

Errors and Omissions in a Condemnation Case
*Legal Malpractice Issues for Condemning Authority
and Property Owner Representations*

In *A Good Lawyer*, Stephen Comiskey describes the role of a lawyer:

Who are we lawyers? Our families, friends, neighbors, and, most amazingly, total strangers, turn to us with their most personal and consequential matters and we all, both they and us, are confident we can assist them. And we do assist them. We manage crises. We work the problems. We do the deals. We try the cases. We serve our clients.¹

Considering the importance of the task lawyers are asked to undertake, Mr. Comiskey argues persuasively that perfection is the only acceptable goal in client representation.² He proceeds to offer guideposts to meet this expectation for ourselves and from our clients, including the following:

Always ask yourself: Is this something I can, and should, do for my client, or would my client be better served if someone else did it? Ask yourself this question not only with respect to others on your staff, whose legal fees would be less expensive than yours, but also to lawyers outside of your law firm, who may specialize in that legal area.³

When a client comes to a lawyer with a condemnation case, it could very well be the most significant legal issue that the client will ever have. Excepting the power to deprive a citizen of his life or liberty and the power of conscription, the government's power to take a person's private property is arguably the most onerous burden of citizenship that we have. Our country was founded on principles of private property, and the ownership of private property is inextricably commingled with our notions of the "American dream." Faced with the possible acquisition of a portion or all of his property, the property owner will have understandably high expectations. In considering the case, the lawyer's first responsibility, to the client and to himself, should be to determine whether he can meet those expectations.

A lawyer is obligated to decline the representation of a client in which the lawyer lacks the requisite knowledge or experience to competently accomplish the client's goals in the representation. The Texas Disciplinary Rules of Professional Conduct inform this decision. Rule 1.01 addresses when a lawyer should accept or decline a representation:

A lawyer generally should not accept or continue employment in any area of the law in which the lawyer is not and will not be prepared to render competent legal services. "Competence" is defined in Terminology as possession of the legal knowledge, skill, and training reasonably necessary for the representation. . .

¹ STEPHEN W. COMISKEY, *A GOOD LAWYER* 2 (Chaos, Ltd. 1997).

² *Id.*

³ *Id.* at 7.

In determining whether a matter is beyond a lawyer's competence, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience in the field in question, the preparation and study the lawyer will be able to give the matter, and whether it is feasible either to refer the matter to or associate a lawyer of established competence in the field in question. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequences.⁴

In a condemnation case, the client's goals in the representation can be many and varied, and like any other case, a lawyer considering accepting a condemnation representation must first consider whether he or she is capable of handling the case. Condemnation law is a specialized practice; it has been likened to Milton's "Serbonian bog . . . [w]here armies whole have sunk."⁵ Its rules and procedures can seem arcane, convoluted, at times contradictory, and there are intrinsic pitfalls that can threaten even experienced condemnation lawyers with potential exposure to professional liability. As a consequence, one must be circumspect in accepting condemnation representations. In *The First Part of King Henry the Fourth*, Shakespeare's character Falstaff notes: "The better part of valour is discretion."⁶ For Falstaff, the exercise of discretion saved his life many times. For the aspiring condemnation lawyer, the exercise of discretion may prevent overcharging a client, to the detriment of the future client relationship, sinking more time into a file than is warranted, to the detriment of the lawyer's bottom line, or having to call one's error and omissions or malpractice carrier, to the detriment of all of the above and to the lawyer's reputation and career.

The first two scenarios are much more common, and more likely, than the third. The problem in these situations has less to do with the lawyer's ability to accomplish the client's goals than with the lawyer's ability to recognize potential pitfalls, manage client expectations, and determine an appropriate allocation of risk between client and lawyer at the outset of the representation. For the hourly-billing lawyer, whether representing a condemning authority or property owner,⁷ there are many twists and turns that a condemnation case can take that could result in either charging or writing-off fees substantially in excess of what was anticipated at the time of the initial engagement. Except in limited situations, these fees are not recoverable for the client in a condemnation case. For contingent fee cases, and the rare reverse-contingency case, the lawyer may find himself in a situation where his time in the case greatly exceeds any hope of recovery and his obligation to his client forces the expenditure of good time (money) after bad.

⁴ TEX. DISCIPLINARY R. PROF. CONDUCT § 1.01, Comments 1 and 2.

⁵ See e.g. H. DIXON MONTAGUE, SUBSTANTIAL IMPAIRMENT OF ACCESS: AN ILLUSORY CONCEPT THAT DOESN'T NEED TO BE (February 2002) (citing *Brazos River Authority v. City of Graham*, 335 S.W.2d 247, 251 (Tex. Civ. App.—Fort Worth 1960), *aff'd in part and rev'd in part*, 354 S.W.2d 99 (Tex. 1961); JOHN MILTON, PARADISE LOST 86 (Signet 1968) (1667)).

⁶ WILLIAM SHAKESPEARE, THE FIRST PART OF KING HENRY THE FOURTH, ACT 5, SC. 4 (Oxford University Press 1914) (1598).

⁷ The appropriateness of representing property owners in condemnation cases on an hourly basis is discussed in Section II, B(2), *infra*.

With experience, guidance, and study, the practitioner may learn to avoid certain representations and to structure others so that these risks become manageable.

I. The Unique Character of Condemnation Cases

As stated above, condemnation law is a specialized area of the law, and condemnation cases have a unique character. Unlike traditional lawsuits, condemnation cases do not begin as judicial cases. Instead, the proceedings initiated by a condemning authority's condemnation petition are administrative in nature. There are a number of ramifications that arise from this aspect of condemnation cases. First, the proceedings are not governed by the Texas Rules of Civil Procedure; instead, the procedures to be followed are found in Chapter 21 of the Texas Property Code. The condemnation petition does not allege that the defendant has done anything wrong; there is nothing to answer for or deny in a condemnation case, despite the prophylactic answers frequently filed by lawyers purporting to protect their client's interest. These answers do not accomplish anything for the client's interest and instead have the potential to lead to a waiver of valuable rights.

The trial court's role is very limited during this phase of the case. He must appoint three disinterested freeholders as Special Commissioners, and, if an appeal of the award of these commissioners is not timely filed, he must enter judgment on the condemning authority's petition and the amount of the award of Special Commissioners.⁸ These are ministerial acts.⁹ The trial court cannot, for example, grant a continuance or compel witnesses to attend the proceedings. Additionally, there is no discovery during the administrative phase other than the mandatory exchange of information contained within Section 21.0111 of the Texas Property Code. Discovery requests sent during the administrative phase are outside of any "discovery period" and are, therefore, a nullity.

A condemnation case becomes a judicial case only upon the timely appeal of the award of Special Commissioners. At that point, the case is to proceed as any other civil case on the court's docket.¹⁰ Even then, however, condemnation cases are different from other civil cases. For example, because the trial court's jurisdiction is an appellate jurisdiction, matters which could have been presented in the administrative phase of the case, but were not, cannot be considered. This rule restricts the condemning authority's ability to amend its petition, either to join parties or change the property interests to be acquired. While there are circumstances where a condemning authority may be able to dismiss a party or reduce the rights or interests it seeks to acquire, attempts to add a party or condemn additional property require a separate condemnation case and administrative hearing.

In addition to procedural differences, there are substantive issues presented in condemnation cases that often require a degree of understanding that cannot be obtained without

⁸ Additionally, the trial court may enter judgment on the award in the event that an appeal is timely filed and subsequently abandoned. *See e.g. Denton County v. Brammer*, 361 S.W.2d 198,200 (Tex. 1962); *State v. Beaver Farms, Inc.*, 549 S.W.2d 223,227-28 (Tex. Civ. App. — San Antonio 1977, writ ref'd n.r.e.).

⁹ *See In re State*, 85 S.W.3d 871, 874 (Tex. App. — Tyler 2002, no writ); *Pearson v. State*, 315 S.W.2d 935, 938 (Tex. 1958).

¹⁰ TEX. PROP. CODE §21.018(b).

substantial experience handling these cases. Many of these issues are concerned with whether the property owner may recover damages for certain aspects of a taking. Whether an item is compensable is a question of law, a facet of these cases that makes the condemnation attorney's interactions with the real estate appraiser extremely important. In complex condemnation cases, the compensation question is rarely a straight-forward assessment of the market value of the property or even the difference in market value before and after the taking. Instead, there is an increasing myriad of rules of what a jury must, and must not, consider in determining compensation. These rules present an additional source of pitfalls for the practicing condemnation attorney.

The procedural and substantive pitfalls of condemnation cases do not fall evenly on attorneys for condemning authorities and property owners. Like the differing and divergent goals of their clients, what may be important to the condemning authority's attorney may be of no consequence to property owner's counsel, and vice versa. Nevertheless, there is insight to be gained in understanding the issues that may arise for each. From the condemning authority's perspective, the primary goal is the acquisition of the property that it has determined it needs to serve its public purpose. The attorney has been hired to achieve this goal at the lowest cost possible to the condemning authority, certainly in terms of the amount of compensation paid and, in most cases, in the amount of legal fees and expenses incurred. In terms of professional responsibility, the amount of compensation to be paid is secondary to acquiring the necessary property rights. However, there are also ethical issues that relate to the compensation issue that the practitioner should bear in mind.

Generally, the primary goal for the property owner will be to maximize the compensation to be paid for the property rights to be acquired and the damages, if any, resulting from the taking to its remaining property. In some instances, a property owner's primary goal may be to avoid the taking altogether. Whether challenging the right to take or the amount of compensation (and sometimes both), the property owner's lawyer in a condemnation case faces the potential for a number of ethical considerations that are unique to condemnation cases.

II. Condemnation of the Necessary Property Rights

Any analysis of the right to condemn property must begin with the condemnation statute, codified in Chapter 21 of the Texas Property Code. According to the Texas Supreme Court:

In condemnation proceedings, the property owner is given a single opportunity to recover damages for the taking of his property for public use. The procedure is governed by statute, and the statutory requirements are to be strictly followed.¹¹

The condemnation statute sets forth established guidelines for the conduct of condemnation proceedings for the protection of property owners' rights where acquisition of their private property is required to serve a public purpose. Section 21.011 provides that "the exercise of the eminent domain authority in all cases is governed by Sections 21.012 through 21.016" of the

¹¹ *Coastal Industrial Water Authority v. Celanese Corporation of America*, 592 S.W.2d 597, 599 (Tex. 1979); *City of Bryan v. Moehlman*, 282 S.W.2d 687, 690 (Tex. 1955).

Texas Property Code.¹² These sections establish “a two-part process consisting of an initial administrative proceeding and then, if necessary, a judicial proceeding.”¹³

A. Questions of Public Necessity

Article I, Section 17 of the Texas Constitution proscribes the taking of private property for a public use without adequate compensation.¹⁴ Challenges to the public necessity of a condemning authority’s project, however, face a decisively uphill battle, as indicated in the Interpretive Commentary:

In general, all property located within the state may be taken under the power of eminent domain, both real and personal. *City of Galveston v. Brown*, 28 Tex. App. 274, 67 S.W. 156 (1902). The property must be taken for a public use, and if private property is taken for a purely private purpose, Section 17 is violated as well as the due process clause of the fourteenth amendment of the United States Constitution. *See Hairston v. Danville & W. R. Co.*, 28 S. Ct. 331, 208 U.S. 598, 52 L. ED. 637 (1907).

A public use has been defined as one which concerns the whole community in which it exists, not a particular individual or a number of individuals. *Leathers v. Craig*, Civ. App. 228 S.W. 995 (1921). The question is largely one for the legislature, the courts refusing to interfere except to inquire whether the legislature could reasonably have considered the use a public one. *West v. Whitehead*, Civ. App., 238 S.W. 976 (1922), error refused. The term is not limited to business necessity and ordinary convenience, but may extend to matters of public health, recreation and enjoyment. *Rindge Co. v. Los Angeles County*, 43 S. Ct. 689, 262 U.S. 700, 67 L. ED. 1186 (1922).¹⁵

The necessity for the taking of the property under an exercise of the power is a political or legislative question and not a judicial one. *Imperial Irr. Co. v. Jayne*, 138 S.W. 575 (1911).

While this question is one of law for the trial court to decide, “where the Legislature declares a particular use to be a public use the presumption is in favor of this declaration and will be binding of the courts unless the use is clearly and palpably of a private character.”¹⁶

The question of whether or not in a given case the use is a public one depends upon the character, and not the extent, of such use. It depends upon the extent of the right the public has to such use, and not upon the

¹² TEX. PROP. CODE §21.011.

¹³ *Seiler v. Intrastate Gathering Corporation*, 730 S.W.2d 133, 137 (Tex.App.—San Antonio 1987, no writ).

¹⁴ TEX. CONST., art. I, §17.

¹⁵ TEX. CONST., art. I, §17, Interpretive commentary.

¹⁶ *West v. Whitehead*, 238 S.W. 976, 978 (Tex. Civ. App.--San Antonio 1922, writ ref’d).

extent to which the public may exercise that right. It is immaterial if the use is limited to the citizens of the local neighborhood, or the number of citizens likely to avail themselves of it is inconsiderable so long as it is open to all who choose to avail themselves of it. The mere fact that the advantage of the use inures to a particular individual or enterprise, or group thereof, will not deprive it of its public character.

It seems to be a settled rule that where the use for which property is sought to be taken under the power of eminent domain is public, the necessity and expediency of exercising the power, and the extent to which the property thereunder is to be taken, are political or legislative, and not judicial questions, the legislative determination of which is conclusive, and not reviewable, by the courts. These questions rest wholly within the legislative discretion.¹⁷

While ensuring that a condemning authority's project serves a public purpose is not generally within the condemnor lawyer's professional responsibility, making sure the condemning authority complies with the required procedures is. As more than one court has noted, a state actor in a condemnation proceeding "must show strict compliance with the law that authorizes the taking."¹⁸ "Evidence must be introduced demonstrating compliance with each of the several steps required."¹⁹ One of the steps requires that the governing board of the condemning authority make a determination as to whether the taking is necessary to serve the public.²⁰ "Proof that the governing board of the condemnor has by affirmative action made a determination of necessity must be made in a hearing on the merits before the court."²¹ "A resolution of the board of directors 'clothed' with the right of eminent domain is the proper method of determining and declaring public necessity."²² Once a condemning authority's governing body makes this determination, however, it is not subject to judicial review unless the

¹⁷ *Id.*; see also *Anderson v. Teco Pipeline Co.*, 985 S.W.2d 559, 565 (Tex. App.—San Antonio 1998, no writ).

¹⁸ *Saunders v. Titus County Fresh Water Supply District No. 1*, 847 S.W.2d 424, 425 (Tex.App.—Texarkana 1993, no writ); *Coastal Industrial Water Authority v. Celanese Corp. of America*, 592 S.W.2d 597, 599 (Tex. 1979) ("The procedures are governed by statute which must be strictly followed for the benefit of the landowners").

¹⁹ *Saunders*, 847 S.W.2d at 425-26.

²⁰ *Id.* at 426; see also *Maberry v. Pedernales Electric Cooperative, Inc.*, 493 S.W.2d 268, 271 (Tex.Civ.App.—Austin 1973, writ ref'd n.r.e.); *Bevly v. Tenggasco Gas Gathering Company*, 638 S.W.2d 118, 121-22 (Tex.App.—Corpus Christi 1982, writ ref'd n.r.e.).

²¹ *Maberry*, 493 S.W.2d at 271; see, also, *Anderson v. Teco Pipeline Co.*, 985 S.W.2d 559, 566 (Tex.App.—San Antonio 1998, writ denied) ("Proof that the board made a determination of necessity is also required for the trial court to have jurisdiction to grant a right of way to a condemnor").

²² *Anderson v. Clajon Gas Company*, 677 S.W.2d 702, 704 (Tex.App.—Houston [1st Dist.] 1984, no writ), citing *Houston Lighting & Power Co. v. Fisher*, 559 S.W.2d 682 (Tex.Civ.App.—Houston [14th Dist.] 1977, writ ref'd n.r.e.).

property owner can establish that the condemning authority has committed fraud or has acted purely arbitrarily.²³

As one can imagine under the above-stated authorities, it is much easier for the property owner's counsel to prove that a condemning authority failed to determine a public necessity than it is to prove that there is no public necessity for its project. Depending on the circumstances of the case, however, the resulting dismissal can be just as devastating, particularly to the settlement position of the condemning authority. Technically, the award of fees to the property owner in a case that is dismissed on the property owner's motion is optional under Section 21.019(c) of the Texas Property Code; in practice, however, these fees are customarily awarded and may be substantial. Having to pay these fees in addition to its own attorneys' fees incurred will be a bitter pill for the condemning authority considering it has not even acquired the property interests that it needed for its project. This client can reasonably be expected to look to its attorney for an explanation for this result.

The lawyer filing the condemnation case often will not have been involved in the pre-condemnation negotiations and actions. Whether the lawyer has guided the entire process or has come in at the end, however, making sure a proper board resolution has been passed should be the part of every condemnor lawyer's pre-condemnation checklist. Generally, the condemning authority is not required to determine the necessity for taking the specific property involved in the condemnation case.²⁴ It is sufficient that its governing body recognized the public need for the project and, therefore, approved the acquisition of the property interests necessary to meet this public need.²⁵

B. The Statutory Prerequisites to Filing the Condemnation Petition

Section 21.012(b) of the Texas Property code establishes the four requirements a condemning authority must plead in its petition for condemnation:

- (1) describe the property to be condemned;
- (2) state the purpose for which the entity intends to use the property;

²³ See *Atwood v. Willacy County Navigation Dist.*, 271 S.W.2d 137, 142 (Tex. Civ. App.—San Antonio 1954, writ ref'd n.r.e.), cert. dismissed, 350 U.S. 804 (1955), holding approved in *Davis v. City of Lubbock*, 326 S.W.2d 699, 706 (Tex. 1959); *National Ass'n of Audubon Societies v. Arroyo Colorado Navigation Dist. of Willacy and Cameron Counties*, 110 S.W.2d 150, 152 (Tex. Civ. App.—San Antonio 1937, no writ); *Mercier v. MidTexas Pipeline Co.*, 28 S.W.3d 712, 719 (Tex. App.—Corpus Christi 2000, writ denied); *Mclnnis v. Brown County Water Improvement Dist. Number 1*, 41 S.W.2d 741, 746 (Tex. Civ. App.—Austin 1931, writ ret' d); *Lin v. Houston Community College System*, 948 S.W.2d 328, 337 (Tex. App.—Amarillo 1997, writ denied); *Dallas Housing Authority v. Higginbotham*, 143 S.W.2d 79, 83 (Tex. 1940); *Anderson v. Clajon Gas Co.*, 677 S.W.2d 702, 704 (Tex. App.—Houston [1st Dist.] 1984, no writ).

²⁴ *Houston Lighting & Power Company v. Fisher*, 559 S.W.2d 682, 686 (Tex.Civ.App.--Houston [14th Dist.] 1977, writ ref'd n.r.e.) (“The members of the Board were not apprised of the specific details of the project including the necessity of acquiring the specific nine acre tract owned by appellees; however, considering the magnitude of this project, it would be unreasonable to require that each individual member of the Board be knowledgeable about every specific acquisition.”).

²⁵ See *id.*

- (3) state the name of the owner of the property if the owner is known; and
- (4) state that the entity and the property owner are unable to agree on the damages.²⁶

Of these requirements, the fourth has resulted in the most litigation and the biggest headache for condemning authorities. Prior to filing a condemnation action, a condemnor is required to make a “bona fide effort to agree” on the amount of money to be paid to the landowner.²⁷ This is not a difficult burden on the condemnor. It need not engage in protracted negotiations and need not further negotiate when to do so is futile, a situation that arises when a property owner insists on terms that are unacceptable to the condemnor.²⁸ Under no circumstances does a condemnor have a duty to compromise in negotiations.²⁹ The condemnor must merely refrain from making offers that are arbitrary or capricious.³⁰ Furthermore, there is no general duty of good faith beyond this minimal requirement.³¹

The basic situations for the condemnor to avoid in terms of good-faith negotiations are improperly instructing the appraiser on the appraisal on which an offer is to be based and negotiating for different property than what the condemnor ultimately condemns. The condemnor lawyer should be circumspect in instructing the appraiser regarding compensable and non-compensable items and to the extent possible should seek identity of interests between an offer and the property to be acquired. This is not to say, however, that the condemnor must make perfectly accurate offers.³² Even before the Texas Supreme Court’s decision in the *Hubenak* case, an erroneous legal instruction to an appraiser would not necessarily defeat the good-faith requirement unless the instruction was intended to deprive the property owner of compensable damages.³³

C. Off the Hook? The Misguided Allure of the *Hubenak* Case

The good-faith negotiations requirement, intended to reduce the number of condemnation cases that had to be filed by ensuring that the condemning authority and property owner at least had some dialogue concerning compensation prior to the filing of a lawsuit, was always a low

²⁶ TEX. PROP. CODE § 21.012(b).

²⁷ See *Hubenak v. San Jacinto Gas Transmission Co.*, 141 S.W.3d 172, 180-81 (Tex. 2004); *State v. Hipp*, 832 S.W.2d 71, 77 (Tex. App.—Austin 1992, rev’d on other grounds, *State v. Dowd*, 867 S.W.2d 781 (1993); *Mercier*, 28 S.W.3d at 720; *State v. Schmidt*, 894 S.W.2d 543, 545 (Tex. App.—Austin 1995, no writ); *Precast Structures Inc. v. City of Houston*, 942 S.W.2d 632, 634-36 (Tex. App.—Houston [14th Dist.] 1996, no writ).

²⁸ *Anderson*, 677 S.W.2d at 706.

²⁹ *Hipp*, 832 S.W.2d at 78.

³⁰ *Mercier*, 28 S.W.2d at 720.

³¹ See *Marburger v. Seminole Pipeline Co.*, 957 S.W.2d 82, 87-89 (Tex. App.—Houston [14th Dist.] 1997, writ denied).

³² See *Mercier*, 28 S.W.2d at 720 (court used county property tax appraisal to evaluate whether an offer was reasonable).

³³ See *Precast Structures Inc.*, 942 S.W.2d at 636 (court held that an offer based on an erroneous legal assumption was still reasonable).

hurdle for condemning authorities to clear. This hurdle has been lowered even further by the Texas Supreme Court's majority opinion in the *Hubenak* case.³⁴

Hubenak is a consolidation of nine pipeline condemnation cases involving multiple claims by the property owners that the condemning pipeline companies, San Jacinto Gas Transmission Co. and MidTexas Pipeline Co., failed to negotiate in good faith prior to initiating condemnation proceedings because their pre-condemnation offers sought to acquire more rights in the requested pipeline easements than they ultimately condemned for in their condemnation petitions. In affirming the pipeline companies' right to condemn in all of the consolidated cases, the Court concluded first that the "unable to agree" requirement is not jurisdictional and second that the pipeline companies "satisfied their burden to show that they and the landowners were unable to agree on the damages."³⁵

In all nine cases, the pipeline companies filed motions for summary judgment seeking to establish their right to condemn as a matter of law, and the property owners filed cross-motions for summary judgment challenging the trial courts' jurisdiction as a matter of law for the companies' purported failure to negotiate in good faith. In five of the cases, the pipeline companies' right to condemn was granted by summary judgment; in the remaining four cases, the condemnation actions were dismissed on the property owners' cross-motions for summary judgment. This procedural context is significant for one reason: in none of its motions did the pipeline companies make the argument, adopted by the Court, that the "unable to agree" requirement was not jurisdictional.³⁶ Instead, like the property owners, the pipeline companies recognized that the requirement was "jurisdictional" but argued, as the Court's opinion also concluded, that the summary judgment evidence established as a matter of law their good-faith negotiations. This conclusion by the Court resolved the only issue to be resolved in the case, the pipeline companies' good-faith negotiations. Thus, the argument that the requirement is not jurisdictional, which the Court illogically discusses before determining whether the requirement had been satisfied,³⁷ was not presented to trial court, as required by Rule 166a of the Texas Rules of Civil Procedure, and was not necessary to a resolution of the case. The Court proceeds to posit a new procedure whereby the condemnation case is abated for a reasonable time until the "unable to agree" requirement is satisfied. If after a reasonable period of time the condemnor has not made an offer, then the condemnation proceeding should be dismissed.³⁸

The Court's jurisdictional argument is not only unnecessary to a resolution of the *Hubenak* case, it is also wrong. In concluding that failing to negotiate in good faith results in an optional abatement of the proceedings, the Court has disregarded a century of condemnation law to manufacture a procedural remedy, abatement, that is not found in the statutory procedures governing these cases. The mechanism of the Court's opinion is a confusion of the term "jurisdiction" in condemnation jurisprudence and general concepts of subject matter jurisdiction.

³⁴ *Hubenak*, 141 S.W.3d 172.

³⁵ *Id.* at 180, 187.

³⁶ *Id.* at 178.

³⁷ If the requirement was satisfied, the Court would have no need to address the consequences of it not being satisfied.

³⁸ *Hubenak*, 141 S.W.3d at 184.

As the Court recognizes in its opinion, “the term ‘jurisdiction’ has proven to be a ‘word of elastic, diverse, and disparate meanings.’”³⁹ In common condemnation parlance, the statutory prerequisites to filing a condemnation proceeding have been referred to as “jurisdictional.”⁴⁰ This has never been taken to mean that the trial court lacked *subject matter* jurisdiction over the case. The trial court’s subject matter jurisdiction is controlled by statute; all of the trial courts in the *Hubenak* case had subject matter jurisdiction over statutory condemnation cases.⁴¹

Despite the “jurisdictional” terminology, the statutory prerequisites are really conditions precedent to be complied with before filing the condemnation case. Instead of a contract between parties, these conditions are set forth in the condemnation statute, which even the *Hubenak* Court reminds “must be strictly complied with by the condemning authority.”⁴² Like any other condition precedent, the failure to perform one of these conditions precludes recovery and requires a dismissal. Unlike conditions precedent in contractual settings, however, the dismissal of a condemnation case is generally without prejudice to refile once the condition or prerequisite has been complied with. While this procedure may be more cumbersome than the abatement procedure set forth in *Hubenak*, it is the procedure contemplated by the condemnation statute; any change in this procedure should be the result of a legislative, and not a judicial, act.

The aftermath of the *Hubenak* opinion is, for all practical purposes, an abandonment of the purpose behind the “unable to agree” requirement, “to forestall litigation and to prevent needless appeals to the courts when the matter may have been settled by negotiations between the parties.”⁴³ This policy was intended to protect, and the impact of the Court’s holding will disproportionately impact, smaller cases where the amount in controversy is often not enough to warrant hiring an attorney or, often, even an appraiser. It is the property owners in these cases that the “unable to agree” requirement was intended to protect by forcing the condemning authority to put a reasonable number on the table before filing legal proceedings that will require the property owner to incur fees and expenses that it cannot recover. Without this requirement, it may be in the property owner’s best economic interest to donate its property rather than incur the fees and expenses associated with prosecuting a claim for compensation in a condemnation case, which fees and expenses may exceed the possible recovery. This enables the condemning authority to offer a nominal amount of compensation, which often the economic realities of these cases dictate that the property owner should accept irrespective of whether the offer approaches a reasonable amount for the interests to be acquired.⁴⁴

Moreover, because the abatement procedure is not set forth in the condemnation statute, it is very unlikely that the property owners that could benefit from abatement, those with smaller

³⁹ *Hubenak*, 141 S.W.3d at 183; citing *Minto v. Lambert*, 870 P.2d 572, 575 (Colo.Ct.App. 1994, cert. denied).

⁴⁰ See e.g. *Anderson*, 985 S.W.2d at 566, fn. 5.

⁴¹ See e.g. TEX. GOV’T CODE 25.0812(b)(2) (jurisdiction statute for Fort Bend County Courts at Law).

⁴² *Hubenak*, 141 S.W.3d at 180; citing *Brinton v. Houston Lighting & Power Co.*, 175 S.W.2d 707, 709 (Tex.Civ.App.—Galveston 1943, writ ref’d w.o.m.).

⁴³ *Hubenak*, 141 S.W.3d at 184.

⁴⁴ This problem is exacerbated when the condemning authority, like most governmental entities, uses its own lawyers as opposed to hiring outside counsel, which will diminish the litigation-avoidance incentive to pre-condemnation negotiations.

cases who likely cannot afford to hire a lawyer, will even know of its existence. In more substantial cases, however, abatement is not likely to be invoked for two reasons: (1) perversely, the condemning authority has a greater incentive to make a reasonable pre-condemnation offer because, as the amount in controversy increases, the property owner has a greater incentive to contest the offer; and (2) the benefit to the property owner of litigation avoidance is offset by the increasing benefit of the amount in controversy. Thus, the dilution of the good-faith negotiations requirement in *Hubenak* is bad law and bad news for those property owners facing condemnation who can least afford it.

D. Fee Considerations In Right-to-Take Cases

In theory, most property owners affected by a condemnation project would probably rather see the project go somewhere else or, at the least, avoid having to take their property. By the time they hire an attorney, property owners are generally resigned to the inevitability of the project, and their focus has shifted to the more practical issue of compensation. As mentioned above, however, there are instances where the client property owner's primary goal is to defeat the taking. When this situation arises, it can present a number of professional responsibility issues for the condemnation lawyer.

Most of these issues relate to the management of the client's expectations. The client needs to understand that the trial court's discretion to second guess a condemning authority's determination of public necessity and authorization to condemn is limited. While it is true that the condemning authority has less discretion in failing to follow the statutory procedures for a condemnation case, a dismissal under these circumstances will generally be followed by a subsequent condemnation lacking whatever procedural infirmity resulted in the initial dismissal. This does not accomplish the client's goal of avoiding the eventual acquisition of its property. Moreover, if the attorney charges the client for his time incurred, the fees and expenses in a full-blown challenge to the right to condemn can be substantial, potentially exceeding the amount of compensation that the property owner stands to recover if the challenge is unsuccessful. If the attorney has a contingent fee arrangement that fails to address how a challenge to the right to condemn will be handled, the attorney may be forced to pursue the challenge with the only hope of recovering his time in the case coming from the condemning authority in the unlikely event that the challenge is successful. This situation can lead to an unacceptable tension between the attorney's obligations to his client to accomplish its aims and his own self-interest in avoiding a potential sinkhole of time and opportunity cost.

The attorney representing a property owner must work hard to ensure his client has a reasonable expectation of what can be accomplished in terms of challenging the right to take. An unsuccessful challenge to the condemnation, with its attendant fees and expenses, can vitiate the overarching purpose behind the constitutional guarantee that property will not be taken for a public purpose without adequate compensation being paid. Money is fungible, and every dollar spent by the property owner, either in challenging the right to take or in attempting to obtain the compensation to which it is entitled, is a dollar that is deducted from its ultimate recovery and, accordingly, "adequate compensation." Where appropriate, the property owner's counsel has an ethical obligation to pursue a challenge to the condemning authority's right to take. The decision to do so, however, should be entered into only after careful consideration by the attorney and full

disclosure of the potential cost to the client and a realistic assessment of the likelihood that the challenge will not be sustained.

E. The Four-Letter Word, Part 1: Waiver

As noted in the *Hubenak* opinion, a property owner's right to challenge the condemnation may be waived. There are numerous opportunities for waiver. To the extent the "unable-to-agree" requirement still has any force after *Hubenak*, the right to raise it is waived when the property owner appears at the hearing of Special Commissioners.⁴⁵ Once the award of Special Commissioners is filed with the trial court, the property owner may waive all potential grounds for dismissing (or, under *Hubenak*, abating) the condemnation proceedings either by failing to timely file an appeal of the award⁴⁶ or by withdrawing the amount of the award deposited into the registry of the court.⁴⁷ If an appeal is not timely filed, the trial court only has power to enter judgment on the amount of the award for the rights set forth in the condemnation petition. From the standpoint of a lawyer's professional responsibility to his client, waiver by any of these means is an unacceptable result for both the lawyer and the client.

III. The Amount of Compensation to be Paid

In addition to the condemnor lawyer's responsibilities to acquire the property interests required by his client, he has a responsibility to ensure that his client does not pay too much. The property owner's lawyer has a parallel obligation to ensure that his client is compensated for all permissible impacts of the taking. Depending on whether the condemnation involves a whole or partial taking, vacant or improved land, fee ownership or a leasehold interest, or claims for remainder damages, the issues involved in meeting these responsibilities can range from straightforward to exceedingly complex. Particularly in a partial taking case involving improved property, the burden is high on the condemnor lawyer to ensure that his client does not pay damages for elements of compensation which are not compensable. Unfortunately, there is not a concomitant burden to ensure that the condemnor pays the property owner for all compensable elements of damages. The result of this imbalance is an incentive for condemnor lawyers to restrict the elements of damage for which compensation is to be paid and an increased burden on lawyers representing property owners to make sure they recover all of the compensation to which they are entitled.

A. The Push-and-Pull Dynamics of Compensable Damages

These countervailing responsibilities and incentives have resulted in a push-and-pull phenomenon in condemnation law on the issue of compensable damages. An analysis of three relatively recent partial takings cases out of the Texas Supreme Court, *State v. Schmidt*,⁴⁸

⁴⁵ See e.g. *Jones v. City of Mineola*, 203 S.W.2d 1020, 1023 (Tex.Civ.App.—Texarkana 1947, writ ref'd).

⁴⁶ TEX. PROP. CODE §21.018(a); see also *John v. State*, 826 S.W.2d 138, 141 (Tex. 1992).

⁴⁷ See *Amason v. Natural Gas Pipeline Co.*, 682 S.W.2d 240, 242 (Tex. 1984); *State v. Jackson*, 388 S.W.2d 924, 925 (Tex. 1965).

⁴⁸ 867 S.W.2d 769 (Tex. 1993).

Interstate Northborough Partnership v. State,⁴⁹ and *County of Bexar v. Santikos*,⁵⁰ demonstrates the role this phenomenon can have in shaping condemnation law.

Schmidt involved the taking of a 5-foot strip of land in connection with the State's elevation of Highway 183 in Austin, Texas. In the trial court, the property owners recovered substantial damages for the negative impact of the elevated highway facility on the market value of their remaining land, despite the fact that none of the elevated facility was to be constructed on the part taken from the property owners but instead was to be located entirely on the State's pre-existing right-of-way.⁵¹ The *Schmidt* Court rejected the property owners' theory of damages, determining that the damages claim did not result from the State's taking of their property but from its new use of its existing right-of-way and of property taken from other landowners.⁵² These damages, resulting from the "diversion of traffic, inconvenience of access, impaired visibility of ground-level buildings, and disruption of construction activities," were, according to the Court, "a consequence of the change in Highway 183 shared by the entire area through which it runs."⁵³ The damages were held community in nature and not recoverable.⁵⁴

The general rule for compensation prior to *Schmidt* was set forth in *State v. Carpenter*:

[T]he damages are to be determined by ascertaining the difference between the market value of the remainder of the tract immediately before the taking and the market value of the remainder of the tract immediately after the appropriation, taking into consideration the nature of the improvement, and the use to which the land taken is to be put. . .

Generally, it may be said that it is proper as touching the matter of the value and depreciation in value to admit evidence upon all such matters as suitability and adaptability, surroundings, conditions before and after, and *all circumstances which tend to increase or diminish the present market value*.⁵⁵

There can be little doubt that, in the 57 years between *Carpenter* and *Schmidt*, this language was construed broadly by attorneys for property owners with an eye towards obtaining compensation for their clients for any element of damages that could be viewed as impacting market value. Thus, *Schmidt* was hailed as a watershed case for condemning authorities, to be asserted by condemnor lawyers as authority for denying broad categories of remainder damages in partial takings cases, increasingly in excess of the constraints of Justice Hecht's carefully-

⁴⁹ 66 S.W.3d 213 (Tex. 2001).

⁵⁰ *County of Bexar v. Santikos*, 144 S.W.3d 455 (Tex. 2004).

⁵¹ *Schmidt*, 867 S.W.2d at 777.

⁵² *Id.* at 779. ("In the present cases it is clear that the diminution in value claimed by Schmidt and Austex in their remaining property is due entirely to the State's modifications to Highway 183 and not to the use of the strip taken from each tract.")

⁵³ *Id.* at 781.

⁵⁴ *Id.*

⁵⁵ *Carpenter*, 89 S.W.2d 194, *opinion on motion for rehearing*, 89 S.W.2d 979 (Tex. 1936) (emphasis added).

worded and structured opinion. Similar to *Carpenter*, there can be little doubt that the holdings and dicta in *Schmidt* were construed broadly by attorneys for condemning authorities to restrict the compensation to be paid by their clients.⁵⁶ As a result, eight years later the Court would feel compelled to clarify compensable damages in condemnation cases. This clarification came in its 2001 opinion in the *Interstate Northborough* case.

Interstate Northborough involved the State's project to widen I-45 in Houston, requiring moving the frontage road to within 22.5 feet of the property owner's office building. As a result of the taking, two of the property's five driveways had to be relocated or closed.⁵⁷ The increased proximity of the roadway, which did occur in part on the part taken, was held to be a compensable damage.⁵⁸ The property owner was additionally permitted to recover damages for the resulting loss of the property's aesthetics.⁵⁹ Finally, even in the absence of finding of a material and substantial impairment of the property's access as a result of the loss of two of its driveways, the property owner was permitted to recover its costs for necessary modifications to the remaining property resulting from the condemnation, including modifications necessary to restore safe access to the property.⁶⁰

From *Interstate Northborough* it was clear that the *Schmidt* opinion did not cut as wide as had been argued by attorneys for condemning authorities. However, the Court has quickly made clear that, just as *Schmidt* does not close the door to all remainder damages, *Interstate Northborough* does not leave the door to these damages wide open. The pushing and pulling contest over where the line on compensable damages should be drawn continued with the *County of Bexar v. Santikos* case.⁶¹ In *Santikos*, the property owner, relying in part on *Interstate Northborough*, asserted substantial damages to the remainder of its unimproved property resulting from the State's taking of a sliver of land off the frontage for construction of a sloping embankment up to the newly-raised highway facility. The property owner argued that, in the event of future big-box retail development, the slope of this embankment would prevent "normal" driveways into the property at the location of the taking and that the State's construction of the embankment created a "market perception problem" by leaving the property "in a hole."

⁵⁶ After the *Schmidt* opinion, lawyers for condemning authorities argued for a three-part test for recovering remainder damages in condemnation cases:

- (1) The landowner must show that the damages claimed should be treated differently from diversion of traffic and increased circuitry of travel;
- (2) The landowner must show that the damages result solely from the use of the part taken; and
- (3) The landowner must show that the nature of its injury is special and not a community impact.

⁵⁷ 66 S.W.3d at 217.

⁵⁸ *Id.* at 223.

⁵⁹ *Id.* at 217.

⁶⁰ *Id.* at 224.

⁶¹ 144 S.W.3d 455.

In an opinion authored by Justice Brister, the *Santikos* Court first rejected the property owner's characterization of his claim for damages for the potential impairment of a hypothetical driveway at the location of the taking and future embankment as one of "unsafe access" under *Interstate Northborough*:

More important, it is hard to find any effects on access here, as the tract has no businesses, homes, driveways, or other improvements of any kind. Easy access to the frontage remains along 90 percent of the Santikos tract; the only claim is that someday a developer might want to build a driveway at the single most difficult and expensive location on the entire property.⁶²

The Court recognized *Interstate Northborough* as authority for the proposition that "costs to mitigate or move existing driveways or other improvements may be compensable even if impaired access is not," but noted again that "no driveways or other improvements need to be moved in this case."⁶³

The Court was less kind in its treatment of the property owner's claim for damages for "diminished market perception," which it characterized as a "malleable" term which, in this case, "proved to be based on a combination of diminished access, diminished visibility, loss of view, and loss of 'curb appeal.'"⁶⁴ The Court determined that all of the claims denominated by the property owner as "diminished market perception" represented noncompensable damages and that these damages could not be "transmuted to compensable ones by asserting them under a pseudonym."⁶⁵ The Court thus rejected all claimed remainder damages, remanding the case solely for a determination of the market value of the land taken.⁶⁶

The arguments made by the opposing sides in these cases can be viewed from the perspective of the lawyers' competing ethical duties to their clients. In each case, the attorney for the condemning authority asserted, consistent with his obligation to see that his client does not pay more than is required, that the claimed damages were not recoverable. In each case, the property owner's lawyer argued for the compensability of damages that may not have been clearly provided for under existing case law as part of his effort to ensure that the property owner received all of the compensation to which it was entitled. Furthermore, it is not an accident that these cases arise in the context of partial takings. These cases, particularly those involving improved property, pose the most complex compensation issues in condemnation cases and, accordingly, present the greatest opportunity for errors and omissions by the practicing condemnation attorney.

Condemnor lawyers live by the mantra, repeated in *Santikos*, that not all damages to property are compensable, while property owner lawyers are constantly aware that the instant condemnation case represents the property owner's one and only opportunity to recover for the

⁶² *Id.* at 460.

⁶³ *Id.* at 461(citing *Northborough*, 66 S.W.3d at 224).

⁶⁴ *Id.*

⁶⁵ *Id.* at 462.

⁶⁶ *Id.* at 464.

impacts of the taking on the market value of the property. The property owner is certain not to recover for a particular element of damages if its attorney does not seek to recover it. A trial-and-error approach is insufficient and unfair to the client. The property owner has to rely on its attorney to determine what claims can be asserted to make sure it recovers all of the compensation to which it is entitled without incurring needless expenses litigating noncompensable items. And yet the ability to recognize, for example, when claims may be asserted for impairment of access or for lost business profits, both of which are not typically recoverable, can only come after a great deal of time and experience handling these types of cases.

B. Fee Considerations on Litigating Compensable Damages

1. Recognizing Compensable Damage Issues

The lengthy pursuit of damage claims that are ultimately rejected, as in the *Schmidt* and *Santikos* cases, can certainly have a chilling effect on a lawyer's enthusiasm for condemnation cases in the future. And yet, if the property owner's lawyer in *Interstate Northborough* had submitted to the State's position on *Schmidt* and failed to pursue the remainder damages recovered in that case, he would have failed in his duty to his client to recover the full amount of damages allowed under law for the taking. At the same time, the condemning authority was rewarded in the *Schmidt* and *Santikos* cases by its attorney's decision to contest the property owners' claimed damages but penalized in *Interstate Northborough*, where the substantial litigation costs involved in an appeal were added to the substantial damages that it was also required to pay. On a case-by-case basis, these inefficiencies can be punitive. Depending on whether the property owner has hired its attorney on an hourly or contingent basis, a sustained and unsuccessful pursuit of damages can result in attorneys' fees greatly in excess of the client's recovery or in a fee that fails to compensate the condemnation attorney for the time incurred on the case.

Unfortunately, these inefficiencies in condemnation cases are probably unavoidable as long as the attorney represents property owners and is fully committed to fulfilling his duty to his clients. Damage issues on the blurred line of compensability will arise, and, if necessary, this duty will require the attorney, like the attorneys in *Schmidt*, *Interstate Northborough*, and *Santikos*, to litigate the issue as far as necessary, irrespective of the risks that he may not recover a fee or that the fee will not equate to the amount of time and effort expended on the case. These risks can be minimized, however, for the condemnation attorney handling condemnation cases on a contingent fee. Experience in this practice area, particularly with complex remainder-damage cases, over time should lead to an ability to recognize and separate compensable elements of damage from those elements that are noncompensable. Maintaining a substantial docket of cases, while not reducing the risk, allows a condemnation attorney to lessen the impact of having one of his cases end up in protracted litigation over compensability by spreading this risk over more cases.

2. Hourly Fee vs. Contingent Representations of Property Owners

Most of the discussions on fees in this paper assume that the condemning authority is represented on an hourly basis and the property owner is represented on a contingent-fee basis.

While contingent fees are sometimes viewed with suspicion, in condemnation cases charging the property owner an hourly fee merits greater concern. A property owner cannot recover its fees and expenses incurred; all a property owner recovers in the typical condemnation case is its compensation for the taking. While a contingent fee has the potential to result in a fee in excess of the lawyer's time expended, charging by the hour for the lawyer's time expended has the more grave potential of exceeding the amount of the property owner's recovery. At a minimum, the lawyer seeking to charge an hourly rate for his time on the case owes it to his client to advise it of this possibility.

Under Section 1.04 of the Texas Rules of Professional Conduct, a lawyer may not charge a fee that is "unconscionable."⁶⁷ "A fee is unconscionable if a competent lawyer could not form a reasonable belief that the fee is reasonable."⁶⁸ Among the factors to be considered in assessing the reasonableness of the fee are "the skill requisite to perform the legal service properly" and "the amount involved and the results obtained."⁶⁹ On a visceral level, a fee that exceeds the property owner's recovery or potential recovery from a condemnation case will strike some clients as unconscionable.⁷⁰

C. The Four-Letter Word, Part 2: More Waiver

As discussed above, the initial phase of a condemnation case is administrative in nature; the trial court's appellate jurisdiction is invoked by an appeal of the award entered by the Special Commissioners. Just as the property owner loses its right to contest the condemnation if it fails to timely file an appeal of the award, the property owner can waive its right to contest the compensation to be paid by failing to file a timely appeal of the award.⁷¹ In general, once the appeal is filed, the award becomes a nullity.⁷² However, even if an appeal is timely-filed, the property owner can abandon the appeal if it withdraws the amount of the award and fails to pursue its compensation claim.⁷³ In this event, the trial court may determine that the appeal has been abandoned and render judgment on the amount of the award.⁷⁴

D. The Four-Letter Word, Part 3: Reversed and Rendered

The property owner has the burden of proof on damages,⁷⁵ and the issue of compensability of damages is generally a question of law for the court to decide.⁷⁶ Together,

⁶⁷ TEX. DISCIPLINARY R. PROF. CONDUCT § 1.04(a).

⁶⁸ *Id.*

⁶⁹ TEX. DISCIPLINARY R. PROF. CONDUCT §§ 1.04(b)(1), (4).

⁷⁰ The "unconscionable" standard was adopted in an attempt "to eliminate factual disputes as to the fee's reasonableness." TEX. DISCIPLINARY R. PROF. CONDUCT § 1.04, comment 1.

⁷¹ TEX. PROP. CODE § 21.018(a)

⁷² See *State v. Hilton*, 412 S.W.2d 41, 42 (Tex. 1967) ("... the award of the board of special commissioners is inadmissible"); *State v. Berry*, 385 S.W.2d 711, 714 (Tex.Civ.App.—San Antonio 1964, writ ref'd n.r.e.).

⁷³ *Brammer*, 361 S.W.2d at 200.

⁷⁴ *Id.*

⁷⁵ *Amason*, 682 S.W.2d at 242; *Jackson*, 388 S.W.2d at 926.

⁷⁶ See *Santikos*, 144 S.W.3d at 459.

these rules in condemnation cases can sometimes lead to a harsh result for the property owner who has prevailed in the trial court on a damage theory that is ultimately rejected on appeal. Under certain circumstances, the property owner can be deemed to have failed to present any evidence of compensable damages and the trial court's judgment will be reversed and rendered for nominal damages to the property owner.⁷⁷

IV. Conclusion

*"No one respects the flame quite like the fool who's badly burned"*⁷⁸

We all endeavor, for our own sake and for the sake of our clients, to avoid being burned in the first place. Condemnation cases, however, present a wide array of pitfalls for the occasional practitioner. With experience and a study of the myriad of issues that can arise in these cases, one can develop the knowledge, ability, and skills necessary to pilot lawyer and client through these pitfalls so that the representation ends up with a satisfactory result for both. The most important skill the lawyer can develop may be recognizing those cases, whether due to the complexity of the case and the lawyer's relative expertise, the economics of the amounts involved compared to the amount of work required, or the unrealistic expectations of a client, where the lawyer should decline the representation.

*"From all this you'd imagine that there must be something learned"*⁷⁹

⁷⁷ See *Jackson*, 388 S.W.2d at 926.

⁷⁸ PETE TOWNSHEND, *Slit Skirts*, on ALL THE BEST COWBOYS HAVE CHINESE EYES (Atlantic 1982).

⁷⁹ *Id.*