

ALI-ABA Course of Study

Condemnation 101: Making the Complex Simple in Eminent Domain

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Problems with Proofs and Juries in Condemnation Cases

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The Federal Constitution and State Constitutions alike prohibit the taking of property for a public purpose without the payment of just and adequate compensation. *See US Const. Amend 5*. The requirement of just compensation provides that the government shall pay for all property interests taken in order to make the property owner whole, or in as good a position as if the property had not been taken. *See Alмота Elevator & Warehouse Co. v. United States*, 409 U.S. 470 (1973). No matter the jurisdiction, the primary question for the trier of fact to answer in a condemnation case is what constitutes just and adequate compensation for the property taken or damaged? At first glance, this question would seem to provide for a simple straight forward case. However, the answer can be complicated and the path from opening statement to closing argument can be riddled with evidentiary road blocks and brick walls.

The answer of what is just compensation is comprised of two distinct elements -- the part taken and the damages to the remainder, also known as consequential or severance damages. *See Wright v. MARTA*, 283 S.E.2d 466 (Ga. 1981). What actually makes up each element differs among the states as not all losses suffered by a condemnee are compensable in every jurisdiction. Speculative or sentimental value and pre-condemnation losses are never recoverable. *60 AM. JUR. TRIALS 447 §5 (2008)*. Other damages, such as business loss, vary between federal and state jurisdictions with different burdens of proof. *Compare United States v. Powelson*, 319 U.S. 266 (1943) (no business loss in federal actions) *with Bowers v. Fulton County*, 146 S.E.2d 884 (Ga. 1966) (recoverable as separate element). Condemnation cases are unique in that neither side has the burden of proving a value by a preponderance of the evidence, but rather each must prove the value it seeks. *60 AM. JUR. TRIALS 447 §7 (2008)*. Instead, there are burdens in proving certain foundational aspects, such as an increased value due to project influence, or the probability of a zoning change to support highest and best use. *See Nichols on Eminent Domain § 8A.01[8], § 12B.12*.

Even with the most skilled litigator, a condemnation case can be won or lost on the evidence itself and how it is presented. Jurors want to hear the story behind the evidence. They also tend to want to do what is fair and equitable. The best evidence in the world will not save a case if the jury finds the story is too dramatic or not dramatic enough, or the witnesses are overreaching or arrogant, or the evidence is too complex. As a whole, the jury wants the lawyers in the courtroom to: (1) keep it simple; (2) emphasize the facts over opinions; (3) keep the trial moving because they have more important things they could be doing; (4) speak clearly and loudly; (5) use good visuals; (6) be prepared; (7) be professional and polite to everyone, including opposing counsel; (8) open and close with clarity and brevity; (9) show them you care about your client and their claims; and (10) treat them as equals and avoid at all costs talking down to them. *See S. Macpherson, Viewing Your Case Through the Juror's Eyes*, CP006 ALL-

1. Proving Value

To help the jury answer the question of just and adequate compensation, fair market value is the measuring stick that is standard in all jurisdictions: what would a willing buyer pay and what would a willing seller accept in an arm's length transaction with no compulsion to buy or sell? *See United States v. 564.54 Acres of Land*, 441 U.S. 506 (1979). For the practitioner, the tricky part is translating this standard into dollars that truly measure what has been taken and what has been damaged by the taking. Is just and adequate compensation always the same as fair market value? What kind of evidence should you consider using to prove fair market value as the condemnor? As the condemnee? What evidence can you present in the jurisdiction?

There are a few basic concepts that frequently arise in most condemnation cases that govern fair market value and will drive the kind of evidence introduced. Of the three approaches to valuation, market, income and cost, the market approach in which the property is compared to sales of other similar properties is generally preferred to prove fair-market value. *See 40 AM. JUR. PROOFS 3D 395, § 11 (2008)*. The price paid by the willing buyer to the willing seller is determined as of a certain valuation date – the date the condemnation is filed, the date of possession or title vesting, or the date of the trial or judgment. *60 AM. JUR. TRIALS 447 §9 (2008)*. A property's highest and best use is referred to across the board as the most profitable use that is legally permissible, physically possible, and economically feasible. *See 5 Nichols on Eminent Domain, § 12B.12 (3d ed.)*. It is commonly at issue, particularly when the current use and the highest and best use differ. This paper is not broad enough to cover all aspects of proof. Below is a discussion of some of the more disputed sources of proving value.

(a) Evidence of offers to sell/offers to buy the subject property

Pre-take offers on the subject property may be relevant to the question of fair market value of property. However, in most jurisdictions, an offer is not admissible as direct evidence of value primarily because it is not an arm's length completed transaction. Similarly, a mere option to purchase the condemned property is inadmissible because no transaction has occurred. Unaccepted offers can be easily fabricated, cannot be verified, and may be made with no expectation of performance. As a result, most states prohibit evidence of such offers even if made by a bona fide third party. *See 5 Nichols on Eminent Domain, § 21.4 (3d ed.)*. Evidence of an offer, however, may be used to bolster an appraiser's opinion of value, or for impeachment purposes on cross examination of the property owner. If the offer is close enough in time to the date of valuation, it may be admissible against the landowner. *See United States v. A Certain Tract or Parcel of Land*, 47 F. Supp. 30 (N.D.Ga. 1942). Such evidence is often the subject of a motion in limine by condemnor and condemnee alike because it poses risks for both sides.

(b) Evidence of the price paid by the property owner for the subject property

Similar to unaccepted offers, the price paid by a condemnee on the subject property may be relevant to the question of fair market value. Whether it is admissible as direct evidence of value depends on how close to the date of valuation the sale occurred. The testifying appraiser may want to rely upon it as a comparable sale. The impact such evidence has also depends on its proximity to the date of valuation. The decision to use evidence of the pre-take price paid for the property is a strategic one. If the price paid by the property owner before the taking supports her value, then she should consider using it.

(c) Admission of offers to settle between condemnor and condemnee

Should pre-take offers to settle ever be used as evidence of value or for impeachment purposes? The short answer is never on any day of the week and twice on Sundays. Pre-take settlement discussions in any type of litigation are generally excluded no matter the circumstances. In the context of a condemnation, pre-take offers to “sell” to the condemnor should be excluded as evidence of market value. *60 AM. JUR. TRIALS 447 § 43 (2008)*. They are highly prejudicial because they are offers of compromise that often occur without the benefit of counsel. A property owner who may not understand his or her rights to compensation may feel compelled to accept a lower offer than the value later asserted at trial. The negotiations are by no stretch of the imagination at arm’s length and thus, are not reflective of true fair market value. A motion in limine should be made to exclude all evidence of negotiations and offers to settle.

(d) Evidence of the sale of remainder property

If the subject property is sold after the date of taking, the question arises as to whether the sale is relevant to fair market value and should be admitted. If the property owner claims the remainder property is so damaged by the taking as to impact fair market value, then a sale close in time to the valuation date could be admitted as direct evidence or for impeachment purposes. Of course if the property owner sells the remainder property for a higher value, then a claim for consequential or severance damages due to the taking can be severely impacted. It is similar to allowing evidence of a comparable sale that occurs at some point after the date of taking. Some jurisdictions admit this evidence of the sale if the sale was closed soon after the taking or valuation date, the market remained stable in the interim, and the taking had no impact on the sale price. *60 AM. JUR. TRIALS 447 §42 (2008)*.

(e) Zoning changes to prove highest and best use

In proving value, a property owner is not limited to only the subject property’s current use. When the proposed use is the property’s highest and best use but zoning restrictions limit that use, the condemnee is entitled to show the probability of a zoning change and how it impacts on market value. The burden of proving a reasonable probability of rezoning falls on the condemnee to show that the property can be adapted to the proposed use; the use is reasonably probable within a certain period of time; and proposed use enhances the market value of the property. *See Clark v. Mississippi Transp. Com'n, 767 So. 2d 173 (Miss. 2000)*. To be admissible, jurisdictions vary on what constitutes a “reasonability probability” and how to prove it. *See, e.g., Unified Gov’t v. Watson, 577 S.E.2d 769 (Ga. 2003) (evidence of rezoning admissible upon showing reasonable probability or possibility)*. There are generally two views – evidence of an actual probability that the zoning will be changed in the reasonably foreseeable future versus evidence of any factor that may influence value, including the possibility of a zoning change. *40 AM. JUR. PROOFS 3D 395 §18 (2008)*.

The condemnee and his appraiser must be careful not to value the property as if the use were an accomplished fact. Instead, the property is valued at a price that includes the ability to develop the property for the proposed use. *See, e.g., West Jefferson Levee Dist. V. Coast Quality Constr. Corp., La., 93-1718, 640 So.2d 1258 (La. 1994)*. Certain factors should be considered and introduced to support a probable zoning change probable:

- Rezoning of surrounding properties

- Institutional support for the zoning change, i.e. school, park, church, bus stop tend to support higher residential density and a walking community
- County or municipal land planning in the area
- Demographics and growth patterns,
- Character of the neighborhood, i.e. older homes being purchased, demolished and replaced with McMansions
- Demand in the area for the proposed use
- Sales of similar properties at prices supporting the new zoning
- Physical characteristics of the subject and of nearby properties and,
- Age and circumstances of the zoning ordinance at issue
- History of rezoning in the jurisdiction

40 AM. JUR. PROOFS 3D 395 §16 (2008). For both condemnor and condemnee, having an expert appraiser with rezoning experience helps the jury understand the likelihood or not of the zoning change. It is important to note that zoning changes often involve a very political process in the particular jurisdiction. No particular witness can testify for certain that the zoning will or will not happen. On cross examination, this fact alone can help steer the jurors towards a conclusion of probability.

(e) Bank appraisals, tax assessments and other sticky evidentiary issues

Tax assessments and other similar assessments should be excluded as direct evidence of fair market value for several reasons. Tax assessors rarely have their hand on the pulse of the market. Valuations by Uncle Sam are done in a vacuum without the input of the property owner, i.e. the seller in the transaction. Assessments in which the value of the property is determined by “someone other than the taxpayer and on which no oath was administered” are not indicative of fair market value. *See Gruber v. Fulton County, 111 Ga. App. 71, 140 S.E.2d 552 (1965)*.

Property valuations, such as a bank appraisal, prepared outside the context of the condemnation and on a date other than the date of valuation are inadmissible as substantive evidence when used for purposes of showing a property’s value. A bank appraisal prepared before a condemnation does not reflect market value because it only assigns a value to the property in order to determine the level of financing available. The appraisal process for purposes of financing can be much different than the recognized comparable sales approach in a condemnation, primarily because bank appraisers use listings and offers.

Such appraisals also are not admissible for impeachment purposes as a prior inconsistent statement if the appraisal is not connected in time and circumstances to the date of the taking. To be properly admitted, the prior statement must be relevant in time and in circumstances in order to establish the inconsistency. *See Brookhaven Associates v. Dekalb County, 371 S.E.2d 231 (1988)*.

In those states that require an initial deposit of funds, evidence of the condemnor's estimate of value and deposit into the court registry upon filing the condemnation is excluded. The jury should never consider such evidence in determining just and adequate compensation. *See 60 AM.JUR.TRIALS 447 § 44 (2008)*.

2. Key witnesses: Expert vs. Lay

Condemnation cases are built around witness testimony and credibility. The use of an expert appraisal witness to put a stamp of approval on a claim for damages is almost universally favored. The appearance of a qualified witness with the proper credentials and experience who explains value on an impartial basis can provide a lasting impression on the jury. If the property at issue involves more complex issues than a simple strip take, other foundational witnesses may be required to establish the facts that support the appraiser's opinion of value. Engineers, soil experts, surveyors, land planners, and environmental experts can assist with issues such as rezoning, future development, wetlands, and flood zones.

When it comes to appraisal experts, jurisdictions differ as to the specific qualifications of and the evidentiary basis for an expert's opinions. For example, many states require that the buyer and the seller of a comparable property be introduced into evidence for the expert to be able to rely on the comparable sale. At a minimum, an appraiser should be certified in the jurisdiction, provide a written engagement letter that clearly establishes that the appraiser has no interest in the outcome, and have a working knowledge of the applicable law and appraisal standards. For both condemnor and condemnee, an expert must have independence, impartiality and the basic qualifications to assist the trier of fact in understanding the complex field of appraisals. The appraiser advocates for his or her opinions, not the property, not the owner or condemnor, and not the outcome of the case. In general, it is best to hire an appraiser who testifies on both sides of the "v" to bolster his credibility, maintain independent opinions, or just avoid being painted as a gun for hire on cross examination.

At trial, the condemnor is limited to relying on experts to prove value. The expert's testimony at the right time is the crucial step for the condemnor at trial and should be reserved until he or she can give the greatest impact or support for the case. For the condemnee, however, an expert witness is not the only option or even the best option in every case. The property owner should always testify about the property itself not only because she has the most information to offer, but also because she can personalize the property for the jury. In some cases, the owner can and should also testify as to value. Some jurisdictions permit a property owner to give an opinion of value of the property being taken or damaged without qualifying as an expert. *See 7 Nichols on Eminent Domain § G1.07[1] (rev. 3d ed. 2007)*. The only requirement is that the owner be able to explain the basis for or the process of reaching her conclusion of value, including familiarity with the property, the market area, and values in the market. *See, e.g., City of Alma v. Morris, 180 Ga. App. 420, 349 S.E.2d 277 (1986)*.

The testimony of a property owner can have a greater impact on the jury given the correct circumstances. A lay witness may help break the battle of the experts because he or she may be the most qualified to testify in terms of personal knowledge of the property or the business or the home. The downside of course is the property owner risks appearing sentimental, unrealistic given market demands, or even downright greedy. A condemnor's professional and courteous cross examination of the owner that avoids beating up the witness while attacking his credibility can provide an effective comparison to the other side's highly qualified and impartial expert.

3. Demonstrative Exhibits

Demonstrative exhibits can be critical to winning a case because they can drive home a point or concept better than oral testimony alone. Juries tend to be visual. The best demonstrative exhibit is the property itself. If the judge will allow it, a site visit can be extremely useful, especially to show changes in access, visibility, grades, etc. Ongoing construction or physical changes to the property between the date of taking and the trial, however, may provide grounds for objection by either side.

If a property visit is not an option either legally or strategically, demonstrative exhibits should be used to fill the gap between seeing and hearing. It is easier for a jury to understand the concept if they can see and even touch a tangible item representation of it during the testimony. For example, if the highest and best use of vacant land is commercial development, an aerial photograph of surrounding developed property or a land development plan showing potential development helps the jury see the possibilities. Use of any one or a combination of demonstrative exhibits should include:

- Photographs of both the subject and the comparable properties;
- Engineering plans of the public project;
- Zoning maps showing current or future zoning;
- County or municipal land planning maps;
- Topographic maps;
- Aerial photographs before and after the project;
- Development overlays showing development potential;
- Comparable sales maps;
- Damage summaries or charts showing conclusions of value;
- Traffic count charts;
- Mitigation plans;
- Site or as-built surveys;
- Market studies showing relocation efforts (if a business is involved);
- Video of the property showing access in/out of and circulation within the property.

Aerial photographs are particularly useful because they place both the property and the taking in context. For example, before a road project, a Mercedes dealership had road grade direct access to the property and buildings with landscaped areas out front to display shiny cars. After the take, the business has indirect access requiring customers to go past the property to a side road and through an industrial area to the rear service area. A 30 foot retaining wall was installed where the driveway once stood:



Figure 1 Aerial of Mercedes dealership after taking and near completion of road project, introduced to show new circuitous indirect access through side road

Explaining the new circuitous route in the after condition would be extremely difficult if not impossible without the use of an aerial. With the aerial, a jury can see it and even imagine trying to find the property.

Likewise, photographs can demonstrate changes in visibility by putting the jury on the ground or in the position of someone accessing the property. Photos taken from the viewpoint of the driving public as it goes past the subject property are compelling and show the jury the feel of the 30 foot retaining wall:



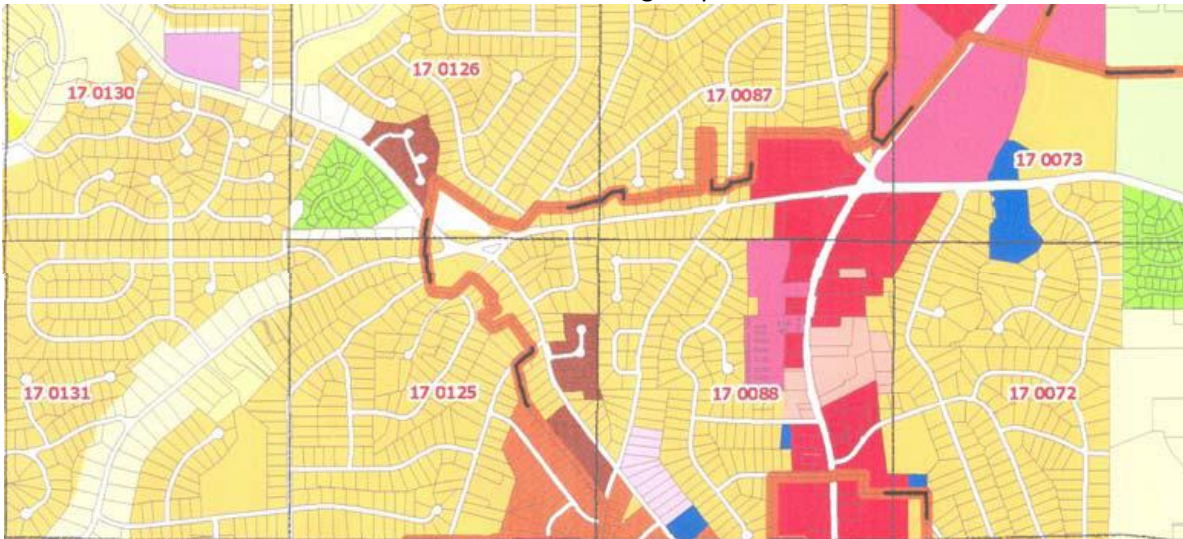
Figure 2 After view of Mercedes dealership from road showing 30 foot retaining wall introduced to show change in visibility and access



Figure 3 After view of Mercedes dealership from road showing client standing in front of 30 foot retaining wall, introduced to show change in visibility and access

Zoning and land planning maps are very useful to demonstrate that the proposed change is probable or possible given the nearby development trends:

Current Zoning Map



Legend

Zoning Districts

Adopted from Fulton County

- | | |
|---|--|
| <ul style="list-style-type: none"> R-1 Single Family Dwelling District R-2 Single Family Dwelling District R-2A Single Family Dwelling District R-3 Single Family Dwelling District R-3A Single Family Dwelling District R-4 Single Family Dwelling District R-4A Single Family Dwelling District R-5 Single Family Dwelling District R-5A Single Family Dwelling District R-6 Two Family Dwelling District A - Medium Density Apartment District A-L Apartment Limited Dwelling District A-1 Apartment Dwelling District A-O Apartment Office District | <ul style="list-style-type: none"> TR Townhouse Residential Districts O-I Office and Institutional District C-1 Community Business District C-2 Commercial District MIX Mixed Use District CUP Community Unit Plan District NUP Neighborhood Unit Plan District M-1 Light Industrial District M-2 Heavy Industrial District AG-1 Agricultural District Sandy Springs Overlay District 06 0311 Landlots Highways |
|---|--|

Figure 4 Zoning Map & Legend as of date of take introduced to demonstrate trend for commercial and higher density residential in support of probable zoning change and higher land values

In some cases, the proposed zoning and the current zoning may not comply with county or municipal future land planning, i.e. a mid-density residential zoning change conflicts with a future green space or park corridor. It can be a useful demonstration to the jury that the municipality has an interest in preventing the zoning change based on the land use map:

Future Land Use Zoning Map

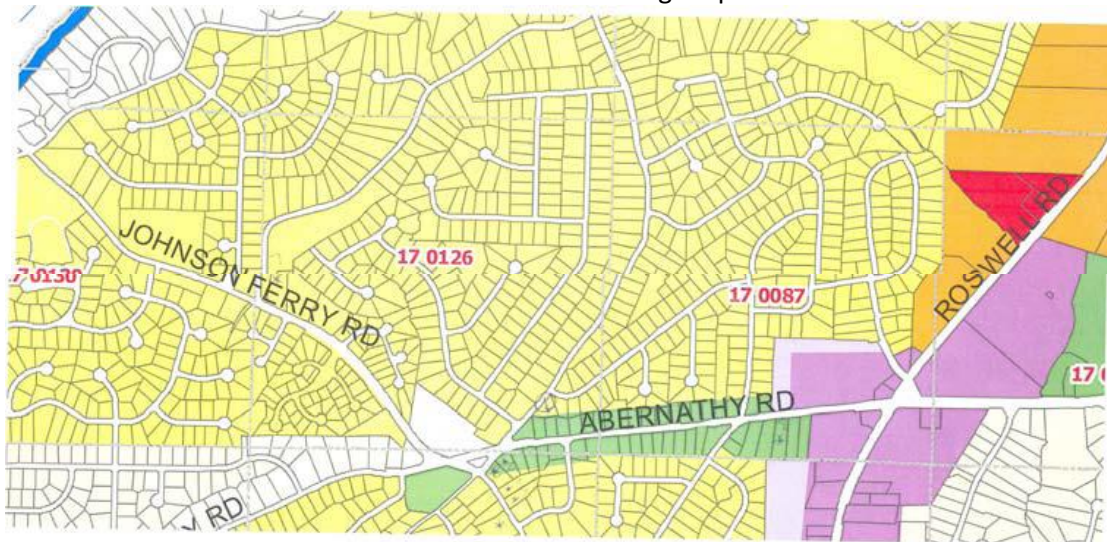


Figure 5 Future Land Use Map introduced to rebut testimony of city witness that proposed zoning change was improbable because city had interest in keeping zoning low and values low for future green space plan along Abernathy Road

To ensure admissibility, exhibits should depict the property, its conditions or the comparable as close to the date of taking as possible. If for example, construction is ongoing during trial, some jurisdictions disallow photographs because it is not the permanent state of the property and can be prejudicial to the condemnor. The rules of evidence in the jurisdiction will govern what can be shown on the property. As a general rule, demonstrative exhibits must be authenticated by a witness. It is not necessary that the witness be the one who prepared the exhibit. Rather, the witness must be able to identify the exhibit, state that it is an accurate representation of what they observed or what they are familiar with, and that it was prepared under his supervision or control. *See Fountain v. MARTA*, 249 S.E.2d 296 (Ga. App. 1978).

4. Dealing with Market Reality

Fair market value as of the date of valuation is the baseline measurement by which condemnation cases are governed. To state the obvious, a boom market benefits the property owner. The condemnor must take the property as it was on the date of taking and do its level best to poke holes in that market. Well what happens if the bottom of the market falls out just before the taking? Between the date of taking and the trial date? What if the drop is the worst recession in U.S. history caused by such abnormal factors as fraud? Should the property owner be subjected to conditions in such a market?

The condemnee should argue that the current economy is an anomaly and the conditions giving rise the current market are so unusual that the property owner should not be punished by and the government should not be allowed to benefit from an artificially depressed market. The jury should not be required to take into consideration the current market, but should assess the value as if today's market had not occurred. It is analogous to the project influence rule recognized in some jurisdictions – that any enhancement or depreciation in value caused by the

project for which property is condemned must be disregarded in determining fair market value. See e.g., *Williams v. City and County of Denver*, 363 P.2d 171, 174 (Colo. 1961). Thus, fair market value should be determined based upon the price that a willing buyer and willing seller would agree on without compulsion or impacts caused by

The argument of valuing property under more normal circumstances is not new in condemnation law. In a case dating back to 1873, *U.S. v. Inlots*, 2 Am. Law Rec. 577 (S.D. Ohio 1873), *aff'd* 91 U.S. 376, the court examined the unusual market conditions, finding that it would be unfair to subject the property owner to the depressed values. Thus, the court charged the jury that it should assess the property's value before the market had occurred. In *Howell v. State Highway Department*, 167 S.C. 217 (1932), the Supreme Court of South Carolina upheld the trial court's ruling that fair market value was defined as "a fair sale at normal times," and not the value during the Great Depression. In 1938, the Court of Appeals of New York in *In re Board of Water Supply of New York City*, 277 NY 452, found that the general rule of measuring compensation as of the date of taking must yield to exceptional circumstances. It further found that fair market value does not encompass panic value, auction value, speculative value or artificially depressed or inflated values. See also *D.R. Kornegay v. City of Richmond*, 41 S.E.2d 45 (Va. 1974) (finding just compensation is not measured by panic, but what is fair, economic, just and equitable value under normal circumstances). More recently, the appellate division of Louisiana held in *Vela v. Plaquemines Parish Gov't*, 729 So.2d 178 (La. App. 4th Cir. 1999), found no error in the trial court's ruling that that depressed economic conditions leading up to the taking were abnormal. The appellate court recognized, however, that such conditions may extend past the point of being abnormal, and that the determination for timing was a fact question.

5. Dealing with the bored, angry, cheap or the overly empathetic juror

This question ties into the earlier discussion in this paper debating jury versus bench trials. Given a choice between a jury trial and a bench trial, a property owner is better off presenting a case to a jury of twelve decision makers versus one in a black robe. Trial is the one shot that an owner has to receive compensation for a taking. A jury of ordinary citizens is more likely to infuse into its deliberations sympathy for the property owner, irritation or even anger at the idea of government takings, and understanding or personal experience with owning property, a business, a house, etc. A jury also can benefit the condemnor by punishing the property owner for overreaching, being greedy, or taking their tax dollars.

The key to engaging the jury is a theme that takes the facts testified to by the expert and turns it into a story that a jury will care about. The theme should tie into the demonstrative exhibits used throughout the trial. Presenting your case around a theme keeps the jurors engaged and compels them to care about your client's position.

For the condemnor, the case is about the constitution, or bringing a school or traffic relief to a much needed area. Provide the jury with a clear and concise explanation of what eminent domain is and what it is not. State in plain terms that there is no doubt the property owner is entitled to be compensated. However, that compensation must be reasonable and limited. Condemnation is not about taking your grandmother's house and giving it to Wal-Mart. Some practitioners may go as far as reminding the jury that this is an example of the constitution in action and how our democracy works. This type of theme is a recognition of the rights of the owner, but more importantly, it is an acknowledgement of the necessity of a public project. It is a subtle reminder that public projects are paid for by tax dollars and a government budget. This can help stymie the sympathetic or the angry juror.

For the property owner, it is important to personalize the property and the claims to the jury. The case is about the locally owned mom and pop store, or their grandmother's home, or land that has been in their family for generations. No one anticipated the taking, thus implying that it could happen to anyone of the jury members. The owner is only asking for what she is entitled to, i.e. more than the government estimates, but no more and no less. This particularly helps with the cheap or bored juror. There also can be the implication that the government has taken the owner's property, valued it too low and now criticizes the property or the way it was utilized. The property owner must acknowledge that the necessity of the project is not at issue. We all need roads, schools, bridges and clean water. But the government must pay just compensation and this is the owner's only day in court.