You need to start strong with an effective question to which you know the answer, and as to which the answer will resonate with the jury/judge. This should not drag out excessively but rather be a quick and effective hit. It is critical to grab the judge/jury's attention, and once it is grabbed, you must keep it.

2. **Ask Only Questions That Will Elicit Yes or No Answers.** This is always true in conducting cross examination, but it is particularly critical in the cross examination of an expert appraiser. No matter how well prepared or trained a lawyer is, the appraiser will necessarily know his/her subject matter better than the lawyer. Accordingly, one cannot ask open-ended questions that will permit the expert to essentially repeat his direct examination or otherwise demonstrate to the jury the depth and scope of his knowledge and expertise.

3. **Ask Short and Simple Questions.** Valuation cases are complicated and, not to beat a dead horse, boring to the average juror, and probably even to the seasoned judge. There is no more lethal a combination than boring and hard. Questions must be short, simple, expressed in layman's terms, and easy to follow and understand.
4. **Know the Answer to Every Question You Ask.** Only the most skilled (and lucky) trial lawyers can get away with “winging it” at trial. It is the far better practice to use the deposition that you have taken, or any other materials that you can use to lock the witness in, and ask questions to which you know the answer. Judges and juries can usually tell when a lawyer has been sand bagged by an answer that he/she did not expect.

5. **Identify and Attack Only Areas of Vulnerability.** You do not have to, nor should you, attack every aspect of an expert’s opinion. You must select those aspects that are most important and as to which you have a reasonable prospect of success. The case is not supposed to be won or lost through cross examination; rather, you will have your own expert and evidence, and should, within the overall context of your trial strategy, look to win your case there. Be conservative and concentrate on those areas where there are legitimate points that can be made quickly and effectively.

6. **Go For the Jugular.** It is important to get to the point as quickly as you can, while of course setting the proper background and laying whatever legal foundation is required. One must know where one is going in a cross examination and how one is going to get there.

7. **Be Entertaining.** Continuing to beat a dead horse, you simply cannot put the judge or jury to sleep. Keep your pace at a crisp level, alternate your voice to the extent you can, move around a little bit if that is permitted, and make sure that no one can accuse you of speaking too softly for anyone to hear.

8. **Use Exhibits.** Again, the subject matter is difficult to understand and intrinsically not the most interesting. An expert can be cross examined most effectively with appropriate documents, maps, aerial photographs, tax map blow-ups, and other visibly interesting and irrefutable evidence. Abstract questioning, without props, is difficult to follow and typically boring.

9. **End At the Right Time and End Big.** Remind yourself over and over again that cross examination is but a piece, albeit an important one, of the overall mosaic of trial. There is a lot more to be done after cross examination is complete. Do not feel that you must continue to drone on after you have made the essential points. Do not ask one question too many. Finally, it is particularly effective to end on an important or big note, with an effective question and answer that scores one of your best points. When you do that, sit down and congratulate yourself.

**Specific Strategies**

The following is an outline of impeachment points that trial counsel should strive for. This list is certainly not exhaustive:
• The expert is wrong about important facts.

• The expert does not know certain important facts.

• The expert's valuation techniques and judgment are contrary to written authority or inconsistent with accepted theories and methodologies of valuation.

• The expert has relied on unreliable hearsay or assumptions that are invalid or subject to question.

• The expert's opinion is contrary to his/her prior reports, testimony, speeches, articles or other writings.

• The expert has not seen important documents or exhibits.

• The opposing expert agrees with as much as possible of your expert's methodology and approach; at a minimum, opposing expert acknowledges credibility of such approach.

• Opposing expert has not spent much time or effort on the engagement.

• Opposing expert has made mistakes in calculations (e.g., simple mathematical errors and/or errors based upon incorrect assumptions or forecasts).

• The expert's conclusion is impractical or unbelievable, as it results in a value that makes no economic sense.

Finally, although it is typically better to attack the message rather than the messenger, there may be instances where a deposition has revealed that a successful attack can be made against the messenger. Thus, a witness can be shown to be biased, and therefore not credible, where he/she has worked for the same client numerous times in the past; he/she is regularly employed by opposing counsel; charges are excessive, suggesting this is a witness who can be bought; the expert earns a majority, or a substantial part, of his/her income through paid testimony; and the expert's report was essentially prepared by counsel rather than the expert.

It is also quite effective to challenge the expert's qualifications during voir dire, where a deposition has established that the expert is merely an accountant or real estate broker rather than a valuation expert, or where the expert's experience in the real world is not extensive.

**Conclusion**

Cross examination of the opposing expert appraisal is indeed critical, but it is also critical to remember that it is a part of the overall trial. One must therefore
develop the theme of the trial, establish the differences between the competing experts, focus in on a particular theme for discrediting the opposing expert based on those differences, conduct all the preparation that one can before getting anywhere near the court room, take an effective deposition, prepare a comprehensive cross examination file, and then be sure to conduct the most effective cross examination possible, which may consist of no cross examination at all or perhaps a limited and highly targeted one. The rules of cross examination are simple and easy to understand, but can be awfully difficult to follow. If they are followed, there is no reason why the result cannot be a successful one most of the time.