

Condemnation Summit XXVIII

OCTOBER 7, 2022 | ARIZONA BILTMORE

Welcome & Program Introduction



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Today's Agenda

9:00 AM	Plenary Discussion of Evidentiary Motions in Eminent Domain Cases
10:30 AM	Networking Break
10:45 AM	Relocation Hot Topics & Best Practices
11:45 AM	Lunch on the Lawn
1:00 PM	Civil Practice & Procedure Updates from the Superior Court Bench
2:30 PM	Networking & Cookie Break Sponsored by Integra Realty Resources
2:45 PM	The Ins & Outs of Water Utility Condemnations
3:45 PM	Networking Break
4:00 PM	What Condemnation & Real Estate Professionals Need to Know about ESG & DEI

Plenary Discussion: Evidentiary Motions in Eminent Domain Cases

DANIELLE CONSTANT, JENNINGS STROUSS

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Motions *in Limine*

“In Limine”:

Latin: "at the start"

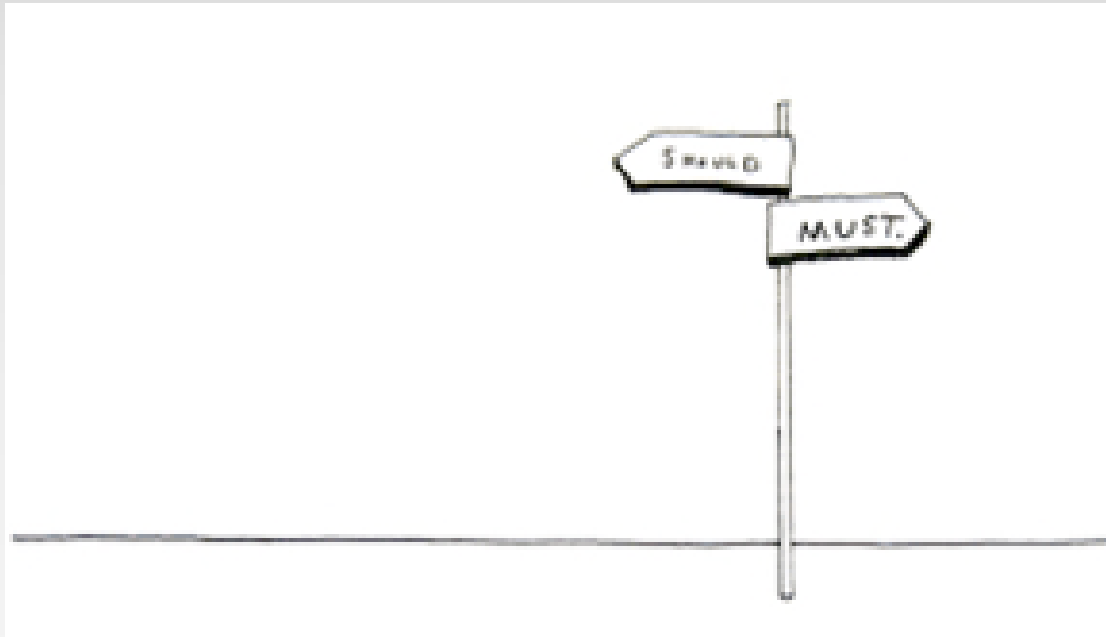
literally, "on the threshold"



Motions *in Limine*

- Procedures governed by **Rule 7.2**
- The Rule presumes you know what MILs are, because it doesn't tell you what they are.
- Procedural Requirements:
 1. Must consult with your opponent (but not a 7.1(h) consultation)
 2. File 30 days before either the trial or the trial management conference, or when the judge says they are due
 3. Response due 10 days later (10 days = 10 business days)
 4. No replies allowed

Motions *in Limine*



“All motions in limine submitted in accordance with Rule 7.2(b) **must be ruled on before trial** unless the court determines the particular issue of admissibility is better considered at trial.”

7.2(d)

Motions *in Limine*

So what is a Motion *in limine* (MIL)?

“A pretrial motion in limine is generally used as a substitute for evidentiary objections at trial.”

Zimmerman v. Shakman, 204 Ariz. 231, 235, ¶ 12 (App. 2003)

Motions *in Limine*

“A pretrial motion in limine is merely a convenient substitute for evidentiary objections at trial. ... [The Trial Court] may well consider that procedure preferable to hearing objections piecemeal at trial.”

State v. West, 176 Ariz. 432, 442 (1993), overruled other grounds

Motions *in Limine*

MILs should refer to evidence.

I.E., a Rule of Evidence should be cited.

The Courts frown on discovery issues cloaked in the appearance of a MIL. Discovery issues should be brought under Rules 26.1 and 37.

Zimmerman, ¶¶ 12-14.

Motions *in Limine*

MILs are not dispositive motions.

Those should be brought under rules 12 and/or 56.

Motions *in Limine*

Just because a MIL may preclude a certain area of inquiry does not make it a dispositive motion.

The defense did not provide any authority that their “*theories of calculating just compensation through evidence of project influence, best use, and owner testimony, were, in and of themselves, claims or defenses. The trial court's rulings did not preclude the [defense] from pursuing their claim, which ultimately resulted in a monetary judgment in their favor. Rather, the court's rulings limited the evidence that could be introduced in support of the claim. As such, the court's rulings involved ‘disputed evidentiary issue[s]’ of relevance and Rule 403 considerations, which may be properly considered in a motion in limine. See Ariz. R. Civ. P. 7.2. We see no error.*”

City of Tucson v. Tanno, 245 Ariz. 488, 494–95, ¶ 25 (App. 2018)

Motions *in Limine*

- A party may wish the Court to preclude areas that are irrelevant, inadmissible, or unfairly prejudicial.
- May narrow the issues for trial (and maybe spur settlement).
- Helps minimize bench conferences at trial.
(*cough cough [literally])
- Gives the court time to consider the admissibility of certain lines of questioning that are more complex than a “simple” objection can cover.

Motions *in Limine*

Common Evidence Rules:

- 401-402 Relevance
- 403 Prejudice, Confusion, Waste of Time
- 404-406, 608-609 Witness Character
- 408 Previous Settlement Offers

Motions *in Limine*

408 Previous Settlement Offers

State ex rel. Miller v. Superior Court, 189 Ariz. 228, 231 (App. 1997)

- ADOT filed a MIL seeking to preclude the pre-litigation appraisal.
- The trial ruled the prior appraisal admissible.
- ADOT petitioned for special action to the Court of Appeals.
- The Court of Appeals *reversed* the trial court.

Motions *in Limine*

- 1) The pre-litigation appraisal is precluded under ARS § 12-1116 (O).
- 2) It was precluded under 408 as it was prepared to make the owner a settlement offer.
- 3) Public policy concerns that when an agency must protect public funds, which includes assessing the worth of a property, that assessment should not be used against it later.

State ex rel. Miller v. Superior Court, 189 Ariz. 228, 231 (App. 1997)

Motions *in Limine*

But...

A witness may be impeached (607) which can include a “prior inconsistent statement” (613).



Motions *in Limine*

Back to Common Evidence Rules:

- 501-502 Privileges
- 602 Personal Knowledge (i.e., “*Foundation*”)
- 702-706 Experts (more on that later)
- 801-807 Hearsay
- 901-903, 1002-1006 Documents and Public Records

Motions *in Limine*

- What happens if MIL is denied and the evidence can/will be admitted?
 - You can special action to the COA, but their acceptance of special action is discretionary.
 - You can still object to the evidence at trial if appropriate.
 - You can appeal after the jury verdict. In Arizona, the objection is preserved.

“The court’s denial of a motion *in limine* preserves the moving party’s objection to the evidence for purposes of appeal.”

7.2(d)

Motions to Exclude Expert Witness Testimony

Arizona Rule of Evidence 702:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- a) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- b) The testimony is based on sufficient facts or data;
- c) The testimony is the product of reliable principles and methods; and
- d) The expert has reliably applied the principles and methods to the facts of the case.

SO MANY RULES

**SO LITTLE
BRAINSPACE**

Don't worry . . .

Help is on the way

Ariz. R. Evid. 702

- Identical to Federal Rule since 2012
- Federal advisory committee notes and federal decisions
- *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993)
- *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999)
- *State ex rel. Montgomery v. Miller*, 234 Ariz. 289 (App. 2014)
- *State v. Bernstein*, 237 Ariz. 226 (2015)



Rule 702 – Role of Court



- Court is “gatekeeper”
- Party proffering witness bears **burden** of establishing relevance, reliability, and admissibility of the testimony by a **preponderance of the evidence**
- “Close cases” are for the jury

Expert Qualifications



- Knowledge
- Skill
- Experience
- Training
- Education

702(a) Help the Trier of Fact



702(b) Sufficient Facts or Data

- Focus on **quantity** of information
- What research / investigation did the expert conduct?



702(c) Reliable Principles and Methods



Accepted body of
learning or experience

702(d) Reliably Applied to the Facts



Plus . . .

- Has the expert:
 - Maintained **standards** controlling application of the technique?
 - Accounted for obvious **alternative explanations**?
 - Accounted for available data and **unknown variables**?
 - Engaged in improper **extrapolation**?
- Big picture questions:
 - Is testimony **relevant** and **reliable**?
 - Is there an **analytical gap** between the data and opinion?

But what about
condemnation
cases?



Party Seeking Exclusion

- What is the “fact in issue”?
- Did the expert do his or her homework?
 - Review report, file, and ask at deposition.
- If expert relied on studies, articles, and industry standards, were they applied correctly?
 - Any USPAP violations?
- Where testimony is based on experience, reliability is more important
 - Expert’s assurance of reliability isn’t enough.
- Can you use expert’s own testimony to support exclusion?

Party Opposing Exclusion

- Battle of experts – should be presented to the jury
 - Expert testimony can be “shaky”
 - Evidence does not need to be flawless
- Industry materials and case law endorsing expert’s methodology
 - Novel methodologies are also acceptable
- Expert’s qualifications, experience, and testimonial history
- Experts are permitted wide latitude to offer opinions
 - First-hand knowledge not required
- Rule 702 should be applied with flexibility

Other Considerations

- Timing of motion
- Partial exclusion
- One expert per issue
- Hearing strategy

