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EFFECTIVE *VOIR DIRE*, OPENING, AND CLOSING ARGUMENT FROM A PROPERTY OWNER'S AND CONDEMNOR'S PERSPECTIVE

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I. Introduction

The effective trial of a condemnation case requires all of the same skills as the trial of any case. Relevant to the present subject, however, is that one must know your opponent's case as well as your own in order to be able to present your case most persuasively. In short, the "property owner's" perspective and the "condemnor's perspective" are two sides of the same proverbial coin.

Through pre-trial preparation, discovery and negotiation, the disputed facts or law that causes any particular case to be one of the 5% that must be tried, rather than one of the 95% that is settled, are identified and known to each party. The trial then is the contest between opposing sides striving to persuade the chosen decision maker, i.e. jury, to their view of reality.

There are universal rules of good trial practice that apply to the trial of all cases, including condemnation cases, which are beyond the scope of this paper. But one cardinal rule that merits mention is the importance of a consistent theme that runs throughout your case and should be the foundation upon which all aspects of your case are built. A consistent theme will tie all components of your case together, including *voir dire*, opening, direct and cross examinations, and closing argument. In addition, it will allow you to take maximum advantage of "primacy, recency and frequency," the well-supported psychological finding that while jurors remember only a small percentage of what is said during a trial, they remember most that which is said first, last and most frequently.

An example of opposing thematic interests may be a property owner's desire to make the case about "more than just money," while the condemnor seeks to persuade the jury that the trial is an intellectual debate about nothing more than the market value of a particular piece of dirt as of a certain date in time.

Finally, as each of these issues has competing sides, each of them may be employed differently by different trial counsel. Just as there is no single description of an "ideal trial lawyer," there is no single "magic bullet" for assembling a condemnation case for either a property owner or condemnor. Each counsel must build the case to match not only the specific issues and evidence of the case, but also the strengths of counsel's personality and trial skills.

Some trial lawyers may be gregarious and aggressive; others may be calm and methodical. Both styles may be equally effective, as long as their case is assembled consistent with not only the evidence, but their unique personalities. Consequently, the ideas that that follow are for the consideration of thoughtful counsel. They are not intended as magic bullets to be followed blindly in every case from either perspective.

II. *Voir Dire*

Voir dire provides a good starting point for our discussion, not only because it is the first time potential jurors meet the parties and counsel, but because it varies widely across the country from jurisdiction to jurisdiction and, therefore, exposes the limitation of all suggestions. Some jurisdictions permit wide-ranging, attorney-conducted *voir dire*, while others provide limited court-conducted inquiry that barely serves to identify grossly inappropriate jurors. Thus, what you may be able to accomplish in *voir dire* is dependent on how *voir dire* is conducted in your particular jurisdiction.

But, regardless of how extensive your *voir dire* may be, counsel should seek to begin to persuade the jury by introducing the jurors to the theme and major elements of your case (primacy). In addition to beginning the persuasion process, counsel should seek to exclude the least receptive jurors and, if possible, identify and retain those that counsel believe may be most receptive to counsel's message. Thus, *voir dire* serves two basic purposes: (1) to influence to the extent possible the selection of the triers of fact; and (2) simultaneously start to argue your case to those triers of fact.

With respect to the first goal—influencing the selection of the jury—it must be recognized that counsel cannot "select" the jury. All counsel can do, hopefully, is identify and exclude those jurors counsel believes may be least receptive to counsel's presentation. Thus, the first step is to try to visualize "the ideal juror" and the characteristics of "a bad juror." And this is neither science, nor a reliable art. Every experienced trial attorney can tell a war story about the perceived "perfect juror" who turned out to be exactly the wrong juror for the particular case. Even professional "jury consultants" spend less of their time trying to identify or pick a "perfect juror" than working with counsel to develop a consistent and persuasive theme and trial presentation, which will be persuasive to a larger pool of persons generally.

Counsel should also consider to what extent he or she would like to identify potentially favorable jurors. In a perfect world, if a favorable juror is identified, counsel may choose to use the full number of peremptory challenges to "reach" the favorable juror. Of course, if a juror is clearly favorable to one party, it is likely that same juror may be recognized as unfavorable by the other and stricken for that reason. For this reason experienced counsel representing property owners may disagree on whether they really want to know whether the potential jurors are familiar with the *Kelo* case, or whether they have strong feelings about the authority of the government to take private property in the first instance. Counsel may reasonably choose to gamble on the percentages in that regard. For example, polls show that a large percentage of the public disagreed with the *Kelo* decision and the government's authority to take private property purely for "economic development," as opposed to eliminating blight. Counsel may choose to gamble that when the selected jurors discover that the owner's property in the case to be tried has been taken for mere economic development that the majority of the jurors will have a negative reaction to such information.

Of course, because the perspectives of the property owner and condemnor are two sides of the same coin, in a case involving a taking for economic development it is likely that the condemnor *will* want to identify those jurors who disagree that a government should have the authority to take property for such a purpose. Thus, the "rule" derived from the above example, if there is one, is that counsel may always want to identify unfavorable jurors—so they may strike them—but should seek to identify favorable jurors carefully and possibly obliquely, in order to avoid highlighting the juror for opposing counsel and losing them.

Even the above rule is premised on the idea that opposing counsel would agree on the description of "good" and "bad" jurors for each side of the case. That may not be the case. Counsel for the property owner may believe middle aged white males are "bad" jurors for an owner in a condemnation case, while the condemnor's counsel may believe that such jurors are "bad" for the condemning authority for a different reason. But, if opposing counsel do agree on what may be a "good," "bad," favorable," or "unfavorable" juror characteristic, they will likely seek to deny one to the other. In other words, if the owner wants jurors with real estate experience on the jury, the condemnor probably won't; if the owner wants to strike middle-aged white males, the condemnor probably won't; if the owner wants jurors employed in "social" professions that increase the likelihood of open mindedness (e.g. teachers, social workers, sales persons, etc.), the condemnor probably wants conservative business types (small business owners, bookkeepers, scientists, managers, etc.).

But because jury selection is such a guessing game, it is very possible that you may be able to openly seek to identify those jurors with characteristics you personally believe will favor your presentation and such identification may go entirely unnoticed by opposing counsel, because opposing counsel does not harbor the same preconceived assumptions as you do. So, with respect to *voir dire*, a thoughtful practitioner will consider: (1) what type of juror would be good for this type of case and why; (2) if such a juror was identified, is it likely that opposing counsel will recognize the juror as unfavorable and strike the juror: (3) is there a way, through questions or otherwise, to identify such potentially favorable jurors without highlighting them for opposing counsel; (4) what are the characteristics of a likely unfavorable juror and what questions may be asked to identify such jurors; (5) who are the "leaders" who may unduly influence other jurors; (6) do you think such a juror would be favorable or unfavorable to your case and do you want to take the risk in either event.

Of course, favorable juror characteristics may vary with the facts of the particular case, i.e. there is not one "ideal juror" for every case.

-- Real estate background (realtor, broker, property manager) may be good if you have a solid appraisal (better than the condemnor), which a real property background may help the juror recognize, but the same juror may be awful if your appraiser minimized costs and expenses and used an aggressive cap rate in valuing the property by the income approach.

-- Real estate development background may be good if the highest and best use is undisputed, but may be awful if the appraisal is based upon a highest and best use that will require rezoning. A juror familiar with all the obstacles that must be overcome or negotiated to actually get a land development plan approved would be susceptible to the condemnor's argument that the plan would not be approved, or the risk discount applied by the appraiser is too small.

Because counsel cannot either "choose" all the jurors they want, or strike all the jurors they don't want, in *voir dire* counsel should also seek to begin to influence all jurors who may sit in judgment. Condemnor's counsel may seek juror commitments to "follow the law" and "the court's instructions" while owner's counsel may seek similar commitments from the jurors to insure that the owner receives "full just compensation" for the "involuntary" taking of his valuable "private property." Condemnor's counsel may wish to begin persuading the jurors that they will be tasked to simply determine an objective fact—the value of the subject property, while owner's counsel may wish to empower the jury as protectors of the constitution and the owner's constitutional right to be paid full just compensation before the government can involuntarily take his property.

Counsel should consider using *voir dire* to begin exposing the jurors to the issues in the case: complete taking v. partial taking; severance damages, i.e. the owner is entitled to be compensated not only for the value of the property taken, but also the damages caused to the remainder; temporary and permanent easements; etc.

III. Opening Argument

The opening is counsel's first opportunity to present a full picture of the case from each perspective. Experienced counsel may disagree on whether the opening is an "argument" or merely a "statement" or roadmap to familiarize the jury with the evidence to be presented. But all counsel may agree that full advantage should be taken of "primacy, recency and frequency' to insure that all important elements of your case are presented clearly to the jury in opening.

Condemnor's counsel may seek to keep the issues objective (merely valuing a piece of dirt), while owner's counsel may wish to plant a flag on the moral high ground and explain to the jury how the owner has not been properly compensated and needs the jury to render justice. The strength of the owner's case may be enhanced by making the case about "more than just money." The juror's time is valuable and it should be made clear to them that they are needed for something important – to right a wrong, to insure the owner's constitutional right to full just compensation is protected, to keep the government honest, etc. And while generally it may be desirable for condemnor's counsel to keep the tone moderate and the subject restricted to merely the value of a piece of dirt, condemnor's counsel should not pass up the opportunity to claim the moral high ground for the government if the owner "over reaches" or seeks a windfall at the community's expense.

Regardless of the strategy and tone chosen to present your case, it should be consistent throughout the case beginning with *voir dire* and then fully developed in opening. The line between argument and mere statement is easily navigated. Consider:

Owner's Counsel: "My client's property is more valuable than the government contends because it is particularly suited to be rezoned and developed as ….."

Condemnor's Counsel: "Objection your Honor, argumentative."

Versus

Owner's Counsel: "*We will prove* that my client's property is more valuable than the government contends because it is particularly suited to be rezoned and developed as ….."

While the first statement may be objected to as argumentative and inappropriate for opening, by merely telling the jury that "the evidence will show…." or "we will prove…." counsel will avoid objection and still be able to present the full case in the most persuasive manner and language possible.

In contrast to owner's counsel's effort to make the case about "more than money" and that the owner is entitled to be treated fairly, condemnor's counsel should consider a theme built around the concept that this is an in rem, not an in personam action. The proceeding is about land, not people, and the courts have defined the measure of just compensation as fair market value. That provides an objective, not subjective, means to reach valuation. Then it is important to explain to the jury (in *voir dire* if you can to some small degree and certainly in opening and closing) that it is this objective means of determining value that makes the system fair. If the method were subjective, based upon personalities, then one landowner would be treated differently from another just because they might appear to be more likable, or because of any of a number of other subjective factors. The fair market valuation system based upon land and not persons helps insure that all citizens are treated the same. That is what fairness and justice require. While the jury might be inclined to be sympathetic for some personal reasons, they are honor bound to ignore such sympathy and measure just compensation based upon fair market value principles. When jurors understand WHY sympathy cannot be a factor, and are reminded of that, they really do try, at least, to follow the law and limit their consideration to fair market value.

Condemnor's counsel should consider reminding the jury that the objective fair market valuation method requires the application of some legal fictions—some things they have to assume which may not be true. For instance, they have to assume property is for sale by a willing seller, they have to assume the condemnor is a willing buyer with no unusual need, they have to assume a date of valuation in the past—again these assumptions are for the purpose of applying the fair market valuation method (as opposed to a subjective award based on sympathy, anger or prejudice). This is not just some arbitrary game with strange rules, there is a sound reason behind the rules—fair market valuation.

Condemnor's counsel should be a guide for the jury—and a fair one. Help jurors understand technical terms and remember even simple concepts—like "easement" may be technical to them. Jurors appreciate this and their ears prick up when those terms you have defined first come up in the case. Make full use of cardinal rules of persuasion to make your case as clear, memorable and persuasive as possible right from the outset: humanize the case, tell a story, use exhibits, simplify complex concepts, etc.

In summary, the opening is counsel's opportunity to present the case in the best possible light and convince the jury that if you prove what you promise to prove that the only just and fair inquisition is the amount you request.

IV. Closing Argument

Closing argument is argument, but it should not be dictatorial. The jurors will have to debate and negotiate amongst themselves to reach a verdict. The strongest advocate for you in the jury room will *not* be a jury who argues: "The property owner thinks his property is worth X because Y" but a juror who argues that "*I* think the property is worth X because Y." The goal from the outset of the trial, beginning in *voir dire*, is to educate the jury and get them to adopt

your view of the case as their own. Then they will be arguing *their* beliefs not *your* beliefs in the jury room.

Thus, counsel should use closing argument, not to laboriously go through all the evidence chronologically, but to persuasively arm the jurors to debate the merits in the jury room. The critical facts and issues that undergird your central theme should be covered (recency). Highlight the key instructions and key exhibits that support the critical pillars of your case and show how the law, fairness and common sense all converge to support your position.

Reprise (frequency) the big issues and main theme of your case. Reiterate the importance of full just compensation.

"Half a cup of justice is half a cup of injustice."
Alice in Wonderland, Lewis Carroll

From the owner's perspective, maintain the emotional and moral righteousness of your case, i.e. remind the jurors why the case is about "more than just money." And use the opportunity to speak with the jury to insure that your case is clear, memorable and persuasive, so they may argue it clearly and persuasively when they retire. Finally, but certainly not least, counsel for the property owner should never fail to tell the jury what their inquisition should be! Preferably, the desired inquisition should have been front and center before the jury throughout the trial in an exhibit. If you are hesitant, or embarrassed, to say the amount of the inquisition you want, it is extremely unlikely that the jury will award it.