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Condemnation in Indiana: Discovery of Expert Appraisal Reports

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CONDEMNATION IN INDIANA: DISCOVERY OF EXPERT APPRAISAL REPORTS

INTRODUCTION

Some concern has been expressed over the extent to which facts, opinions and conclusions ascertained by an expert who has been hired by a litigant for consultation and testimony should be subject to pretrial discovery.¹ Opponents of broad discovery argue that litigation is primarily a contest between adversaries and an "arms-length affair."² Such discovery, it is alleged, would be an unwarranted interference with a party's trial preparation.³ Proponents of broad discovery stress its importance in promoting a just, speedy and inexpensive determination of the case⁴—important goals in a day when the overcrowding of court dockets has become a major problem.⁵ Mutual knowledge of all relevant evidence before trial is deemed essential in giving each party a complete and fair hearing on the merits of the controversy.⁶

1. See Friedenthal, *Discovery and Use of an Adverse Party's Expert Information*, 14 STAN. L. REV. 455 (1962); Long, *Discovery and Experts Under the Federal Rules of Civil Procedure*, 38 F.R.D. 111 (1965) [hereinafter cited as Long]; Note, *Pretrial Discovery in Condemnation Proceedings: An Evaluation*, 42 ST. JOHN'S L. REV. 52 (1967).

2. See Rosenberg, *Changes Ahead in Federal Pretrial Discovery*, 45 F.R.D. 481, 484 (1968).

3. See, e.g., Long, *supra* note 1, at 123.

4. *Id.* at 112. See also *United States v. Meyer*, 398 F.2d 66 (9th Cir. 1968):

[I]n condemnation cases full pretrial disclosure of appraisers' opinions and details upon which they are based is required if the rules are to accomplish their purpose to "make a trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent."

Id. at 70 (footnotes omitted).

5. See *Roe v. Cherry-Burrell Corp.*, 28 Mich. App. 42, 184 N.W.2d 350 (1970):

It seems to us, having in mind the clogged dockets of our trial courts, that the interest in shortening the interval between the commencement of an action and adjudication requires not only that we allow litigants to require disclosure of the other side's case in advance of trial, but further that in some cases it is the duty of the trial court to insist that the parties employ these ancillary techniques in an effort to expedite the trial process and to reduce the backlog.

Id. at 53, 184 N.W.2d at 356.

6. See *Hickman v. Taylor*, 329 U.S. 495 (1947):

[T]he deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time honored cry of "fishing-expedition" serve to preclude a party from inquiry into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession.

This divergence of opinion over the scope of discovery is particularly acute in condemnation actions where the trial may depend principally upon expert testimony, with opinions and underlying factual data constituting a bulk of the evidence.⁷ These opinions and factual data are often determinative of the amount of payment to be made to the condemnee. In order to guarantee that adequate compensation is afforded, procedures must be provided so that both the landowner and condemnor are given every opportunity to establish the true value of the property being taken.⁸ It is the contention of this note that the opportunity can be most effectively given by allowing discovery of expert opinions, conclusions and facts upon which they are based as contained in appraisal reports compiled prior to trial. This discovery would be accomplished by obtaining the adverse party's appraisal report before trial and would be allowed as long as it is known that the expert appraiser is going to testify.

Courts have been hopelessly split over the allowance of such discovery. Some decisions have prohibited discovery entirely⁹ while others have allowed complete discovery.¹⁰ In compromising between these extremes, a number of courts have differentiated between facts upon which the opinions and conclusions of an expert are based and the opinions and conclusions themselves, only the former being discoverable.¹¹

Id. at 507 (footnotes omitted).

7. See *United States v. Meyer*, 398 F.2d 66, 69 (9th Cir. 1968).

8. See *Pinellas County v. Carlson*, 242 So. 2d 714, 716 (Fla. 1970).

9. See, e.g., *United States v. 900.57 Acres of Land*, 30 F.R.D. 512 (W.D. Ark. 1962); *United States v. 6.82 Acres of Land*, 18 F.R.D. 195 (D.N.M. 1955); *United States v. Certain Acres of Land*, 18 F.R.D. 98 (M.D. Ga. 1955); *United States v. 7,534.04 Acres of Land*, 18 F.R.D. 146 (N.D. Ga. 1954).

10. See, e.g., *United States v. 2,001.10 Acres of Land*, 48 F.R.D. 305 (N.D. Ga. 1969); *United States v. 50.34 Acres of Land*, 13 F.R.D. 19 (E.D.N.Y. 1952); *Swartzman v. Superior Court*, 231 Cal. App. 2d 195, 41 Cal. Rptr. 721 (Dist. Ct. App. 1964). See also *Pinellas County v. Carlson*, 242 So. 2d 714 (Fla. 1970), where full discovery was permitted to the condemnee yet was denied to the State unless the condemnee initiated such discovery.

11. See, e.g., *United States v. 284,392 Sq. Ft. of Floor Space*, 203 F. Supp. 75 (E.D.N.Y. 1962); *California v. United States*, 27 F.R.D. 261 (N.D. Cal. 1961); *United States v. Certain Parcels of Land*, 25 F.R.D. 192 (N.D. Cal. 1959). A common method of separating facts from opinions in reports submitted by the experts is to order the reports to be inspected by the court *in camera*. See, e.g., *United States v. Certain Parcels of Land*, 15 F.R.D. 224 (S.D. Cal. 1953).

This fact-opinion distinction has been sharply criticized. See Friedenthal, *Discovery and Uses of Adverse Party's Expert Information*, 14 STAN. L. REV. 455, 473 (1962); Long, *supra*

In support of the contention that appraisal reports should be subject to discovery, consideration will be given to the nature of condemnation itself. The condemnation procedure and the inherent difficulty of establishing the amount of compensation to be paid to the condemnee will be noted in order to understand the value of such discovery. The reasons for the denial of discovery will then be discussed. Finally, consideration will be given to Trial Rule 26 of the Indiana Rules of Trial Procedure which establishes a separate procedure for discovery from experts.¹² Some lower courts in Indiana have interpreted this rule to mean that appraisal reports prepared by experts expected to be called as witnesses at trial are not discoverable.¹³ A close scrutiny of the rule will show this interpretation to be erroneous.

EXERCISE OF THE POWER OF EMINENT DOMAIN

Requirement of "Just Compensation"

The exercise of eminent domain transcends all rights in the free use, enjoyment and disposal of property by the individual.¹⁴ It is not dependent upon any specific constitutional grant. Rather, it has been called inherent as a built-in attribute of sovereignty.¹⁵ To prevent abuse and injustice which might result from its unrestricted use, payment of just compensation to the landowner is required by the United States Constitution¹⁶ as well as the Constitution of

note 1, at 144-45. The distinction is without merit, according to these authors. Opinions of an expert are actually facts in the case, with his conclusions constituting as much of the evidence as his observations. For the purposes of this note, the decisions distinguishing between fact and opinion are therefore included within the collection of cases denying discovery.

12. IND. R. TR. P. 26(B)(3).

13. *E.g.*, Northern Ind. Pub. Serv. Co. v. First Nat'l Bank, Cause No. 71-PSC-1161 (Porter Super. Ct., Sept. 14, 1973).

14. One court described the condemnee as a "victim" of "one of the most harsh proceedings known to law." Pinellas County v. Carlson, 242 So. 2d 714, 716 (Fla. 1970).

15. Board of Comm'rs v. Blue Ribbon Ice Cream & Milk Corp., 231 Ind. 436, 109 N.E.2d 88 (1952):

It is inaccurate to say, as it has sometimes been said in Indiana, that the exercise of the right of eminent domain is "prescribed by the Constitution and regulated by statute." The power is inherent in, and essential to, the existence of all government even in its most primitive forms. It does not depend for its existence upon a specific grant in the Constitution. It is a power which exists without constitutional recognition, a power which is limited, but not conferred, by constitutional provisions.

Id. at 439, 109 N.E.2d at 89.

16. U.S. CONST. art. 5; U.S. CONST. amend. XIV. See Chicago, Burlington & Quincy

Indiana.¹⁷ This requirement includes a guarantee to the landowner of an opportunity to contest the necessity of the taking and the amount of compensation to be awarded.¹⁸

Just compensation must be payment of a full and perfect equivalent in money for the property taken.¹⁹ It is a reciprocal requirement in that it must be fair to both the property owner and the condemnor.²⁰ Indiana case law interprets just compensation as putting the property owner in as good a pecuniary position as he would have been in had his property not been taken.²¹

Judicial Procedure in Establishing Just Compensation

Indiana statutory law governs the procedure for determining the necessity of the taking as well as the amount of compensation to be paid for the taking.²² Any person, corporation, association or agency with "clear legislative authority" to condemn is entitled to invoke this procedure.²³ If the provisions of the statute are followed, no violation of the due process clause of the fourteenth amendment of the United States Constitution or any Indiana constitutional provision exists.²⁴

Before proceeding to condemn, the condemnor is required to make an effort to purchase the land, right of way easement or other property or right being sought.²⁵ This effort must be made in "good

R.R. v. Chicago, 166 U.S. 226 (1897), where the Court interpreted the fourteenth amendment as applying the limitation of "just compensation" under the fifth amendment to the states.

17. IND. CONST. art. 1, § 21.

18. Slentz v. Fort Wayne, 233 Ind. 226, 231, 118 N.E.2d 484, 487 (1954).

19. Monongahela Navigation Co. v. United States, 148 U.S. 312, 326 (1893).

20. *Id.*

21. *See, e.g.*, State v. Reid, 204 Ind. 631, 636, 185 N.E. 449, 451 (1933). However, some losses incurred due to the taking are not compensable. *See* note 96 *infra* and accompanying text.

22. IND. CODE §§ 32-11-1-1 to -15 (1971).

23. Indianapolis Oolite Stone Co. v. Alexander King Stone Co., 206 Ind. 412, 418, 190 N.E. 57, 59 (1934); Kinney v. Citizens' Water & Light Co., 173 Ind. 252, 255, 90 N.E. 129, 130 (1909).

24. Southern Ind. Gas & Elec. Co. v. Boonville, 215 Ind. 552, 558, 20 N.E.2d 648, 651 (1939).

25. IND. CODE § 32-11-1-1 (1971). An exception to this requirement is recognized where eminent domain proceedings are brought by the state highway department, or any state board, agency, or commission which has taken over the duties of that department to locate, relocate, construct, repair, and/or maintain Indiana public highways. IND. CODE § 32-11-1-9 (1971).

faith," and must be alleged and proven by the condemnor before the court has jurisdiction to proceed.²⁷ If the owner is unwilling to sell below a price considered by the condemnor to be excessive,²⁸ the condemnor may institute a proceeding in eminent domain by filing a complaint with the clerk of the circuit or superior court of the county where the land or other property or right is situated.²⁹ Notice of the proceedings must then be sent to the condemnee requiring him to appear in court and show cause why the property should not be appropriated.³⁰ The landowner is then entitled to a hearing on the question of the right of the condemnor to appropriate the property.³¹ At this time, the court must rule upon any objections made by the condemnee.³² Should all the objections be sustained, the legal effect is the same as that of sustaining a demurrer to the complaint in a civil action.³³ Opportunity may then be given to the condemnor to amend his complaint or appeal to the state supreme or appellate court from the decision.³⁴

Should the objections be overruled, the court must appoint three appraisers to assess the landowner's damages.³⁵ If the landowner desires to appeal the court's decision to overrule the objections and to appoint the appraisers, he may do so at this time.³⁶ The

26. See *Wampler v. Trustees of Ind. Univ.*, 241 Ind. 449, 172 N.E.2d 67 (1961): What constitutes a "good faith" or "bona fide" offer to purchase? Each case must be determined in light of its own particular circumstances. However, the authorities generally indicate that where there is disagreement regarding the value of property, if a reasonable offer is made honestly and in good faith and a reasonable effort has been made to induce the owner to accept it, the requirements of the statute for an offer to purchase have been met.

Id. at 456-57, 172 N.E.2d at 71 (footnotes omitted).

27. *Slider v. Indianapolis & L. Traction Co.*, 42 Ind. App. 304, 309-10, 85 N.E. 372, 375 (1908).

28. See *Wampler v. Trustees of Ind. Univ.*, 241 Ind. 449, 457, 172 N.E.2d 67, 71 (1961), where the court held that the attempt to agree need not be pursued further than to develop the fact that an agreement to purchase was not possible at any price which the condemnor was willing to pay.

29. IND. CODE § 32-11-1-2 (1971).

30. *Id.* § 32-11-1-3.

31. *Cemetery Co. v. Warren School Township*, 236 Ind. 171, 178, 139 N.E.2d 538, 541 (1958).

32. IND. CODE § 32-11-1-5 (1971).

33. *Lebanon v. Public Serv. Co.*, 214 Ind. 295, 300, 14 N.E.2d 719, 722 (1938).

34. IND. CODE § 32-11-1-5 (1971).

35. *Id.* The appraisers must be disinterested freeholders of the county in which the land is situated. *Id.* § 32-11-1-4.

36. IND. CODE § 32-11-1-5 (1971).

duties of the appraisers consist of assessing the damages, or the benefits and damages, resulting from the condemnation process.³⁷ If either party is aggrieved by the assessment he may file written exceptions within ten days after the appraisal reports are filed.³⁸ Should any exception be made, "the cause shall further proceed to issue, trial and judgment as in civil actions"³⁹

The Civil Action

A major portion of all governmental acquisition is achieved by negotiation and settlement.⁴⁰ Therefore, the procedure as outlined above may not be used in its entirety. But when the issue of compensation to be paid for the taking does reach trial as a civil action, many difficulties may be encountered. The use of technical terms and procedures in determining "value" of the subject property may cause confusion in the minds of jurors.⁴¹ Complications also result from the presence of three conflicting values—market value, value to the owner and value to the taker.⁴² Wide disparity is common among appraisals prepared for each party.⁴³ Two basic reasons exist for this difference in valuation. The first is that the meaning of "value" is not, and probably cannot, be defined with mathematical precision.⁴⁴ Second, the determination of the market value of property is intertwined with the value placed by the condemnee on his

37. *Id.* § 32-11-1-6.

38. *Id.* § 32-11-1-8.

39. *Id.*

40. MacBride, *Valuation for Condemnation*, in A.B.A. NATIONAL INSTITUTE, CONDEMNATION, COMPENSATION AND THE COURTS, at 9 (1968).

41. See Yates, *Testimony of the Expert Appraiser in Condemnation Proceedings*, 32 WASH. L. REV. 314, 317 (1957), where the author also cites lack of preparation as a cause of such confusion.

42. 1 ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN § 46, at 222-24 (2d ed. 1953).

43. See Bishop, *Condemnation Trial Techniques for the Condemnor*, in A.B.A. NATIONAL INSTITUTE, CONDEMNATION, COMPENSATION AND THE COURTS, at 177 (1968), where the author notes that differences in appraisals of over 100 percent are not uncommon.

44. See *Andrews v. Comm'r of Internal Revenue*, 135 F.2d 314 (2d Cir. 1943), cert. denied 320 U.S. 748 (1943):

"Value" is not a single purpose word. Men have all but driven themselves mad in an effort to definitize its meaning. The problem arises in its most perplexing form when, as here, property has not in fact been sold and an effort is made to ascertain what it would have fetched if it had been sold. The answer is obviously a guess. . . . As we recently said, the word "value" almost always "involves a conjecture, a guess, a prediction, a prophesy. . . ."

Id. at 317 (footnotes omitted).

property and the price the condemnor is willing to pay. Different people will view property value with varying considerations, especially when each is seeking to protect his own interests.

Upon reaching trial, the litigation becomes a battle of experts. As in all litigation, each attorney must be thoroughly acquainted with his case in order to effectively present his evidence and to successfully cross-examine and rebut testimony offered by expert appraisers called by opposing counsel.⁴⁵ It is submitted that unless full disclosure of appraisal reports is allowed, adequate trial preparation is unduly inhibited. This is because establishing the amount of just compensation for the taking is both difficult and confusing. Numerous legally compensable damages must be considered. A number of methods may be utilized in determining market value. And ultimately, problems may be encountered due to the role that an expert appraiser's judgment plays throughout this process.

THE INHERENT DIFFICULTY OF DETERMINING JUST COMPENSATION

Damages which are generally compensable and which form the basis for providing just compensation fall within the following categories:

First. The fair market value of each parcel of property sought to be appropriated, and the value of each separate estate or interest therein;

Second. The fair market value of all improvements pertaining to the realty, if any, on the portion of the real estate to be condemned;

Third. The damages, if any, to the residue of the land of such owner or owners to be caused by taking out the part sought to be appropriated;

Fourth. Such other damages, if any, as will result to any persons or corporation from the construction of the improvements in the manner proposed by the plaintiff.⁴⁶

The appraiser must necessarily weigh all these elements of damage before arriving at an opinion on value.

45. See Nizer, *The Art of the Jury Trial*, 32 CORN. L.Q. 59, 68 (1946).

46. IND. CODE § 32-11-1-6 (1971).

Fair Market Value of the Property Appropriated

The Supreme Court of Indiana has held that the measure of the "fair market value" of property taken by eminent domain is the amount that the land could be sold for if the owner were willing to sell at the time of the appropriation.⁴⁷ Market value is a highly ambiguous term, being given a wide variety of meanings both by courts and economists.⁴⁸ Qualified valuation experts are the first to admit that the determination of market value is an inexact science.⁴⁹ Different formulae, rules and experience must be applied prior to formulating an appraisal opinion.⁵⁰ Furthermore, the use of each may vary widely depending upon the circumstances of each case, since in making his appraisal the expert may employ any commonly accepted appraisal technique and consider any factor which may affect the sale value of the property at the time of the taking.⁵¹

Appraisers use three primary methods in determining the market value of a particular piece of property. From the appraiser's viewpoint, an adequate appraisal should include each of these methods where they are applicable.⁵² Often, each method is subject to error when the expert relies upon personal judgment rather than a sufficient amount of market data.⁵³ Because expert testimony is so important, each party should scrutinize the bases upon which his appraisal has been formulated before reliance is placed upon it in court.

A. Market Approach

The first method, and probably the most widely used,⁵⁴ is the market approach. The market approach involves the utilization of comparable sales which tend to indicate the market value of the

47. *Southern Ind. Gas & Elec. Co. v. Gerhardt*, 241 Ind. 389, 393, 172 N.E.2d 204, 205 (1961); *Albertson Cemetery Ass'n v. Fuhrer*, 192 Ind. 606, 613, 137 N.E. 545, 547 (1923).

48. SMITH, *IS THE APPRAISAL WITNESS QUALIFIED?*, at 2 (1971).

49. Bishop, *supra* note 43, at 161.

50. *Id.*

51. INDIANA STATE BAR ASSOCIATION, *CONDEMNATION IN INDIANA*, at 86 (1966). See also *Gradison v. State*, ___ Ind. ___, 300 N.E.2d 67, 72 (1973).

52. Note, *Real Estate Valuation in Condemnation Cases—The Place for the Expert*, 43 NEB. L. REV. 137, 141 (1963).

53. SMITH, *supra* note 48, at 6.

54. Bishop, *supra* note 43, at 161-62.

property being taken. These sales must have been voluntarily made within the immediate neighborhood of the property being condemned and must not have occurred within the remote past.⁵⁵ Unless these criteria are met, the sales are not relevant to market value and are inadmissible at trial.⁵⁶ Many personal judgments are required to weigh the various similarities and differences between each comparable sale property and the property being taken. For example, a sale of property located two miles away in a congested city might be too remote to be used as a comparable sale, although such a distance would be of little importance in an agricultural area.⁵⁷

The appraiser must also research carefully into the data surrounding each comparable sale due to the formulation of various additional rules of admissibility. For example, offers to purchase or sell the comparable sale property are inadmissible as evidence of value.⁵⁸ Exchanges of property are also inadmissible unless the market value of the property given in exchange and used as a comparable sale is proven.⁵⁹ Independent evidence of forced sales, purchases made for the expansion of factories, schools, or similar properties, or purchases reflecting temporary market conditions, artificial stimuli, or governmental regulation should arguably not be used as comparable sales.⁶⁰ The information to determine whether the com-

55. *Northern Ind. Pub. Serv. Co. v. Darling*, 239 Ind. 237, 242, 154 N.E.2d 881, 883 (1959).

56. Admissibility of evidence of comparable sales is, however, largely within the discretion of the trial court. *Gradison v. State*, ____ Ind. ____, 300 N.E.2d 67, 79 (1973).

57. *See id.*:

The terms "similarly situated" and "immediate neighborhood" . . . are . . . relative terms. The more commonplace the property, the easier it is to find two or more alike or nearly alike. Accordingly, a greater degree of similarity should be required, and the size of the geographic area encompassing the properties to be compared may properly be more restrictive, as an element of similarity. As the property under consideration becomes less commonplace, however, the area may properly be enlarged, without losing what would logically be regarded as similarity. . . . Practical considerations enter into such judgments that preclude establishing fixed rules and formulas.

Id. at 78.

58. *State v. Lincoln Memory Gardens, Inc.*, 242 Ind. 206, 213, 177 N.E.2d 655, 658 (1961).

59. *United States v. Leavell & Ponder, Inc.*, 286 F.2d 398, 404 (5th Cir. 1961), *cert. denied*, 366 U.S. 944 (1961).

60. 1 ORGEL, *VALUATION UNDER THE LAW OF EMINENT DOMAIN* §§ 22-26, at 99-132 (2d ed. 1953). *See also State v. Quackenbush*, ____ Ind. ____, 303 N.E.2d 830, 833 (1973), where

parable sale would thus be inadmissible might be discovered through interviews with buyer and seller, by consulting with local real estate brokers, by researching county records or by inspecting listings and offers on the comparable sale.⁶¹ Therefore, not only is there a possibility of error in personal judgment, but also in factual data due to a lack of research, resulting in the exclusion of the comparable sale as irrelevant to market value.

B. *Cost Approach*

A second method for determining market value, utilized primarily when improved land is being condemned, is the cost approach. This method involves estimating the replacement cost of the improvements on the land at present market price, less estimated accrued depreciation, plus estimated land value.⁶² The primary function of reproduction cost in determining market value is to set an upper limit beyond which an appraisal should not ordinarily go.⁶³ While the structure may add little or nothing to the value of the land, it seldom adds more to it than the reproduction cost.⁶⁴ An important use of the cost approach is in the condemnation of "service properties" which are owned for nonprofit uses and which only occasionally come on the market. Examples of such property include churches, club-houses, golf courses, schools and university buildings.⁶⁵

The cost approach has been criticized since it will generally not reflect economic and market conditions.⁶⁶ The approach is based upon the assumption that the buyer of the property would want to erect a substantially identical structure on the land if it were unimproved. A buyer will generally pay what he considers to be the

the court held that evidence of a comparable sale, the value of which has increased or decreased as a result of the appropriation, is inadmissible.

61. Note, *Real Estate Valuation in Condemnation Cases—The Place for the Expert*, 43 NEB. L. REV., 137, 141 (1963); see also *Nestle v. Santa Monica*, 6 Cal. 3d 920, 927-28 n.4, 496 P.2d 480, 484-85 n.4, 101 Cal. Rptr. 568, 572-73 n.4 (1972) (testimony of an expert indicating the degree of research he had completed).

62. Bishop, *supra* note 43, at 166-67. Replacement cost is not applicable in estimating the fair market value of land in a condemnation action. *State v. Lincoln Memory Gardens, Inc.*, 242 Ind. 206, 213, 177 N.E.2d 655, 658 (1961).

63. 2 ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN § 188, at 3 (2d ed. 1953).

64. *Id.*

65. *Id.* at 4.

66. Note, *Real Estate Valuation in Condemnation Cases—The Place for the Expert*, 43 NEB. L. REV., 137, 139 (1963).

market value of the land only upon the condition that he will be able to erect the improvements he desires. If the building is not of the type he desires, it does not enhance the value of the whole property by the amount of its reproduction cost.⁶⁷

A critical problem involved in the cost approach is the tendency to omit full deductions for depreciation, obsolescence and inadequacy of the existing improvements. This omission will tend to inflate the estimate of market value.⁶⁸ It is therefore important for a party to have knowledge of the amount of deductions used by the opponent's expert appraiser when the cost approach is being applied. Obtaining the expert's appraisal report would be a quick and efficient means of revealing this information.

C. *Income Approach*

The third method of measuring market value is the income approach. A common illustration of the use of this approach is in the condemnation of rented premises such as apartment houses or office buildings.⁶⁹ Essentially, the method consists of three steps: (1) the computation of the net income (gross income less expenses); (2) selection and application of a capitalization rate (discount factor); and (3) the processing of the net income into an estimate of the capital value by means of a capitalization (discount process).⁷⁰ It is important to stress that it is not the income produced by the business on the property, but evidence of rental income from the real estate itself that is involved.⁷¹

Under the income approach, the appraiser is concerned with the value of the future income potential of the property. This value is generally measured by the net income which a fully informed person may reasonably assume the property will produce during its

67. 2 ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN § 188, at 3 (2d ed. 1953).

68. *Id.* § 199, at 57. The converse, or including too much for depreciation, obsolescence, and inadequacy, causing deflation in the estimate of market value, would of course also be a problem.

69. Note, *Eminent Domain: Approaches to Valuation of Real Estate with Emphasis on Mineral Properties*, 74 W. VA. L. REV. 307, 311 (1972).

70. Bishop, *supra* note 43, at 168.

71. See *State v. Heslar*, ___ Ind. ___, 274 N.E.2d 261 (1971) (loss of profits may not be used for the purpose of determining value of land and buildings). See also *Evansville v. Bartlett*, 243 Ind. 464, 186 N.E.2d 10 (1962) (loss of profits by a lessee of the property condemned is admissible in relation to the value of the leasehold).

remaining useful life.⁷² The capitalization rate is derived from sales of comparable properties in the open market. An overall rate is then obtained by computing the annual net income of the comparable properties and dividing by their sale prices. The value of the property being condemned then equals its annual net income divided by the overall capitalization rate.⁷³ Because a low capitalization rate will reflect an increased value, the condemnee will be seeking a low rate; conversely, the condemnor will be seeking a higher rate to decrease the valuation.⁷⁴

The appraiser will usually prefer comparable sales of similar property or replacement cost of the improvements as an indication of market value. If relevant sales are not available and the cost of replacement of the structures would be worthless, the income approach may be the only alternative. For example, a run down and badly located hotel or tenement building would not lead to an estimate of the replacement cost and comparable sales might not be available to show the market value of the property. Such a situation would necessitate the use of the income approach.⁷⁵

While these three methods of valuation are important in the process of formulating an opinion on market value, the expert may be required to compute other variables into his appraisal. One such variable is that he is not limited to a determination of the market value of the property as reflected by its present use. Rather, the "highest and best use" to which the subject property can be adapted may be considered.⁷⁶

Highest and Best Use

The American Institute of Real Estate Appraisers defines highest and best use as

[t]he most profitable use to which the property can be put.
The opinion of such use may be based on the highest and

72. Note, *Eminent Domain: Approaches to Valuation of Real Estate with Emphasis on Mineral Properties*, 74 W. VA. L. REV. 307, 312 (1972).

73. *Id.*

74. *Id.*

75. 1 ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN § 157, at 648-50 (2d ed. 1953).

76. *E.g.*, *Southern Ind. Gas & Elec. Co. v. Ritzert*, 251 Ind. 245, 246, 240 N.E.2d 808, 808 (1968); *Muncie & P. Traction Co. v. Hall*, 173 Ind. 292, 294, 90 N.E. 312, 313 (1910).

most profitable continued use to which the property is adapted or needed, or likely to be in demand in the reasonably near future. However, elements affecting value which depend upon events or a combination of occurrences which, while in the realm of possibility, are not fairly shown to be reasonably probable, should be excluded from consideration. Also, if the intended use is dependent on an uncertain act of another person, the intention cannot be considered. That use of land which may reasonably be expected to produce the greatest net return to land over a given period of time. The legal use which will yield to land the highest present value. Sometimes called optimum use.⁷⁷

The value of the property for a specific future use which the owner has contemplated is not, however, admissible.⁷⁸ A common example used in demonstrating this exception is where an owner of farm land has contemplated subdividing the land into residential lots. While the value of the land for building purposes may be considered, the appraiser may not consider the undeveloped tract of land as though the contemplated subdivision is an accomplished fact since this would be basing value upon conjecture.⁷⁹

One event which may be deemed "reasonably probable" in determining highest and best use is a change in zoning classification. Thus, in *State Roads Commission v. Warriner*,⁸⁰ the property being condemned was zoned for residential use. The defendants argued that at the time of the appropriation, there was a substantial possibility that if the land had not been taken by eminent domain, it would have been reclassified for light industrial use within a reasonable time. In allowing the jury to consider this possibility, the court stressed the fact that there was evidence of population growth in the area, a marked expansion of the area's commercial growth toward the property and a demand by industry for such land. The property was also in close proximity to land already zoned as light industrial and the property was particularly adaptable for such use.

Utilization of existing structures for purposes other than their

77. AMERICAN INSTITUTE OF REAL ESTATE APPRAISERS, APPRAISAL TERMINOLOGY AND HANDBOOK, at 92 (4th ed. 1966).

78. *State v. Hamer*, 211 Ind. 570, 573, 199 N.E. 589, 592 (1936).

79. See, e.g., *State Highway Comm'n v. Conrad*, 263 N.C. 394, 139 S.E.2d 553 (1965).

80. 211 Md. 480, 128 A.2d 248 (1957).

present use may also be reasonably probable. For example, a structure may have been functioning as a single family residence at the time of taking. However, if the home is suitable as an apartment house, and such use would be more profitable than renting the entire building as a unit, the owner may be entitled to have this fact considered by the jury in determining the amount of damages.⁸¹

Inherent in the determination of highest and best use is a certain degree of speculation. But this speculation must be based upon detailed research. Before expressing any opinion, the appraiser must have a thorough knowledge of the property and the surrounding community as well as a grasp of the principles of land and property utilization.⁸² Physical restrictions of the land are highly relevant in his appraisal—i.e., whether there is sufficient irrigation and acreage to support a profitable farm enterprise⁸³ or whether the existing structures upon the land make it unavailable for any use inconsistent with future improvements.⁸⁴ Nonphysical limitations upon the use of property, such as deed restrictions, are also highly relevant.⁸⁵

Up to this point, it has been shown that market value is a complex concept. An appraiser will normally attempt to apply and correlate all the factors discussed above. Yet there are additional elements of an adequate appraisal to be considered. These include damages and benefits to the remainder of the property when there is a partial taking and "other" damages generally compensable.

Damages to the Residue

There are a great number of condemnation cases where only a partial taking of property is involved. When this occurs, the measure of just compensation is the "difference between the market value of the entire tract before the taking and the market value of the residue after the taking" in addition to the fair market value of the land appropriated.⁸⁶

The Supreme Court of Indiana has held that anything affecting

81. *See* Bonaparte v. Baltimore, 131 Md. 80, 83-84, 101 A. 594, 595 (1917).

82. Crouch, *A Perspective Look at Highest and Best Use*, in A.B.A. NATIONAL INSTITUTE, CONDEMNATION, COMPENSATION AND THE COURTS, at 76 (1968).

83. *United States v. 131.79 Acres of Land*, 296 F. Supp. 1381, 1384-85 (W.D. Mo. 1969).

84. Crouch, *supra* note 82, at 76.

85. *Id.*

86. *Stevenson v. State*, 244 Ind. 452, 454, 193 N.E.2d 369, 370 (1963).

fair market value of the residue at the time of the taking may be considered in arriving at just compensation.⁸⁷ Examples of factors which may affect the market value of the residue include its reduction in size or shape, thereby reducing its saleability,⁸⁸ and cost of fencing made necessary by improvements erected upon the condemned land.⁸⁹ Should the use to which the condemnor puts the land appropriated cause danger and annoyance, that use may affect the sale value of the residue and may therefore be compensable.⁹⁰ Because so many elements of damage are entitled to consideration in this area, one author has suggested that counsel for the condemnee be as creative as possible.⁹¹ It is important to emphasize, however, that the various items of loss must only be considered with respect to their effect upon market value, not as specific items which are independently compensable.⁹⁴

Other Damages

The appraiser may determine "such other damages as will result . . . from the construction of the improvement in the manner proposed by the plaintiff (condemnor)."⁹³ Such damages are allowed

87. *State v. Ahaus*, 223 Ind. 629, 634, 63 N.E.2d 199, 201 (1945). In order to qualify for these severance damages, three requirements must be met: unity of ownership, unity of use and contiguity. *State v. Heslar*, ____ Ind. ____, 274 N.E.2d 261, 265 (1971). In relation to these requirements, the court in *Glendenning v. Stahley*, 173 Ind. 674, 91 N.E. 234 (1910) stated:

It is settled that in determining the amount of special benefits or damages sustained by any one proprietor, all land belonging to him lying in a contiguous body, and used together for a common purpose, will be considered as one tract or farm, without regarded to governmental subdivision. . . . This principle cannot be extended to cover lands owned by different proprietors, although contiguous and used under one management and for a common purpose. Claims for damages in proceedings of this character are personal, and must be asserted in the name of the actual owners of the lands affected.

Id. at 683-84, 91 N.E. at 238 (footnotes omitted).

88. *New Jersey, I. & I. R.R. v. Tutt*, 168 Ind. 205, 218, 80 N.E. 420, 425 (1907).

89. *Glendenning v. Stahley*, 173 Ind. 674, 681, 91 N.E. 234, 237 (1910).

90. *E.g.*, *Crumpacker v. State*, ____ Ind. ____, 271 N.E.2d 716, 719 (1971) (cost of constructing a drive for access to residue); *State v. Vaughan*, 243 Ind. 221, 227, 184 N.E.2d 143, 146 (1962) (testimony proper regarding amount of fill necessary to render land suitable for possible use contemplated by landowner); *Southern Ind. Gas & Elec. Co. v. Jones*, 240 Ind. 434, 440, 166 N.E.2d 127, 130 (1960) (power lines); *Northern Ind. Pub. Serv. Co. v. Darling*, 239 Ind. 237, 241, 154 N.E.2d 881, 883 (1958) (danger of gas pipeline exploding); *New Jersey, I. & I. R.R. v. Tutt*, 168 Ind. 205, 218, 80 N.E. 420, 425 (1907) (hazard of fire from passing locomotives).

91. INDIANA STATE BAR ASSOCIATION, *CONDEMNATION IN INDIANA*, at 91 (1966).

92. *Crumpacker v. State*, ____ Ind. ____, 271 N.E.2d 716, 719 (1971).

93. IND. CODE § 32-11-1-6 (1971).

as additional compensation beyond the fair market value of the land appropriated.⁹⁴ This area of damages is largely undeveloped by case law in Indiana.⁹⁵ It is not intended to cover consequential damages of any kind since many of them are too speculative to be compensable.⁹⁶ Elements of damages arguably falling within these provisions are also likely to be used in the determination of fair market value of the residue.⁹⁷

Benefits

Where the right of eminent domain is exercised by the state or a county for public highway purposes, or by a municipal corporation for a public use, the appraiser must assess any resulting benefit to the residue.⁹⁸ These benefits may then be used to offset the damages to the residue and other consequential damages.⁹⁹

To be used in determining just compensation, benefits must be special and result directly or peculiarly to the residue of the property appropriated.¹⁰⁰ Benefits are deemed special when they increase the value of the residue, relieve it from a burden or make it especially adaptable to a purpose which enhances its value.¹⁰¹ Although

94. *State v. Terre Haute*, 250 Ind. 613, 618, 238 N.E.2d 459, 462 (1968). Such damages are allowed only where the facts in the particular case justify them. *Id.*

95. INDIANA STATE BAR ASSOCIATION, CONDEMNATION IN INDIANA, at 91 (1966).

96. *E.g.*, *Cheatham v. Evansville*, ___ Ind. ___, 278 N.E.2d 602, 607 (1972) (cost and relocation expenses not included in just compensation); *State v. Heslar*, ___ Ind. ___, 274 N.E.2d 261, 266 (1971) (loss of business or profits are too speculative to be compensable). *But see id.* at 385 (total denial of access due to method of construction of any improvement on land appropriated is compensable); *State v. Terre Haute*, 250 Ind. 613, 623, 238 N.E.2d 459, 465 (1968) (compensation allowed for expenses of planning and engineering work actually performed, with regard to a proposed sewage disposal plant, prior to the condemnation action).

97. INDIANA STATE BAR ASSOCIATION, CONDEMNATION IN INDIANA, at 91-92 (1961).

98. IND. CODE § 32-11-1-6 (1971).

99. *Id.* See cases cited notes 86-97 *supra* and accompanying text.

100. *State v. Smith*, 237 Ind. 72, 77, 143 N.E.2d 666, 669 (1957).

101. *Id.* For an explanation of special and general benefits, see *State v. Ahaus*, 223 Ind. 629, 63 N.E. 199 (1945):

[B]enefits and injuries are of two kinds: (1) General or public, being such as are not peculiar to the particular proprietor, part of whose property is taken, but those benefits in which he shares and those injuries which he sustains in common with the community or locality at large. (2) Special or local, being those peculiar to the particular landowner, part of whose property is appropriated, and which are not common to the community or locality at large, such, on one hand, as rendering his adjoining lands more useful and convenient to him, or otherwise giving them a peculiar increase in value, and, on the other, rendering them less useful or conven-

the burden of proving benefits is on the condemnor,¹⁰² it is important for the condemnee to prepare for this issue. The reason for this preparation is that the jury may not award full market value for the land appropriated should the evidence demonstrate that the benefits exceed all damages to the residue and the market value of the land taken.

THE EXPERT'S APPRAISAL

From this summary of the numerous elements used in determining just compensation, it is apparent that a complete and thorough appraisal is needed before proceeding to trial. Contingencies that might be encountered as well as the ability to develop a persuasive case before the fact finder necessitates a great deal of time and effort. As one author stated:

An appraisal is to a condemnation award what plans are to a finished building. However skilled the craftsman, he cannot improve upon the architect's work; at best, he can only fulfill the architect's expectations. Similarly, the negotiator or attorney armed with a poor appraisal is unlikely to achieve the fairness to both condemnor and condemnee that is denoted as "just compensation." A reliable, full-supported appraisal, far from being a luxury, must accompany every condemnation.¹⁰³

A comprehensive study of what appraisal criteria are or are not judicially accepted is essential. Should an element of damage be included in the appraisal which is not compensable, exposure of this fact at trial may diminish the expert's credibility. Weak points in the appraisal must be uncovered prior to trial. Revision or re-examination of the initial valuation may then be needed. Market data relating to comparable sales, income properties and cost construction items must be deeply probed. What may be relevant on the surface might actually be inadmissible following cross-examination. While such research will result in a strong appraisal opinion, any benefit may be lost if the data is not reduced into some

ient, or otherwise, in a peculiar way, diminishing their value.

Id. at 636-37, 63 N.E.2d at 202 (footnotes omitted).

102. *Gradison v. State*, ___ Ind. ___, 300 N.E.2d 67, 75 (1973).

103. *Berger & Rohan, The Nassau County Study: An Empirical Look into the Practices of Condemnation*, 67 COLUM. L. REV. 430, 437-38 (1967).

tangible form for later reference. The appraisal report therefore becomes of primary importance in the trial preparation of a condemnation action.

The Appraisal Report

An adequate appraisal report will include data relied upon by the expert, his opinions and conclusions, and the methods of appraisal he used.¹⁰⁴ If the expert does not ordinarily proceed in this fashion, he should be required to do so by the attorney who hired him. A lawyer should not put an expert on the stand without knowing and understanding what the expert is going to say and how he arrived at his opinions and conclusions. The most efficient and inexpensive way of learning a majority of the expert's expected testimony is through referral to it in some tangible form. As a practical matter, a good expert will not be inexpensive.¹⁰⁵ Thus, he may not be available for consultation while the attorney prepares the case. The report will therefore be indispensable prior to trial. Written reports with full text analyses should also be a requirement from the viewpoint of the expert. He may be much too busy to recall the appraisal valuation. The report will serve to refresh his memory before trial, thereby preparing him to present cogent testimony and to withstand vigorous cross-examination.

Due to the various objective and subjective elements which the report may contain concerning market value and damages, the likelihood of two appraisers arriving at the same valuation is extremely remote.¹⁰⁶ The problem is further aggravated by overzealous experts who shade their reports in an attempt to favor the position of their

104. See THE PRINCIPLES OF APPRAISAL PRACTICE AND CODE OF ETHICS OF THE AMERICAN SOCIETY OF APPRAISERS § 8 (1964).

105. See Yates, *Testimony of the Expert Appraiser in Condemnation Proceedings*, 32 WASH. L. REV. 314 (1957):

Could it be that this appraisal service is sought and had too cheaply? One usually gets what he pays for. I would urge upon lawyers that as an initial step in accepting condemnation defense, the client be well-informed of the importance of and proper cost of good and sufficient evidence of valuation.

Id. at 318.

106. Bishop, *supra* note 43, at 177. See also 6816.5 Acres of Land v. United States, 411 F.2d 834, 836 (10th Cir. 1969) (condemnor's experts: \$120,000 & \$140,000; condemnee's experts: \$443,040 & \$635,827); United States v. 19.897 Acres of Land, 27 F.R.D. 420, 421 (E.D.N.Y. 1961) (condemnor's experts: \$63,000 & \$73,400; condemnee's expert: \$101,935); United States v. 64.88 Acres of Land, 25 F.R.D. 88, 91 (W.D. Pa. 1960) (differences in valuation of damages to the residue ranging from \$11,000 to \$67,000).

employers.¹⁰⁷ Even though total impartiality were to be retained, the expert may overlook certain elements of damage or feel that they have no relevance to the particular property.¹⁰⁸ Unfortunately, this divergence also adversely affects ultimate verdicts given by juries. Jury members may be bewildered by the clashes between these experts. As a result, too often a jury will bring back a verdict inconsistent with the evidence presented.¹⁰⁹ This problem demonstrates a need to provide a procedure by which a condemnation trial will become more of a determination of the merits of the controversy. It is submitted that the value of pretrial discovery of appraisal reports in this area is compelling enough to allow such discovery as a matter of course.

THE VALUE OF PRETRIAL DISCOVERY OF THE APPRAISAL REPORT

Before considering the value of allowing discovery of appraisal reports, consideration must be given to the reason for concentrating upon production of the reports themselves instead of other discovery procedures. Production would be the most inexpensive and efficient method of obtaining discovery in a condemnation action. Production does not involve the time necessary to draft lengthy and complicated interrogatories in attempting to discover the facts and opinions to be testified to by the adverse party's expert. The time and effort needed to reply to the interrogatories also imposed on the

107. See Berger & Rohan, *The Nassau County Study: An Empirical Look into the Practices of Condemnation*, 67 COLUM. L. REV. 430 (1967): "[E]xperts, whatever the nature of their employment, tend to view discretionary matter in somewhat of a colored way." *Id.* at 443. See also 2 ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN § 247, at 261 (2d ed. 1953).

Fault may also be placed upon the attorney. Some lawyers desire to control the appraiser they employ by making unwarranted and unreasonable assumptions under the guise of legal theories. The appraiser may not find out until later that such assumptions are unreasonable. SMITH, IS THE APPRAISAL WITNESS QUALIFIED?, at 11 (1971).

108. Another important reason for this divergence of opinion is the constant motion and fluctuation of the real estate market according to the laws of supply and demand. Levy, *The Appraisal Process*, 41 N.Y.S.B.J. 108, 110 (1969).

109. In reaching their verdict, the jury will oftentimes simply average the estimates of market value presented by each party's expert. See, e.g., *United States v. 412.93 Acres of Land*, 455 F.2d 1242, 1245 (3d Cir. 1972); *United States v. 19.897 Acres of Land*, 27 F.R.D. 420, 422 (E.D.N.Y. 1961).

It has been suggested that irrational verdicts may be controlled by the use of special interrogatories to the jury. Dillon, *Often-Overlooked Aspects of Trial Technique in Condemnation Cases*, in A.B.A. NATIONAL INSTITUTE, CONDEMNATION, COMPENSATION AND THE COURTS, at 118 (1968).

answering party is not present when production is used. Answers to interrogatories may not include all the required information.¹¹⁰ Additional questions will then be needed or the attorney may be forced to obtain a court order requiring full disclosure if it is believed the adverse party is being evasive. Depositions might also be utilized, but this is the most expensive procedure in the discovery process.¹¹¹ If the condemnation proceeding involves a small tract of land, the expense may be prohibitive. Since the landowner is an unwilling seller, he should not have to incur the added expense of these procedures to take advantage of discovery.¹¹²

Subjecting appraisal reports to discovery will also prevent the expert from wasting his time travelling to be deposed or helping to answer interrogatories.¹¹³ A danger exists that should the expert be taken away from his job for discovery proceedings, he may not want to take the time to involve himself in future trials.¹¹⁴

110. One author has noted that interrogatories are like a "skirmish line, thrown forward to feel out the enemy, determine his weaknesses, explore the ground, and guide the advance." Address by William H. Speck, *A Symposium on the Use of Depositions and Discovery under the Federal Rules*, in 12 F.R.D. 131, 134 (1951). The problem confronted is that the court may then be compelled to become involved in the dispute, thereby wasting both the court's and each party's time.

111. *Id.* at 137-38.

112. Although this reasoning applies only to the landowner, once he is granted discovery, the condemnor should also be extended this privilege. See *In re Appropriation of the Property of Maiden*, 26 Ohio Misc. 19, 268 N.E.2d 824 (C.P., Lorain County 1970).

Minimizing the cost of discovery is also a solution to the abusiveness of expensive depositions which serve as a means of "shaking down" the deposed party when his opponent has no intention of proceeding to trial. See generally Speck, *The Use of Discovery in United States District Courts*, 60 YALE L.J. 1132, 1132, 1152 (1951); Comment, *Tactical Use and Abuse of Depositions Under the Federal Rules*, 59 YALE L.J. 117, 121 (1949).

113. In construing Md. R. PROC. 410(c)(2), the court in *Wilson v. Baltimore Transit Co.*, Daily Record (Sup. Ct. Balt., Md., May 7, 1958) held that an object of the rule was to make unnecessary, where possible, the oral examination of experts prior to trial. Thus, not only would the expert's time be saved, counsel and litigants would not be wasting their time either. Md. R. PROC. 410(c)(2) provides:

c. Except as otherwise provided in Rule 406 (Order to Protect Party and Deponent), a party may by written interrogatory or by deposition require that an opposing party produce or submit for inspection:

...

2. Report of Expert.

A written report of an expert, whom the opposing party proposes to call as a witness, whether or not such report was obtained by the opposing party in anticipation of trial or in preparation for litigation. If such expert has not made a written report to the opposing party, such expert may be examined upon written questions or by oral deposition as to his findings and opinions.

114. This may seem to be a minute danger, but in view of the shortage of qualified

The saving of time and expense by allowing production is, of course, conditioned on the existence of sufficient appraisal reports. If they are adequately informative concerning the expected testimony, no further discovery may be needed. Thus, obtaining the reports prior to trial will simply advance the time of disclosure from the time of trial to the period immediately preceeding it.¹¹⁵

The first benefit that might be gained from such a procedure is an increase in pretrial settlement, at a sum which is fair to both the condemnee and condemnor.¹¹⁶ Studies have indicated that the condemnee who settles his case is "shockingly underpaid."¹¹⁷ In one study, it was determined that only about 15.7 percent obtained compensation in the settlement process at better than the lowest appraisal made by the condemnor, 56.9 percent received under 90 percent of the lowest appraisal, and 8.6 percent received less than 50 percent.¹¹⁸ Such results should not be allowed to persist. Full discovery of appraisal reports may help in eliminating any inequity. Upon obtaining the adverse party's appraisal report, the party and his expert can make a thorough examination to determine whether it contains an accurate reflection of market value of the property.

experts, it is at least something to consider. See generally SMITH, IS THE APPRAISAL WITNESS QUALIFIED?, at 10-15 (1971); Yates, *Testimony of the Expert Appraiser in Condemnation Proceedings*, 32 WASH. L. REV. 314, 315-16 (1957).

115. See *Hickman v. Taylor*, 329 U.S. 495, 507 (1947).

116. This result will depend upon the willingness of each party to compromise. See generally Fox, *Settlement: Helping the Lawyers to Fulfill Their Responsibility*, 53 F.R.D. 129 (1971):

[E]xperience has shown that reasonable men who negotiate in good faith are quite likely to discover areas of agreement which will preserve the essential interests of all concerned.

The demands of the parties may be represented by two large circles that barely touch, but the important fact is that they usually intersect and that is this common segment which represents the not impossible area of agreement. The precise point of accord may fall anywhere within this field, but it cannot fall outside of it.

Id. at 147 (footnotes omitted).

117. *Nassau*, *supra* note 103, at 442.

118. *Id.* at 442-43. See also COMMITTEE ON PUBLIC WORKS, 88TH CONG., 2D SESS., STUDY OF COMPENSATION AND ASSISTANCE FOR PERSONS AFFECTED BY REAL PROPERTY ACQUISITION IN FEDERAL AND FEDERALLY ASSISTED PROGRAMS (Comm. Print 1965), where studies showed that of some 34,400 acquisitions on which negotiation data was available, 24,877, or 72 percent, represented purchases in which the U.S. Army Engineer's initial offer was less than the agency approved appraisal and 7,897, or 23 percent, of these were actually purchased at less than that appraisal. The study concluded that many attitudes on the part of the government hindered any serious attempt to resolve differences over the value of property appropriated. *Id.* at 117-18.

Both the discovered report and the party's own report may be compared and analyzed in terms of the relative strengths and weaknesses of each. Both parties can then effectively evaluate their cases to determine their chances of obtaining a favorable verdict.¹¹⁹ Realization of the expense of a trial and the possibility of an unfavorable verdict will not coerce the condemnee into abandoning his case.¹²⁰ If either party feels he has a solid appraisal in comparison to his opponent's, this fact will also provide a favorable position in negotiating for a settlement.

While there is a split of opinion over extending the use of discovery solely to determine whether a party should settle his case,¹²¹ any such prohibition should be disregarded in condemnation litigation. The object of the trial is to provide just compensation. If the expense of trial can be avoided, with the condemnor and the condemnee being satisfied with the settlement, any method available to provide just compensation should be considered. This is especially important to the condemnee who is merely an innocent bystander who finds himself in court through no fault of his own and who bears the burden of proving his damages for the appropriation.¹²²

Pretrial production of appraisal reports will also prevent false claims from going to trial.¹²³ The condemnor may be attempting to obtain the property at an extremely low price. The appraisal report will undoubtedly reflect such an attempt.¹²⁴ Upon receiving persuasive appraisal reports from the condemnee, the condemnor may decide not to proceed to trial, especially if he feels the jury may be more sympathetic to the condemnee. Furthermore, it may not always be the condemnor who falsely claims an unrealistic valuation. Too often what a property owner believes his land to be worth is

119. Oftentimes, the lack of knowledge of where each expert differs inhibits settlement because an intelligent evaluation of each party's position cannot be made. Long, *supra* note 1, at 129.

120. Most litigants, though, would probably prefer settlement to trial. A jury trial will always be a calculated risk, while settlement provides a substantial vindication for each party. Fox, *supra* note 116, at 147.

121. Jeppeson v. Swanson, 243 Minn. 547, 68 N.W.2d 649 (1955) (no); Terry v. Fisher, 12 Ill. 2d 231, 145 N.E.2d 588 (1957) (yes).

122. Gradison v. State, — Ind. —, 300 N.E.2d 67, 75 (1973).

123. 4 J. MOORE, FEDERAL PRACTICE ¶ 26.02[2], at 26-65 (2d ed. 1972) [hereinafter cited as MOORE].

124. See note 107 *supra*.

determined by a natural bias. "Suddenly every tree or shrub that he planted, every nail or screw that he installed, each lease improvement he negotiated, takes on a new meaning."¹²⁵ This inflation of property value will also take on the flavor of falsity.¹²⁶ Upon receiving the condemnor's appraisal report, the condemnee will discover the harsh reality that he will not obtain his unrealistic expectations. A knowledge of the possibility of wasting time and trial expense just to defeat these expectations may make it undesirable for him to continue the litigation.

One of the primary purposes of discovery is to narrow the issues to be tried.¹²⁷ While courts have frequently stated that the only issue in condemnation litigation is just compensation and therefore discovery will not perform the function of narrowing any issues,¹²⁸ this is a gross understatement.¹²⁹ As pointed out earlier, there are a vast number of issues involved. Just compensation might be termed the ultimate result to be obtained, consisting of various subsidiary issues such as the validity, relevance and credibility of the tests made by each appraiser; whether the comparable sales used at trial are adequately representative of the property being taken; whether the appraisers' underlying assumptions are valid; whether their methods of appraisal are acceptable; and whether the damages they assessed to the residue are compensable and adequately reflect actual damage.¹³⁰

Upon comparison of appraisal reports, the parties might conclude an agreement on a list of comparables, elements of damage, methods of appraisal or whatever else which is acceptable to both. Stipulations could then be prepared for use at trial.¹³¹ Even if only partial agreement was reached, the trial would thus become less time consuming.

125. Yates, *Testimony of the Expert Appraiser in Condemnation Proceedings*, 32 WASH. L. REV. 314, 314-15 (1957).

126. See note 107 *supra*.

127. MOORE, *supra* note 123, ¶ 26.02[2], at 26-66.

128. *E.g.*, United States v. 4.724 Acres of Land, 31 F.R.D. 290, 292 (E.D. La. 1962); United States v. 900.57 Acres of Land, 30 F.R.D. 512, 518 (W.D. Ark. 1962).

129. See United States v. 2,001.10 Acres of Land, 48 F.R.D. 305, 306 (N.D. Ga. 1969).

130. See United States v. Meyer, 398 F.2d 66, 69 (9th Cir. 1968); Long, *supra* note 1, at 128.

131. IND. R. TR. P. 16(C)(3):

Fact Stipulation. The attorneys shall stipulate in writing with reference to all facts and issues not in genuine dispute.

Full discovery of experts' reports will also prevent concealment of any evidence relevant to the case.¹³² Condemnation litigation should not be a contest waged by diametrically opposed adversaries.¹³³ The obligation imposed upon the condemnor is to provide a fair and just monetary settlement. The condemnee must not receive more than his property is worth. Relevant elements of damage not disclosed at trial may prevent this balance from being struck. The case law generally stands for the proposition that discovery should provide a party with access to anything that is evidence in his case.¹³⁴

Concealment of facts may also lead to another danger that should be eliminated—surprise. If a party is unaware of certain evidence or facts when making his own assessment, and this evidence is introduced at trial by his opponent, the party may not only be prejudiced but the trial may be unduly delayed by continuances.¹³⁵ Production of expert reports will tend to eliminate such a problem. Again, the object in condemnation litigation is to provide just compensation. This might not be the ultimate result when tricking the opponent into mistakes or taking advantage of inadvertent errors is encouraged. All facts, opinions and conclusions should be uncovered prior to trial, permitting each party the time to study contentions of the adverse party and to explore their validity outside the courtroom. As one court stated:

If surprise is eliminated the trial will better reflect the true strengths of the conflicting claims. The adversary system is

132. MOORE, *supra* note 123, ¶ 26.02[2], at 26-66.

133. See *Shell v. State Road Dep't*, 135 So. 2d 857 (Fla. 1961):

It must be borne in mind that in a condemnation proceeding the property of the landowner is subject to taking without the landowner's consent. . . . [It is] incumbent upon the condemnor to award "just" compensation for the taking. In view of this constitutional mandate, the awarding of compensation which is "just" should be the care of the condemning authority as well as that of the party whose land is being taken.

Unlike litigation between private parties condemnation by any governmental authority should not be a matter of "dog eat dog" or "win at any cost." Such attitude and procedure would be decidedly unfair to the property owner. He would be at a disadvantage in every instance for the reason that the government has unlimited resources created by its inexhaustible power of taxation.

Id. at 861.

134. *Hickman v. Taylor*, 329 U.S. 495, 515 (1947) (Jackson, J., concurring).

135. See *Nestle v. Santa Monica*, 6 Cal. 3d 920, 929, 496 P.2d 480, 485, 101 Cal. Rptr. 568, 573 (1972).

valued not for the contest but because it is believed truth will emerge from the clash of competing presentations. The greatest of champions may be felled by an unforeseen blow. The more complete the advance disclosure, the greater the likelihood that the true merits will be hammered out at trial.¹³⁶

Another benefit resulting from such discovery is the preparation of the attorney for effective cross-examination and rebuttal of evidence offered by an expert.¹³⁷ Knowledge of much of the expert's expected testimony may shorten the time needed for cross-examination and expedite the adjudication by allowing a party to concentrate only upon those areas in rebuttal which are felt to be necessary. An expert may be able to disagree promptly with another expert's opinions or market data when first heard at trial, but complete refutation often requires investigation and study.¹³⁸ Effectiveness on cross-examination also demands ample time for consultation and for education of the attorney prior to trial by his own expert.¹³⁹ Finally, cross-examination and rebuttal should attempt to sharpen issues. The battle of wits in which each lawyer attempts to outmaneuver his opponent may confuse rather than clarify the issues.¹⁴⁰ The end result is that the jury may be relying solely upon the relative skills of the lawyers themselves and not upon a sound determination of the evidence.¹⁴¹

136. *Roe v. Cherry-Burrell Corp.*, 28 Mich. App. 42, 52, 184 N.W.2d 350, 356 (1970).

137. See 2 W. HARVEY, *INDIANA PRACTICE*, at 457 (1970) [hereinafter cited as HARVEY]: Effective cross-examination of an expert witness requires advance preparation. The lawyer even with the help of his own experts frequently cannot anticipate the particular approach his adversary's expert will take or the data on which he will base his judgment on the stand. . . . A California study of discovery and pre-trial in condemnation cases notes that the only substitute for discovery of experts' valuation materials is "lengthy—and often fruitless—cross-examination during trial," and recommends pre-trial exchanges of such material. . . . Similarly, effective rebuttal requires advance knowledge of the line of testimony of the other side.

Id. at 463.

See also *United States v. 23.76 Acres of Land*, 32 F.R.D. 593 (D. Md. 1963):

[I]t needs no citation of authority to say that an expert is the most difficult witness to cross-examine, particularly if one is unaware until trial of the substance of his testimony.

Id. at 596.

138. Winner, *Procedural Methods to Attain Discovery*, 28 F.R.D. 97, 103 (1960).

139. *Id.*

140. Yates, *Testimony of the Expert Appraiser in Condemnation Proceedings*, 32 WASH. L. REV. 314, 317 (1957).

141. *Id.*

LIMITATIONS UPON DISCOVERY

However beneficial the production of appraisal reports might be in condemnation proceedings, when courts have denied it,¹⁴² the reasoning has generally been grounded upon three doctrines—the attorney-client privilege, the work-product doctrine and the doctrine of unfairness.

The Attorney-Client Privilege

The attorney-client privilege was developed to protect communications between a client and his attorney from public disclosure. Such a disclosure, it was argued, might affect the outcome of the litigation in a manner adverse to the client's interests.¹⁴³ The communication could, for example, constitute an admission by the client that might be used against him at trial.¹⁴⁴ Discovery might also prevent the client from giving his attorney facts which do not present the case favorably.¹⁴⁵ Thus, the attorney would not have a full and complete case history with which to prepare for trial.

Many courts have extended the attorney-client privilege to communications of the client's expert, calling the expert an agent. The theory behind these decisions is that the expert acts merely as a messenger in relaying the client's communications, such as those contained in an appraisal report, to the client's attorney.¹⁴⁶ Another rationale for this extension is that the expert is in essence an assistant counsel and should be treated similarly to an attorney for purposes of discovery.¹⁴⁷

The better rule, and the one presently being followed by a majority of courts,¹⁴⁸ is that the privilege does not apply to experts. At least it should apply only if the facts and circumstances surrounding

142. See cases cited note 9 *supra*.

143. Radin, *The Privilege of Confidential Communication Between Lawyer and Client*, 16 CAL. L. REV. 487, 490 (1928).

144. Friedenthal, *Discovery and Use of an Adverse Party's Expert Information*, 14 STAN. L. REV. 455, 456 (1961).

145. *Kearney & Trecker Corp. v. Giddings & Lewis, Inc.*, 296 F. Supp. 979, 981 (E.D. Wisc. 1969).

146. See *South Carolina State Highway Dep't v. Booker*, 195 S.E.2d 615, 620 (S.C. 1973), where the court states that this appears to be the older view.

147. Taine, *Discovery of Trial Preparations in the Federal Courts*, 50 COLUM. L. REV. 1026, 1050 (1950).

148. *United States v. 23.76 Acres of Land*, 32 F.R.D. 593, 596 (D. Md. 1963).

the creation of the agency indicate that the expert was retained to evaluate and pass on to the attorney matters which emanate in confidence from the client. If the expert is to examine, evaluate and subsequently testify regarding matters not in the nature of a confidential communication from client to attorney, his report is not privileged simply because it is reduced to writing and delivered to an attorney.¹⁴⁹ Thus, in *San Diego Professional Ass'n v. Superior Court*,¹⁵⁰ an expert had been hired to study deficiencies in the architecture of a medical office building—purely a nonconfidential matter—and the court allowed production of the report to the opposing party. The same situation exists in a condemnation suit. The expert is hired to appraise a piece of land, the land being open to public view. Nothing confidential emanates from this relationship and nothing about an opinion on the fair market value of the property requires secrecy.¹⁵¹

The attorney-client privilege should be used only to protect communications, not an expert's observations and conclusions. These observations and conclusions actually constitute facts in an eminent domain proceeding, relevant to the ultimate resolution of just compensation.¹⁵² Professor Moore, a frequently quoted authority on federal practice and procedure, indicates that the opinions of an expert do not fall within this privilege. Citing *Hickman v. Taylor*,¹⁵³ which held that memoranda prepared by counsel himself do not fall within the attorney-client privilege,¹⁵⁴ Professor Moore states that it naturally follows that expert reports prepared for an attorney are not privileged either.¹⁵⁵ Accordingly, the Indiana Rules of Civil Procedure seem to express an intent to reject those decisions holding an expert's information as privileged simply because of his status as an expert.¹⁵⁶

149. *San Diego Professional Ass'n v. Superior Court*, 58 Cal. 2d 194, 202, 373 P.2d 448, 452, 23 Cal. Rptr. 384, 388 (1962).

150. *Id.*

151. *See also* *Rancourt v. Waterville Urban Renewal Authority*, 223 A.2d 303, 304 (Me. 1966) (there cannot be an employer-expert privilege included within the attorney-client privilege).

152. *See generally* *Security Indus., Inc. v. Fickus*, 439 P.2d 172 (Alas. 1968).

153. 329 U.S. 495 (1947).

154. *Id.* at 508.

155. MOORE, *supra* note 123, ¶ 26.66[1], at 26-468-69.

156. HARVEY, *supra* note 137, at 462.

The Work-Product Doctrine

The second limitation, the work-product doctrine, immunizes from discovery any matter which has been gathered by a lawyer in anticipation of litigation or in preparation for trial.¹⁵⁷ The principle case cited in expounding this doctrine is *Hickman v. Taylor*.¹⁵⁸ The Court in *Hickman* ruled that written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties fall outside the scope of discovery. However, this is a qualified immunity. The Court stated that written material received or prepared by a lawyer in anticipation of litigation may be obtained where discovery of relevant and nonprivileged facts is essential to the preparation of a party's case. Such material would be discoverable upon a substantial showing of "necessity or justification."¹⁵⁹ The work-product doctrine is thus a rule which balances the need for discovery with the right to retain the benefit of one's own research.¹⁶⁰

Because it became a discretionary matter for the judge to decide whether a particular piece of information was part of the work-product of a lawyer, the doctrine produced a stumbling block for those seeking discovery. Proponents of discovery sought to restrict the doctrine in order to further the objectives of discovery in promoting a just, speedy and inexpensive determination of litigation. Others reacted against any form of intrusion into their trial preparation material by an opponent who was set on defeating their clients.¹⁶¹

157. *E.g.*, *Riddle Spring Realty Co. v. State*, 107 N.H. 271, 275, 220 A.2d 751, 755 (1966).

158. 329 U.S. 495 (1947).

159. *Id.* at 510.

160. Thus, the application of the doctrine may depend upon the circumstances of each particular case. *See Shell v. State Road Dep't*, 135 So. 2d 857 (Fla. 1961), where the court distinguished the application of the doctrine, holding that while it may protect expert reports and opinions in other litigation, it should not be applicable in condemnation cases.

We realize that the rule pronounced herein with reference to condemnation proceedings is diametrically opposite to the prevailing rule in ordinary litigation. However, we are convinced that there is no inconsistency because both rules are based upon sound public policy when the sphere in which each operates is properly analyzed. *Id.* at 860. *See also United Airlines, Inc. v. United States*, 26 F.R.D. 213, 217 (D. Del. 1960).

161. This conflict can perhaps best be represented by two statements made by the Court in *Hickman v. Taylor*, 329 U.S. 495 (1947):

Mutual knowledge of all relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts

As in the attorney-client privilege, the work-product doctrine has been extended to agents utilized by the attorney to gather information in preparation for trial.¹⁶² Based on this extension, production of appraisal reports has often been denied on the ground that impressions, observations and opinions of an expert acting pursuant to an attorney's instructions are immune from discovery.¹⁶³ On the other hand, a number of courts have refused to call discovery of appraisal reports "an attempt to secure the . . . mental impressions contained in the files and the mind of the attorney" and an interference with the work-product of the lawyer.¹⁶⁴ Supervision of an expert or acquisition of the reports by the attorney does not convert the reports into the attorney's work-product.¹⁶⁵ The opinions of an appraiser and the data and analysis upon which he rests his opinions and conclusions are the product of the appraiser's expertise, not the lawyer's.¹⁶⁶

One reason for employing the work-product doctrine to deny discovery of appraisal reports is that a party, by obtaining the reports, could exploit the trial preparation of his opponent. A party who has not employed an expert at the time suit is filed would discover the opinions, conclusions and underlying factual data used by the adversary's expert in making his appraisal. The party could then hire an expert who would determine the merits of the information obtained, thereby saving time and expense in deciding whether to settle or proceed to trial.¹⁶⁷ Although it is doubtful that production of the report will alone be adequately informative on the possibility of settlement, disposition of the case prior to trial is a desirable result for both parties.¹⁶⁸ Such an argument is also incon-

he has in his possession.

Id. at 507.

[A] common law trial is and always should be an adversary proceeding. Discovery was hardly intended to enable a learned profession to pursue its functions either without wits or on wits borrowed from the adversary.

Id. at 516 (Jackson, J., concurring).

162. *E.g.*, *Allmont v. United States*, 177 F.2d 971, 976 (3d Cir. 1949), *cert. denied*, 339 U.S. 967 (1950) (statements taken by FBI agents constituted work-product of government's attorneys since no valid distinction exists between materials prepared by counsel and those prepared for counsel's use at trial).

163. *E.g.*, *United States v. 7,534.04 Acres of Land*, 18 F.R.D. 146 (N.D. Ga. 1954).

164. *E.g.*, *United States v. Certain Parcels of Land*, 15 F.R.D. 224, 236 (S.D. Cal. 1953).

165. *Security Indus., Inc. v. Fickus*, 439 P.2d 172, 177 (Alas. 1968).

166. *United States v. McKay*, 372 F.2d 174, 177 (5th Cir. 1967).

167. Long, *supra* note 1, at 125.

168. See cases cited notes 116-22 *supra* and accompanying text.

sistent with the allowance of discovery of an ordinary witness in which similar risks are involved. This risk is a necessary consequence of formulating the issues.

Another argument used in denying production of appraisal reports is that an attorney will forgo the use of experts if such discovery is allowed.¹⁶⁹ The probability of this result is slight in condemnation actions since expert testimony is usually essential for a proper case to be presented.¹⁷⁰

Finally, it is asserted that should an expert obtain a report compiled by the adversary's expert, different conclusions to support his employer's position could be drawn. This result would be difficult to control in the areas of a condemnation trial where an expert's opinion may be supported solely by his own judgment.¹⁷¹ Because an expert witness may escape any charges of perjury by pointing out that he is testifying to his "opinion" and not to "facts," the risk of false testimony may be greater than in the case of an ordinary witness.¹⁷²

However valid the above considerations are in providing that discovery should be limited in some manner, an absolute prohibition of discovery should not be the result. Most of these arguments ignore the discretionary power of the court to prevent undue interference with trial preparation if abuses become apparent. For example, the court could require each party to exchange his appraisal

169. *United States v. Meyer*, 398 F.2d 66, 74 (9th Cir. 1968) (argument raised but rejected by the court).

170. *See United States v. 131.76 Acres of Land*, 296 F. Supp. 1381 (W.D. Mo. 1969), where the court stated:

[D]efendant's counsel's expectation that he would be able to establish the fair market value of the subject property by cross-examination of the government's appraisal witness had been overly optimistic.

Id. at 1395.

171. *See Long*, *supra* note 1, at 125, where the author points out that this fear may result from the distrust with which courts, juries, laymen, and attorneys view expert testimony. *Contra*, *United States v. 23.76 Acres of Land*, 32 F.R.D. 593 (D. Md. 1963):

The Court cannot countenance the argument . . . that discovery, if permitted, will enable property owners to "manufacture" an appraisal to take advantage of the government's weaknesses and contradict its strength. This argument is a general attack on the concept of discovery, not limited to this case, and it comes too late to merit any consideration.

Id. at 597.

172. 2 ORGEL, *VALUATION UNDER THE LAW OF EMINENT DOMAIN* § 247, at 261 (2d ed. 1953).

report as a condition to granting discovery.¹⁷³ Discovery could be postponed until a certain number of days before trial in order to insure that each party will prepare his case independently.¹⁷⁴ A party who does not retain an expert until it is too late for his opponent to obtain effective discovery might be precluded from calling that expert as a witness.¹⁷⁵

As stated earlier, even though the expert report may fall within the work-product immunity, production may be permitted upon a showing of good cause.¹⁷⁶ Good cause may exist when the underlying physical evidence in a suit has been damaged, disassembled, changed or is inaccessible to the same examination by the party seeking discovery.¹⁷⁷ Many courts have reasoned, therefore, that because the property in a condemnation action is open for inspection by either party, good cause for an order requiring production of appraisal reports does not exist.¹⁷⁸ This reasoning lacks one consideration. An expert's thoughts and opinions are unique to him alone. Due to the subjective nature of these opinions, the only source of the information is from the expert himself.¹⁷⁹

Sufficient good cause to require production of expert reports might be established when such discovery will uncover impeachment material.¹⁸⁰ Good cause has also been held to be "implicit" in

173. See *Nestle v. Santa Monica*, 6 Cal. 3d 920, 928, 496 P.2d 480, 485, 101 Cal. Rptr. 568, 573 (1972).

174. See C.P.L.R. § 3140 (McKinney 1970):

[T]he appellate division in each judicial department shall adopt rules governing the exchange of appraisal reports intended for use at the trial in proceedings for condemnation

Pursuant to this rule, the four appellate divisions have adopted the following time limits within which appraisal reports must be exchanged:

Appellate Division, First Judicial Dep't: 10 days

Appellate Division, Second Judicial Dep't: 10 days

Appellate Division, Third Judicial Dep't: 30 days

Appellate Division, Fourth Judicial Dep't: 20 days.

Buffalo v. Ives, 55 Misc. 2d 730, 286 N.Y.S.2d 517 (Sup. Ct. 1968).

175. Friedenthal, *Discovery and Use of an adverse Party's Expert Information*, 14 STAN. L. REV. 455, 487 (1962).

176. See note 159 *supra* and accompanying text.

177. *E.g.*, *Ford Motor Co. v. Havee*, 123 So. 2d 572, 575 (Fla. Dist. Ct. App. 1960); *State Rd. Dep't v. Shell*, 122 So. 2d 215, 217 (Fla. Dist. Ct. App. 1960), *rev'd*, 135 So. 2d 857 (Fla. 1961).

178. See, *e.g.*, *United States v. 6.82 Acres of Land*, 18 F.R.D. 195, 197 (D.N.M. 1955).

179. See *United States v. 23.76 Acres of Land*, 32 F.R.D. 593, 596 (D. Md. 1963).

180. See *Miami Transit Co. v. Hurns*, 46 So. 2d 390, 391 (Fla. 1950); *cf. Carpenter-Tant*

condemnation litigation; since opinions and techniques are central to the litigation, the benefits to be derived before and during trial supply the requisite good cause to allow production.¹⁸¹ The condemnor is required to obtain the property at a price which is fair to both the public and the landowner. This requirement has been held to constitute good cause for ordering production.¹⁸² In adopting this reasoning, deference was apparently given in *South Carolina State Highway Department v. Booker*¹⁸³ to the fact that the condemnee is an unwilling seller who is required to spend a considerable amount of money in preparation for trial. Therefore, any procedure which could shorten the trial and decrease the expenses incurred by the condemnee should be encouraged. Such reasoning is compatible with the purpose of the Indiana Rules of Trial Procedure to provide a just, speedy and inexpensive determination of litigation.¹⁸⁴

The comments to Trial Rule 26 suggest that the decisions which seek to bring expert information within the work-product doctrine are "ill-considered."¹⁸⁵ This rejection of the doctrine follows the trend in recent cases to separate the work of an expert and that of an attorney when discovery is sought.¹⁸⁶

The Doctrine of Unfairness

The third judicial limitation upon discovery is the doctrine of unfairness. The comments to the Indiana Rules of Trial Procedure have adopted this restriction in the new provision concerning experts.¹⁸⁷ The essence of the doctrine is that it would be unfair for one party to obtain information, without expense, from an adverse party's expert.¹⁸⁸ Two primary rationalizations are given for this limitation. The first is that to permit a party to obtain the results of work done by an adversary's expert would be equivalent to taking

Drilling Co. v. Magnolia Petroleum Corp., 23 F.R.D. 257, 263 (D. Neb. 1959) (unless the party can demonstrate that he has reasonable grounds to believe impeaching material is contained in the report, it may not be produced for his inspection).

181. *United States v. 364.82 Acres of Land*, 38 F.R.D. 411, 415 (N.D. Cal. 1965) (production of reports would expedite trials and encourage out-of-court settlements); *South Carolina State Highway Dep't v. Booker*, 195 S.E.2d 615, 619 (S.C. 1973).

182. *South Carolina State Highway Dep't v. Booker*, 195 S.E.2d 615, 619 (S.C. 1973).

183. *Id.*

184. IND. R. TR. P. 1.

185. HARVEY, *supra* note 137, at 462.

186. See, e.g., *United States v. McKay*, 372 F.2d 174 (5th Cir. 1967).

187. HARVEY, *supra* note 137, at 462.

188. *South Carolina State Highway Dep't v. Booker*, 195 S.E.2d 615, 621 (S.C. 1973).

property without providing compensation for it.¹⁸⁹ An offer of compensation is not a cure since it is the expert's privilege, and possibly his duty, to refuse compensation from one party when he has accepted employment with the other.¹⁹⁰ This reasoning may be refuted when it is applied to discovery of expert appraisers in a condemnation action. The expert's opinions and conclusions oftentimes represent the only evidence in the case. The expert, like any ordinary witness, cannot retain a property right in this evidence since he may be compelled to testify at trial.¹⁹¹ It is also the unfairness due to surprise and concealment of evidence which necessitates the discovery of all facts relevant to the issues to be litigated. In view of the beneficial nature of discovery to both parties, unfairness contentions should therefore be subordinated to the need for full and effective discovery.¹⁹² This rationalization is also inconsistent with allowing an ordinary witness to be deposed after great expense has been incurred in locating him.¹⁹³ Finally, the expense will be minimal, or nonexistent, if the court allows a party to obtain his opponent's appraisal report or orders exchange of such reports.¹⁹⁴

The second rationalization for the unfairness doctrine is that discovery should not be used to obtain an adverse party's trial preparation material. To do so would "penalize the diligent and place a premium on laziness."¹⁹⁵ The argument is that by waiting for his

189. *E.g.*, *United States v. Certain Acres of Land*, 18 F.R.D. 98, 100 (M.D. Ga. 1955); *Lewis v. United Air Lines Transp. Corp.*, 32 F. Supp. 21, 23 (W.D. Pa. 1940).

190. *E.g.*, *Hickey v. United States*, 18 F.R.D. 88, 89 (E.D. Pa. 1952); *contra*, *United States v. 364.82 Acres of Land*, 38 F.R.D. 411, 416 (N.D. Cal. 1965) (a hired expert in a condemnation case has no special duty to the lawyer who hires him; rather, he has a duty to use his expertise honestly and fairly so that justice may be accomplished; this duty transcends any possible duty to his employer).

191. This reasoning does not automatically lead to the conclusion that the opposing party has a right to compel the expert's testimony at the pre-trial stage of the case, since the scope of discovery is much broader than the scope of testimony at trial. However, the court does have the power to order discovery upon the condition that the moving party pay a reasonable portion of the expert's fees. This should obviate most of the objections based upon the unfairness doctrine. *MOORE, supra* note 123, ¶ 26.66[1], at 26-470.

192. *See Security Indus., Inc. v. Fickus*, 439 P.2d 172, 178 (Alas. 1968).

193. Note, *Discovery of Experts: A Historical Problem and A Proposed FRCP Solution*, 53 MINN. L. REV. 785, 798 (1969).

194. Pursuant to IND. R. TR. P. 26(B)(3)(c), the court may order that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery. Since little or no time is involved in producing a report for inspection, expenses need not be awarded. *See* note 238 *infra* and accompanying text.

195. This view apparently originated in *McCarthy v. Palmer*, 29 F. Supp. 585, 586 (E.D.N.Y. 1939), *aff'd*, 113 F.2d 721 (2d Cir. 1940), *cert. denied*, 311 U.S. 680 (1940); *see*

adversary to prepare a case, the lawyer could use discovery to receive the essence of that case in preparing his own.¹⁹⁶ At least in condemnation litigation, this result is highly unlikely. Each attorney must be enlightened about the merits of the case to be able to furnish an evaluation and correct opinion to the client. Each lawyer must also be thoroughly prepared for trial due to the technical nature of the evidence to be presented and the necessity for effective cross-examination of experts and rebuttal of their testimony. Undoubtedly, by the time the attorney can receive all the information opposing counsel has obtained, it will be too late to prepare adequately for trial.

Permitting discovery of an expert appraisal report when the expert who prepared it is expected to testify at trial has been shown to be a valuable method of making condemnation litigation more expeditious and less confusing. Judicial limitations placed upon discovery should not frustrate this procedure. It is submitted that the value of production and the inapplicability of judicial limitations was recognized by Indiana when the new Indiana Rules of Trial Procedure were adopted.

THE INDIANA RULES OF TRIAL PROCEDURE

Trial Rule 26(B)(3)

In response to the problems that had been encountered with respect to discovery of experts,¹⁹⁷ Indiana has adopted Trial Rule 26(B)(3):

Schuyler v. United Air Lines, Inc., 10 F.R.D. 111, 113 (M.D. Pa. 1950).

196. In answering arguments based upon the unfairness doctrine, the court in *United States v. Meyer*, 398 F.2d 66 (9th Cir. 1968) stated:

The burdens of discovery are equal, and it is hardly likely, as a practical matter, that either party can rely in any substantial measure upon discovery of the other side's appraisers as a substitute for independent preparation. . . .

It is undoubtedly true that no protective order can wholly eliminate the risk of abuse without unduly hampering useful discovery. Where the opinions of experts are central to litigation, as in condemnation cases, the irreducible risk of abuse must simply be accepted. In the end, the central object of litigation is not to reward diligent counsel and penalize lazy or inept counsel, but to achieve a just adjudication of the controversy between the parties. That can be accomplished only by a full exposure of the relevant facts.

Id. at 75.

197. The Indiana Rules of Trial Procedure distinguish between experts in general and medical experts. According to Trial Rule 35, a copy of the report of an examining physician must be delivered to the party who was examined by court order. If the examination occurred

(3) Trial preparation: Experts

(a) Subject to the provisions of subdivision (B)(3)(b) of this rule and Rule 35(B), a party may discover facts known or opinions held by an expert retained or specially employed by another party in anticipation of litigation or preparation for trial only upon a showing of good cause or a showing that the party seeking discovery is unable without undue hardship to obtain facts and opinions on the same subject by other means or upon a showing of other exceptional circumstances indicating that denial of discovery would cause manifest injustice.

(b) As an alternative or in addition to obtaining discovery under subdivision (B)(3)(a) of this rule, a party by means of interrogatories, may require any other party

(i) to identify each person whom the other party expects to call as an expert witness at trial, and

(ii) to state the subject-matter upon which the expert is expected to testify.

Thereafter, any party may discover from the expert or the other party facts known or opinions held by the expert which are relevant to the stated subject-matter. Discovery of the expert's opinions and the grounds therefor is restricted to those previously given or those to be given on direct examination at trial.

(c) The court may require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery, and, with respect to discovery permitted under subdivision (B)(3)(a) of this rule, require a party to pay another party a fair portion of the fees and expenses incurred by the latter party in obtaining facts and opinions from the expert.

Analysis of Trial Rule 26(B)(3)

An important aspect of this rule is that a distinction has been drawn between experts expected to testify and those that are not.

pursuant to an agreement between the parties, provision may be made that the report need not be delivered. However, the rule does not preclude discovery of a report compiled by the physician, in accordance with Trial Rule 26. Therefore, Trial Rule 26 will ultimately govern all discovery of experts.

Only upon a showing of "good cause"¹⁹⁸ may a nonwitness expert be subject to discovery procedures. No such showing is necessary with regard to discovery from experts expected to testify.¹⁹⁹ There may be legitimate reasons for such a distinction in condemnation cases. Initially, an expert is engaged to form an opinion on damages to be paid for the taking. This opinion will then become the basis upon which a party determines whether settlement is feasible or advisable, or whether there is a possibility of obtaining a favorable verdict at trial. Upon deciding that it would be beneficial to try the action, the expert may then serve as an advisor to the attorney regarding the preparation necessary for trial. Once the trial has begun, the expert may also be helpful in planning trial tactics and in preparing the attorney to handle unfamiliar data in court.²⁰⁰ Up to this point, the expert is serving as a professional consultant on the technical and forensic aspects of his specialty. In addition to these services, however, the expert's opinion may also be important as relevant evidence at trial. Thus, he has a dual purpose in a condemnation case: to serve in a nonwitness capacity and as a witness with relevant evidence.²⁰¹

The fear that discovery may deter thorough trial preparation where an expert's work is not indispensable may be the basis for the showing of need required before discovery is allowed.²⁰² As the role

198. A great deal of controversy has raged over the showing necessary to satisfy this good cause requirement. Following *Hickman v. Taylor*, 329 U.S. 495 (1947), three classes of good cause emerged: (1) good cause needing only relevancy to the subject-matter, (2) good cause requiring hardship or necessity, and (3) good cause, which probably could never be shown, to allow discovery of an attorney's mental impressions. See Note, *Ambiguities After the 1970 Amendments to the Federal Rules of Civil Procedure Relating to Discovery of Experts and Attorney's Work Product*, 17 WAYNE L. REV. 1145 (1971). The good cause referred to in Trial Rule 26(B)(3) undoubtedly means more than mere relevance to the subject-matter of the action. This fact is emphasized when the subsection states that there must be a showing that the party seeking discovery is unable without undue hardship to obtain facts and opinions on the same subject by other means or upon a showing of other exceptional circumstances indicating that denial of discovery would cause manifest injustice.

Id.

199. However, such discovery has not included the use of production of appraisal reports in some Indiana lower courts. *E.g.*, Northern Ind. Pub. Serv. Co. v. First Nat'l Bank, Cause No. 71-PSC-1161 (Porter Super. Ct., Sept. 14, 1973).

200. Swartzman v. Superior Court, 231 Cal. App. 2d 195, 202, 41 Cal. Rptr. 721, 726-27 (Dist. Ct. App. 1964).

201. *Id.* at 202, 41 Cal. Rptr. at 726.

202. Note, *Proposed 1967 Amendments to the Federal Discovery Rules*, 68 COLUM. L. REV. 271, 282 (1968).

of the expert changes to that of a prospective witness, his work becomes essential for the presentation of persuasive opinion testimony. The threat of disclosure of this evidence will therefore not deter trial preparation since without that evidence, an adequate case could not be developed.

Another reason for this distinction is that until an expert is called at trial and qualified as a witness, his opinion as to the value of the condemned land is irrelevant.²⁰³ Subjecting an expert to discovery where he is serving as a consultant will not perform an issue narrowing function or clarify areas in dispute. The party seeking discovery will not be protected from surprise or become prepared for cross-examination or impeachment of the expert at trial.²⁰⁴ Such reasoning led one court to deny discovery on the ground that it would tend to confuse the issues rather than clarify them.²⁰⁵ Only when the expert's initial status as a consultant changes to that of a witness with opinion testimony do these opinions become factors in the case to be evaluated as the testimony of other witnesses with relevant information.²⁰⁶ A party should also be allowed freedom to determine the qualifications of the expert he has hired and the amount of work that went into formulation of the expert's opinion. Each party is entitled to obtain the best possible evidence in support of his case without hinderance.²⁰⁷

203. *Swartzman v. Superior Court*, 231 Cal. App. 2d 195, 203, 41 Cal. Rptr. 721, 727 (Dist. Ct. App. 1964); *contra*, *United States v. Meyer*, 398 F.2d 66, 75 (9th Cir. 1968) (such logic would preclude discovery from anyone, as well as experts, since admissibility of evidence and competency of witnesses may always be raised at trial).

204. *Cf. United States v. Meyer*, 398 F.2d 66, 76 (9th Cir. 1968) (discovery of expert witness allowed in spite of this argument).

205. *Riddle Spring Realty Co. v. State*, 107 N.H. 271, 278, 220 A.2d 751, 758 (1966).

206. *Swartzman v. Superior Court*, 231 Cal. App. 2d 195, 203, 41 Cal. Rptr. 721, 727 (Dist. Ct. App. 1964).

207. The court in *United States v. Meyer*, 398 F.2d 66 (9th Cir. 1968), found little justification for any distinction between expert witnesses and nonwitnesses. Even though discovery of nonwitness experts will not narrow any issues, avoid surprise, and prepare an attorney for cross-examination, these experts may have discovered facts, applied techniques, or arrived at opinions which are relevant and helpful to the discovering party. *Id.* at 76. Apparently viewing suppression of unfavorable evidence as the only reason that the government would not call the expert to testify, the court stated that this would be an "intolerable" situation. *Id.* at 76. A rule denying discovery simply because an opponent reached a witness first and paid for his services would be inconsistent with the purposes of discovery. *Id.* at 76.

It is submitted that such a distinction between expert witnesses and nonwitnesses has little practical relevance in a condemnation action. Generally, an expert hired to assist with trial preparation is also hired to perform the function of a witness at trial.

Showing of Need and the Testifying Expert

The question remains whether discovery of appraisal reports prepared by experts expected to be called at trial is permitted without any requisite showing of need. A close examination of Trial Rule 26 suggests that the answer to this question is in the affirmative.

Trial Rule 26(A) provides that a party may obtain discovery by production of documents.²⁰⁸ Trial Rule 26(B)(3)(b) states that following the use of interrogatories "any party may *discover* from the expert or the other party facts known or opinions held by the expert which are relevant to the stated subject-matter."²⁰⁹ Since discovery includes production of documents, it follows that the above provision includes production of appraisal reports.²¹⁰ Trial Rule 34 has eliminated the requirement of a good cause showing prior to an order for production of documents.²¹¹ Rather, good cause has been transferred to the two sections of Trial Rule 26 dealing with trial preparation material and with experts used in preparation for trial.²¹² It is submitted that good cause is not a requirement in Trial Rule 26(B)(3)(b). The words "good cause" are conspicuously absent from (B)(3)(b) while they are specifically placed in (B)(2) and (B)(3)(a). Reference need not be taken at all to (B)(2) and (B)(3)(a) good cause when dealing with experts expected to testify. Trial Rule 26(B)(2) states in its initial sentence that its provisions are "subject to the provisions of subdivision (B) . . . (3)" Therefore, reference must be had to the provisions of (B)(3) before the provisions of (B)(2) are considered. But (B)(3)(a) also states that its provisions are subject to those in subdivision (B)(3)(b). Thus, (B)(3)(b) must be read before (B)(3)(a) is considered. Reading (B)(3)(b) alone, before (B)(2) and (B)(3)(a), discovery may be undertaken without any requisite showing of need. The only requirements to be met before

208. IND. R. TR. P. 26(A)(3) provides:

(A) Discovery Methods. Parties may obtain discovery by one or more of the following methods:

. . . .

(3) production of documents

209. IND. R. TR. P. 26(B)(3)(b) (emphasis added).

210. IND. R. TR. P. 34(A)(1) states that production of documents is within the scope of Trial Rule 26(B).

211. Because Trial Rule 26 now requires a good cause showing prior to the allowance of discovery, there was no need for good cause to remain a requirement in Trial Rule 34. See 4A J. MOORE, FEDERAL PRACTICE, ¶ 34.08, at 34-83 (2d ed. 1972).

212. IND. R. TR. P. 26(B)(2) & (3)(a).

production of the reports may be ordered are as follows: the reports must be relevant to the subject-matter involved in the pending litigation,²¹³ they must not be privileged²¹⁴ and the "opinions and grounds therefor" which are contained within the reports must have been "previously given" or must be intended to be given on direct examination at trial.²¹⁵

The first requirement, relevancy to the subject-matter, does not raise any problems when production of appraisal reports is sought. An appraisal report is made for one purpose—to show the expert appraiser's opinions and underlying factual data relied upon in determining the amount of just compensation the expert believes should be paid to the condemnee. Clearly, the contents of these reports are relevant and material to the issues involved.²¹⁶ Privilege, the second requirement, is privilege as it exists in the law of evidence.²¹⁷ The privilege immunizing appraisal reports from discovery would be the privilege of communications between attorney and client.²¹⁸ As discussed earlier, case law has generally rejected the attorney-client privilege as a prohibition of discovery from experts.²¹⁹

The final requirement is a new addition to Trial Rule 26. Commentators have suggested that this provision is somewhat unclear,²²⁰ but there should be no difficulty with this provision when condemnation litigation is involved. Opinions to be given upon direct examination at trial will be determined from the party's response to an interrogatory concerning the subject-matter of the expert's expected testimony. These opinions will be on just compensation for the prop-

213. *Id.* at 26(B)(1).

214. *Id.*

215. *Id.* at 26(B)(3)(b).

216. *E.g.*, *United States v. 50.34 Acres of Land*, 13 F.R.D. 19 (E.D.N.Y. 1952):

There can be no question as to the relevancy of the [appraisal reports], as they bear directly on the question of just compensation for the land involved in the condemnation action. Admissibility in evidence is not a prerequisite to the right to discovery and inspection under the Federal Rules of Civil Procedure.

Id. at 21.

217. *United States v. Certain Parcels of Land*, 15 F.R.D. 224, 229 (S.D. Cal. 1953).

218. *South Carolina State Highway Dep't v. Booker*, 195 S.E.2d 615, 619 (S.C. 1973).

219. See notes 143-56 *supra* and accompanying text.

220. Note, *Proposed 1967 Amendments to the Federal Discovery Rules*, 68 COLUM. L. REV. 271, 282-83 (1968); Note, *Discovery of Experts: A Historical Problem and A Proposed FRCP Solution*, 53 MINN. L. REV. 785, 803-04 (1969). These authors suggest the difficulty stems from the use of the words "those previously given."

erty being condemned and will be contained in the appraisal report. Therefore, production of these reports will necessarily concern "the expert's opinions and grounds therefor . . . to be given on direct examination at trial."²²¹

The breadth of these new provisions was recognized in *In re Appropriation of Property of Maiden*²²² where the court sustained a motion for discovery of the identity of expert witnesses, the subject-matter upon which the experts were to testify, the names of persons who had inspected the property involved, the dates of inspection and all appraisal reports. In allowing such discovery, the court pointed out:

In appropriation cases full pretrial disclosure of expert witnesses, appraisers' opinions and the details upon which they are based is required if the Ohio Rules of Civil Procedure are to accomplish their purpose. . . . The testimony of appraisers is the crux of the trial and full disclosure of their opinions and the foundation upon which they rest are essential to adequate litigation, subject to the court's power to control the timing, scope and other protective steps.²²³

Comparison with Federal Rule 26

One note of caution must be given. Indiana has adopted Trial Rule 26 as taken from the 1967 Proposed Amendments to the Federal Rules of Civil Procedure for the United States District Courts.²²⁴ Federal Rule 26, as it presently exists,²²⁵ is much different in scope

221. It has been suggested that discovery of opinions "previously given" should be interpreted as discovery of opinions "previously given . . . on direct examination at trial" or opinions volunteered by an expert during the course of discovery. Note, *Proposed 1967 Amendments to the Federal Discovery Rules*, 68 COLUM. L. REV. 271, 283 (1968).

222. 26 Ohio Misc. 19, 268 N.E.2d 824 (C.P., Lorain County 1970).

223. *Id.* at 20, 268 N.E.2d at 824.

224. HARVEY, *supra* note 137, at 457.

225. FED. R. CIV. P. 26(B)(4) provides:

(4) Trial Preparation: Experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b) (1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) Upon motion, the court may order

than Indiana Trial Rule 26. Federal Rule 26(B)(4) recites that "discovery of facts known and opinions held by experts . . . may be obtained *only* as follows" ²²⁶ This wording is indicative of the restrictive nature of the rule. Subdivision (b)(4)(A)(i) of Federal Rule 26 then provides that interrogatories may be utilized to identify a party's expert witness and to obtain the subject-matter upon which he is expected to testify. This provision is identical to Indiana Trial Rule 26(B)(3)(b)(i) and (ii). However, the Federal Rule continues by stating that the interrogatory may also seek the substance of facts and opinions to which the expert is expected to testify. *Only upon motion to the court* may further discovery be ordered.

Federal courts construing the new rule have been relatively strict about allowing further discovery beyond the use of interrogatories. ²²⁷ Most courts have interpreted (b)(4)(ii) as requiring a showing of exceptional circumstances before production of expert reports would be permitted, apparently using 26(b)(3) in supplying this requirement. ²²⁸ The Indiana Rules should not be interpreted in this manner. A motion for further discovery need not be made to the court under Indiana Trial Rule 26(B)(3)(b) subsequent to the initial

further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b) (4) (C) of this rule, concerning fees and expenses as the court may deem appropriate.

(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (b) (4) (A) (ii) and (b) (4) (B) of this rule; and (ii) with respect to discovery obtained under subdivision (b) (4) (A) (ii) of this rule the court may require, and with respect to discovery obtained under subdivision (b) (4) (B) of this rule the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

226. FED. R. CIV. P. 26(B)(4) (emphasis added).

227. *Breedlove v. Beech Aircraft Corp.*, 57 F.R.D. 202, 205 (N.D. Miss. 1972) ((4)(A)(i) does not envisage production of reports on which expert opinions professedly rely); *United States v. 145.31 Acres of Land*, 54 F.R.D. 359, 360 (M.D. Pa. 1972) (party not entitled to an appraisal report as a matter of course); *Wilson v. Resnick*, 51 F.R.D. 510, 510 (E.D. Pa. 1970) (compelling production of documents containing an expert's opinion on the mere allegation that answers to interrogatories were insufficient would defeat the entire process which 26(b)(4) sets forth).

228. See cases cited note 227 *supra*.

use of an interrogatory. As discussed earlier, a good cause showing is no longer requisite in obtaining documents pursuant to Trial Rule 34 and the correct construction of Trial Rule 26(B)(3)(b) reveals that appraisal reports are now freely discoverable without a demonstration of need.²²⁹

Indiana Trial Rule 26(B)(3)(b) also gives a party the discretion to decide which method of discovery is best suited to his particular circumstances. Federal Rule 26(b)(4) limits a party to the use of interrogatories to obtain the substance of facts known and opinions held by the expert, while in Indiana, the party may use any discovery procedure to obtain this information. Evidence of a change in scope from the 1967 Proposed Amendments to the Federal Rules and the 1970 Rules, as adopted in the federal courts, may also be found in the Federal Advisory Committee's Notes. In the 1967 Proposed Amendments,²³⁰ under an example of the power of the court to curb abuses of discovery, a statement was made that if "an expert's written report affords the opposing party an adequate basis upon which to prepare his cross-examination and rebuttal, the court may prohibit a deposition."²³¹ This example has been omitted from the comments to the Federal Rules as adopted in 1970.

Protective Orders

Abuses may become apparent when discovery of appraisal reports is sought which will necessitate a protective court order. For example, if it is shown that a party seeking production has not retained an expert, it could be argued that production should be denied. Difficulties might be encountered if after production of the report, the discovered party employs a new expert whose report is not given to the moving party. Or, a remedy might be necessary

229. See notes 208-13 *supra* and accompanying text.

230. Note may be taken at this point that the Indiana Civil Code Study Commission Comments were taken from the Federal Advisory Committee's Notes. HARVEY, *supra* note 137, at 457.

231. *Id.* at 464. An attempt may be made to read this example as stating that if the party's *own* expert report forms an adequate basis upon which to prepare cross-examination and rebuttal, that party may be precluded from taking a deposition of his opponent's expert. Any such interpretation would be erroneous. After this example, reference is made to MD. R. PROC. 410(c)(2). This rule requires a party to produce a report prepared by his expert witness for the opposing party's inspection. Should a report not be available, the expert may be deposed. By referring to the Maryland Rule, it is clear the intent of the example is to allow discovery of the adversary's expert report prior to any depositions.

should one party determine he has only received a partial report from his opponent.

There is little reason for denying discovery when a expert has not been retained for use at trial by the moving party.²³² Without the services of an expert, establishing a value for the property being condemned might be troublesome.²³³ It is doubtful that by saving the expense of an expert and relying upon discovery of the opponent's expert, an effective case could be presented to the trier of fact. However, should the moving party suddenly hire an expert immediately before trial, the court might consider two options. A continuance may be granted for the opponent to examine the expected testimony of the expert,²³⁴ or use of the expert at trial might be forbidden.²³⁵ The second option should be adopted where the delay in hiring the expert was an intentional circumvention of the discovery rules.²³⁶

Upon receiving an appraisal report from his opponent, should the party determine that the report is only a partial one, he might obtain a court order for the remainder of the report if it has been reduced to writing. If the party does not realize he has been "short-changed" until trial, some courts have sustained a motion to strike any testimony not contained within the report.²³⁷

Further protective measures are provided in subsection (B)(3)(c) of Trial Rule 26 which authorizes the sharing of expenses. This subsection is a response to the doctrine of unfairness. Here

232. No requirement is in existence which forces a party to retain the services of an appraiser or incur the expense of an appraisal report. See *Swartzman v. Superior Court*, 231 Cal. App. 2d 195, 201, 41 Cal. Rptr. 721, 725 (Dist. Ct. App. 1964); *State v. Reid*, 204 Ind. 631, 642, 185 N.E. 449, 453 (1933).

233. See note 170 *supra*. Where one party has not retained an expert, and is seeking to obtain his adversary's expert report, the court might order a sharing of costs. See note 238 *infra* and accompanying text.

234. See generally *Jensen v. Ind. & Mich. Elec. Co.*, ___ Ind. ___, 277 N.E.2d 589, 590 (1972).

235. See *Nestle v. Santa Monica*, 6 Cal. 3d 920, 928-29 n.5, 496 P.2d 480, 485 n.5, 101 Cal. Rptr. 568, 573 n.5 (1972).

236. Indiana Trial Rule 26(E)(1)(b) provides that a party is under a duty to seasonably supplement his response to a question addressed to "the identity of each person expected to be called as an expert witness at trial and the subject-matter on which he is expected to testify. Since parties are put on notice regarding this obligation, Indiana courts should not hesitate to utilize this option.

237. *E.g.*, *Regents of Univ. of Cal. v. Morris*, 266 Cal. App. 2d 616, 630, 72 Cal. Rptr. 406, 414 (1968).

again, the distinction between experts expected to be called as witnesses at trial and those utilized in preparation for trial is recognized. Only when discovery of the latter is involved may the court require payment by the party seeking discovery of a fair portion of the expert's fees and expenses incurred in gathering market data and in formulating opinions. Where discovery is sought from an expert expected to be called as a witness at trial, a reasonable fee for the time spent by the expert in responding to discovery need only be required. Since an exchange of appraisal reports involves little or no time for the expert, there should be no reason for the payment of such fees.²³⁸

CONCLUSION

For a party to effectively prepare for condemnation litigation, the ability to discover facts and opinions from the adversary's expert may be crucial. Such discovery should be encouraged for a number of reasons. The wide disparity common among appraisals compiled by valuation experts might diminish as each party realizes an appraisal which is difficult to support may be damaging to his case when his opponent can scrutinize the appraisal's validity. The expense of pretrial discovery will be reduced. Settlement prior to trial will be encouraged as unrealistic claims are re-evaluated or dropped. The trial itself may be shortened or simplified as the issues to be tried are limited. Concealment of evidence and surprise when such evidence is produced at trial will be minimized. Each party will ultimately be benefited through a more complete preparation for cross-examination and rebuttal. Yet such discovery should not lead to a decrease in trial preparation by either party because of the necessity for thorough pretrial research.

In view of these benefits, judicial limitations upon discovery should be circumvented or denied applicability. The danger of abuse of discovery that necessitated the formulation of these limitations may be sufficiently avoided by the court's power to issue protective orders. However, a burden is also placed upon each party to cooperate throughout the discovery process. An uncooperative attitude may lead to many results which a liberal discovery procedure attempts to prevent. Constant need to obtain a court order to com-

238. The court should, however, exercise its discretion in awarding expenses to the expert expected to testify when the moving party has not retained an expert.

pel full discovery causes delay and expense. Further, conflicts developing during discovery may impede the atmosphere necessary for a discussion of settlement.

Indiana courts should read Trial Rule 26 in the manner in which it should be interpreted—the allowance of full discovery from experts expected to testify at trial. When new ideas which would result in beneficial changes are developed, courts should not be resistant.²³⁹ The acceptance of this change may help to fulfill the requirement of just compensation in a manner which will be fairer to both the condemnee and condemnor.

239. See *United States v. 900.57 Acres of Land*, 30 F.R.D. 512 (W.D. Ark. 1962), where the court, for the first time in twenty years, was faced with a motion by a condemnee for production of appraisal reports. Calling such discovery an “innovation,” the court sustained the condemnor’s objections to the motion. *Id.* at 521.

