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DIRECT EXAMINATION OF A VALUATION WITNESS

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Introduction

It is evident from the topics of this seminar that the effective presentation of an eminent domain case requires both the substantive knowledge of eminent domain law and well-honed trial skills. And the effective presentation of a valuation witness is no exception. There are legions of books and articles written on cross-examination and closing arguments, as those subjects and activities are the glorified aspects of trial work. How to conduct an effective direct examination is more often overlooked than studied and understood. But to win an eminent domain trial requires that either the owner or condemnor prove the property's value, otherwise the most likely inquisition will be the all too frequent compromise verdict. The valuation witness, which in most cases is an expert appraiser, is a critical witness in that effort.

Of course, the effective direct examination of a valuation witness – just like all aspects of trial work – begins long before the trial starts. It is during the pretrial phase that the foundation for an effective presentation of valuation testimony at trial is laid. This preparation begins with the first analysis of the case, and continues through the identification of issues, the selection of the valuation expert, working with the appraiser in the analysis of the case and preparation of his or her report, discovery and deposition of the witness, preparation of demonstrative exhibits, and finally preparing the witness to testify at trial. Once in court, the attorney's trial skills are used to effectively examine the valuation witness and argue the case through that witness to the jury.

Each of these subjects (selection of an expert appraiser, working with the appraiser through the preparation of his or her report, discovery and preparation for trial, etc.) qualify for separate seminar topics of their own. So would, quite obviously, the trial skills necessary to generally conduct an effective direct examination. This paper must necessarily be limited to a discussion of the melding of trial skills and the unique aspects of a valuation witness to effectively conduct a direct examination of such a witness in an eminent domain trial.

I. The Goal of Direct Examination.

It is important to understand at the outset that the goal of any direct examination is NOT to simply elicit information from the witness to permit the attorney to ride to the rescue and “wrap it all up” for the jury in closing argument. If the jury is not already on your side before you stand up to give your closing, chances are good that the case is already lost. Rather, the purpose of the examination of every witness in a trial, both direct and cross examinations, as well as opening argument (not opening statement), jury instructions and closing argument is for the trial attorney to argue his or her case to the jury. Understanding this fundamental premise sets the proper perspective and foundation for an effective direct examination.

If the attorney understands that every witness, even an expert witness, is a vehicle through which the attorney must argue the case to the jury, counsel will not relinquish responsibility to the witness to carry the water. Rather, the attorney will retain control of the witness and guide the witness through the subject matter in order to make the points the attorney needs to convincingly make to win.

With this perspective the trial attorney will understand that the last thing he or she wants the trial to be is “a battle of the experts.” Every condemnation trial is a battle over value. And most often the primary witnesses in an eminent domain case on the value issue are the opposing appraisers. But, as a trial attorney, you do not want the jury sitting back and judging which appraiser is better or more qualified at the end of the case. If this happens the jury has not been co-opted and brought over to your side, which should be your goal. If the direct examination of your appraiser and the cross-examination of the opposing appraiser go as planned, the jurors themselves should already hold an opinion of what the subject property’s value is before the attorneys deliver their closing arguments. And, if the jurors *themselves* believe that your appraiser’s opinion of value is accurate, if in other words your appraiser’s opinion of value just happens to be also what the jurors believe the value to be, then your opposing counsel in closing will not merely be trying to convince the jurors that your appraiser, i.e. a third-party witness, is wrong, but he or she will be trying to convince the jurors themselves that *their* hard-felt opinion of value is wrong. Good luck with that.

Thus, the goal of the direct examination of a valuation witness at trial is to convince the jurors of the value of the property. If effective and successful, the jurors will be strongly inclined to your opinion of value when you complete your direct examination. This is accomplished by making sure the direct testimony is clear, memorable, credible, and resistant to cross-examination. Further, it is important to remember the basics of trial presentation, including the rules of primacy, frequency and recency, i.e. that jurors remember that which they hear first, last and most frequent.

II. Attorney Preparation.

It is axiomatic that in order to conduct an effective, as opposed to elementary, direct examination, the attorney must be conversant in and knowledgeable of the subject

matter. If an attorney tries to guide an expert witness through testimony of subject matter about which the attorney is ignorant the attorney will not be able to do much more than ask very general questions and hope the witness can provide helpful answers. If you are going to try an eminent domain case you should learn the subject matter. An eminent domain trial attorney's well-read library should have on its shelves the "bibles" of eminent domain and condemnation litigation, including, Nichols on Eminent Domain, The Appraisal of Real Estate, Real Estate Value in Litigation, Uniform Standards of Professional Appraisal Practice (USPAP), as well as property-specific publications on topics relevant to your particular cases. For example, the Appraisal Institute publishes books for appraisers discussing appraisal procedures and techniques, as well as how to appraise almost every type of property, for example hotels, golf courses, distressed commercial real estate, shopping centers, senior housing, health care facilities, rural property, industrial property, conservation easements, apartments, condominiums, and recreational vehicle parks.¹ (See exhibit 1 at the end of this article.) The effectiveness of any examination will be enhanced with a thorough understanding of the subject matter of the testimony. Such a knowledge base will permit the attorney to conduct a free-flowing and conversational examination.

In addition to understanding the issues impacting the value of the particular property at issue, legal issues may arise during the course of any case requiring additional research and support. For example, attached as exhibits 2 and 3 is a sample objection and response to a particular methodology used by an appraiser to reflect adjustments to comparable properties in an appraisal report. The resolution of this particular issue depended upon both appraisal standards and the law applicable to expert testimony generally.

III. The Subject Matter of Direct Examination.

The subject matter of the direct examination of a valuation witness should cover:

- The expert's qualifications;
- A description of the appraisal process;
- A description of the specific work the appraiser undertook to value the subject property;
- A description of the property at issue;
- The highest and best use of the property;
- A discussion and explanation of each approach to value used by the appraiser (e.g. income approach, comparable sales approach, cost approach); and

¹ Of course, many appraisers specialize in appraising particular types of property. This should be a consideration in selecting an appraiser at the outset.

- A final reconciliation of value.

As each subject area is covered, the opportunity should be taken to educate the jury and convince them of the merits of your position. As we consider these topic areas, it becomes apparent how great an opportunity exists to educate and how easily the opportunity may be squandered.

The Expert's Qualifications.

Although, as stated above, we do not want the jury at the end of trial to be left deciding which appraiser to rely upon in reaching their judgment, convincing the jury that your valuation witness is the most credible, professional, diligent and objective of the two is a critical component of convincing the jurors themselves of the property's market value. In short, conveying the professionalism and reliability of your valuation expert through the expert's testimony is a step on the journey, not the end. But it is the first and a most critical step.

The admissibility of expert appraisal testimony in a condemnation case is generally accepted. Most States provide certifications for appraisers. In addition, there are recognized professional associations that further credential and self-regulate the industry. Thus, a well qualified and legally certified appraiser should be able to qualify as an expert before most courts. But the field of appraising real estate is not so well known that the validity of appraisal principles and the rigor of a quality appraisal are well known to most jurors. Consequently, the first object of any direct examination of a valuation expert in an eminent domain case is to introduce the witness to the jury and convince the jury of the witness' competency, diligence, objectivity and credibility. In short, you should make sure the jury understands that your expert is an expert, is recognized by the government, the court and his or her peers as an expert, and that the witness did a quality job (was diligent) and objectively appraised the market value of the property at issue.

It should go then without comment that an attorney should never accept a stipulation to the witness' expertise. Rather, the attorney should fully communicate the witness' expertise through testimony. Here, skill will be required to "bring the witness' expertise to life" without causing the witness to appear boastful, or putting the jury to sleep. Contrast two examples of direct testimony on this subcategory of a direct examination.

Q: Please tell us your name.

A: John Expert.

Q: What is your profession?

A: I am a real estate appraiser.

Q: Will you please describe your professional experience to the jury.

A: I have been certified by the State as an appraiser since 1983 and I have been a practicing appraiser since that time.

Q: Do you have any professional designations?

A: Yes, I have the designation of MAI by the Appraisal Institute which is a professional association.

Q: Have you ever testified as an expert before?
A: Yes, I have been accepted as an expert in many different courts and testified in many different cases as an expert.
Q: Your honor, I would offer Mr. Expert as an expert in the field of real estate appraisal.
Op. Atty: No objection.
Court: He will be so accepted. You may continue.

Contrast the above, which is a not-too shortened example of many expert qualification colloquies, with the following sample voir dire of the same valuation expert.

Q: Please tell us your name.
A: John Expert.
Q: What is your profession?
A: I am a real estate appraiser.
Q: How long have you been engaged in that occupation?
A: For over 27 years now. I first started in the practice in 1981.
Q: Please explain to us what the profession of real estate appraising entails.
A: The accurate appraisal of real estate involves a study of the market, knowledge of all the characteristics of a property and how those characteristics affect its marketability, as well as the laws and regulations concerning land use, because each of those factors will impact a property's market value.
Q: What is your educational background?
A: I received my undergraduate degree from the University of Maryland in 1979.
Q: What field was your undergraduate degree in?
A: Business Administration with a minor in Environmental Studies.
Q: Did you work in that field before pursuing your profession in real estate?
A: I did. I worked for a Land Planning firm for several years and during that time I became more interested in the valuation and value of the various properties the firm was engaged to study. Consequently, I began the formal study of real estate appraisal and have been engaged in this specific field full-time since 1981.
Q: Is the profession licensed by any government body?
A: Yes, the State regulates, certifies and licenses appraisers and one must be licensed in order to practice in the field without supervision by a licensed appraiser.
Q: What is entailed in achieving State certification and license as a professional real estate appraiser?
A: (Details, not just "education and pass test")
Q: When did you become certified and licensed by the State?
A: 1983.
Q: How did you practice in the field between 1981 when you started and 1983 when you achieved your professional certification and license?

A: Initially, I apprenticed with Harold Expert, who was one of the preeminent appraisers in this area at the time. Mr. Expert was my mentor in all aspects of the profession and he guided me through my continuing education and certification, at which time I continued with the firm as a principle.

Q: What is the nature of your firm?

A: The name of our firm is Great Appraisers. Our office is located in Columbia. We have 17 full-time, certified appraisers on staff. Our appraisers have expertise in appraising almost every type and nature of real property, except high volume residential real estate appraisals.

Q: What types of clients does your firm represent.

A: We represent individual owners, banks, investment firms, partnerships and other entities that own property. We have conducted appraisals for estates, as well as governments and condemning authorities.

Q: Let me direct your attention again to the State certification and licensing process, does the State require any continuing professional education in order to retain your license?

A:
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Q: Are there any professional organizations or associations in the field?

A: Yes, there are several. I am an MAI in the Appraisal Institute

Q: What is the nature and purpose of the Appraisal Institute?

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Q: How long have you been a member?

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Q: Have you been active in the association?

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Q: Does the Appraisal Institute provide continuing professional education and recognize advanced study in the field?

A:
Q: What additional courses of study have you taken through the Appraisal Institute?

A: I completed the institute's course of study leading to the MAI designation back in 1987 and received that designation that year, which is the Institute's highest honor and is given for

Q: What has been the nature of your involvement in the Appraisal Institute since you achieved the MAI designation over 20 years ago?

A: I have continued to take courses on various appraisal issues and I have been an instructor for the Appraisal Institute for the last 15 years and have taught numerous appraisal courses for the Institute.

Q: Can you describe some of the courses you have taught?

A:
Q: In addition to your study and membership and participation in the Appraisal Institute, and your teaching of appraisal principles for the last 12 years, what has been the nature of your personal professional practice?

- A:
- Q: Have you appraised any properties that may be familiar to the members of the jury and, if so, which properties and for who?
- A:
- Q: What was the reason that famous property on Middle Lane needed to be appraised?
- A:
- Q: Have you ever been retained to appraise property by the condemnor in this case?
- A: Many times.
- Q: Have you ever worked as the appraiser in a case handled by Mr. Condemnor attorney?
- A: Yes, on several occasions.
- Q: Have you ever been offered as an expert in real estate appraisal in any court?
- A: Yes, on many occasions over many, many years concerning many different types of properties and many different types of cases.
- Q: have you ever been offered as an expert to a court by Mr. Condemnor attorney in cases you worked for him?
- A: Yes,
- Q: What other types of cases have you been retained to value real property in where you testified as an expert in court?
- A:
- Q: Has your expertise ever been successfully challenged in any case?
- A:
- Q: Has any court ever not accepted you as an expert in the appraisal of real property when you have been offered as such?
- A: No.
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The above example is an incomplete illustration of the wide scope of an effective qualification of a valuation expert. If the questioning is handled skillfully the testimony will not be boring, nor will the witness impress the jury as boastful. Rather, the jury will be overwhelmed by the obvious professionalism and depth of experience of the witness. The contrast between the two above examples highlights the endless possibilities that exist in introducing your expert valuation witness to the jury as a real live, credible and respected professional, as opposed to a hired drone. Trial counsel should not short-change this opportunity. The first goal of any direct examination is to introduce the witness to the jury who, after all, were chosen to be on the jury because they did not know anybody involved in the case. Assessing the professionalism, quality, diligence and credibility of a witness is the first step for any juror in assessing the reliability of that witness' testimony – and adopting the witness' opinions as their own.

The appraisal process.

After qualifying the valuation witness as an expert in the field and introducing him to the jury as someone they should trust and rely upon, you should begin the process of educating the jury on the nature of real estate appraising, so they may begin to form their own opinions about the quality of your witness' work ethic, thoroughness and credibility.

Q: Mr. Expert, let me direct your attention back to your earlier comment concerning what the profession of appraising real property entails and ask if you may explain to us what the process of appraising any particular piece of property requires.

A: Certainly. As you know every piece of real property is different and unique. Consequently, the market value of any piece of real property will depend on the unique characteristics of the property, its location, its zoning, its geography, its potential yield and many other factors....

Q: You mentioned that location is important in a property's value. Why is that so?

A:

Q: What is the impact of zoning on a property's value?

A:

This portion of the testimony should address every characteristic of the subject property that the attorney knows will be relevant to determining its market value. By addressing each element initially with respect to the appraisal of real property generally, you will be able to capitalize on the importance of frequency to a jury by reviewing each of these critical characteristics again later in the witness' direct testimony with respect to the specific property at issue in the case. For example:

Q: Mr. Expert, you mentioned earlier in your testimony that a property's location is an important factor to consider in determining the market value of that property. Please explain to us how the location of Mr. and Mrs. Condemnee's property impacts its value.

A:

Q: You also explained that a property's value is dependent on what the owner may do with the property and that that is controlled by various zoning and land use regulations. What is the zoning of Mr. and Mrs. Condemnee's property and how does that affect its value?

A:

Through this process the jury has been slowly and effectively introduced to the witness as an eminent professional, experienced in the field, and fully knowledgeable of the subject matter about which he is testifying. In short, the jury will recognize that the witness *should* be able to determine what the value of the subject property is and tell them. The only question remaining for the jurors to determine is whether this particular

witness is objective and telling them the truth, or shading his or her testimony to help the attorney who hired the witness. You can assuage this lingering concern by demonstrating that the witness “did his homework on this particular property” and that he applied the general principles affecting real property values fairly and objectively.

The Specific Work Undertaken by the Appraiser in the Subject Case.

After you have fully introduced the witness to the jury and then explained the appraisal process and the nature of the work that must be done to competently and accurately determine the market value of a particular piece of real property, you next should proceed to demonstrate the diligence and competence of your witness by walking the jury through, in detail, all of the work that the witness undertook in determining the market value of Mr. and Mrs. Condemnee’s property.

Again, the trial skill of repeating critical information for the jury in a different context (so it does not seem like mere repeating for repetition’s sake) is important. In addition to having your valuation witness repeat critical information so it is not missed by the jury, many of the same critical factors should have been discussed by other witnesses. For example, a Land Planner may have testified earlier in the trial and discussed the importance of zoning and geography with respect to the subject property and why the subject property was particularly suited for the development proposed by the Land Planner upon which the appraiser relied. Thus, a skillful attorney will honor the rule of “primacy, frequency and recency” and make sure that critical information is presented to the jury early (in opening), frequently (by every witness and repeatedly by the same witness) and recently (in closing). At the end of a well-trying case there should not be any concern that the jury slept through or simply missed information that is critical to your case.

The Particular Characteristics of the Subject Property.

After the witness has discussed everything that he did to perform his assignment and accurately appraise the market value of the property, you should have the witness discuss the subject property in detail. This is *another* opportunity for the attorney to emphasize and highlight the critical characteristics of the subject property that bear on its market value. And here, again, detail is important.

Q: Mr. Expert, will you please describe Mr. and Mrs. Condemnee’s property for us.

A: Sure. This subject land is at grade with Old Gunpowder Road on which it has 400 ft. of frontage. The topography of this land is fairly level and it contained more than 80 mature Oak trees. The improvements to the land consisted of a detached dwelling on Parcel 18, a detached dwelling, plus a freestanding garage on Parcel 19 and no improvements on Parcel 73. Subject Parcels 18 and 19 are each connected to Old Gunpowder Road by curb cuts with gravel driveways. Necessary utilities are available to the subject to include public sewer/water, gas and electricity. The two subject

dwelling are reportedly connected to public water and electricity, while gas and public sewer are not connected with each dwelling utilizing its own septic system.

The above example is a description of property taken from an actual written appraisal. Often an expert is asked to describe the subject property at trial and in response will testify similarly to the above, i.e. as the description is written in his or her report. Consider how much of this information will likely be missed or quickly forgotten by a jury. What are the critical characteristics of this property that the jury must know to understand the basis of the expert's opinion? Assume for purposes of discussion that the critical property characteristics upon which the appraiser relies in supporting his or her opinion of value include: (1) the property's location; (2) its level topography; (3) its long road frontage; (4) its large, mature White Oak trees; and (5) the access to utilities. How likely is it that the jury will remember these characteristics if they are delivered to them as set forth above?

As discussed above, the way to make sure critical information is not missed by the jury is to break it down into "bite-sized" morsels that may be easily absorbed. And then after you have elicited all of the details concerning the property through testimony, you may go over the details again through the use of a demonstrative exhibits such as photographs or maps, in order to repeat (frequency) this critical information and make sure it is not overlooked, forgotten or simply missed by the jury.

Q: Mr. Expert, will you please describe Mr. and Mrs. Condemnee's property for us.

A: Sure. This property consists of 3 adjacent parcels totaling 8-acres in size. The property is located on Old Gunpowder Road in the eastern part of the County, just east of Route 29.

Q: Are there any improvements on the property at the present time?

A: Yes, the property is presently improved with two small single-family homes – one on each of the two larger parcels. But the present use is not the property's highest and best use, because it is particularly suited to be redeveloped with as many as 9 single-family lots, instead of just the two structures that present exist.

Q: Before we discuss highest and best use and how that affects this property and its market value, can you describe for us what kind of road Old Gunpowder Road is for those of us who are not familiar with it?

A: Old Gunpowder Road is a 2-lane secondary road that runs north-south between Rt. 198 to the north and Rt. 120 to the south. It runs parallel to Rt. 29 to the west, which is a major commercial thoroughfare and Interstate 95 to the east, which of course connects Baltimore and Washington, D.C. This location, of course, is very convenient to both Baltimore and Washington and the commercial area along Rt. 29 just a couple of miles to the west. At the same time, because this property is located on a secondary road, the traffic is substantially less than on the nearby primary roads and

this makes the subject property very appropriate for residential development.

Q: Let me show you what has been marked as Exhibit 11 and ask you to identify it.

A: This is a large map showing the location of the subject property and the surrounding neighborhoods and roadways.

Q: Your Honor, I move Exhibit 11 into evidence.

Ct.: It is received.

Q: Are there any other residential developments in the area?

A: Yes. Directly across the street is the new Golf Course Estates subdivision, which is a single-family, residential development of 175 homes built on a golf course layout. Those homes are presently selling for approximately \$1,000,000.

Q: You mentioned that Mr. and Mrs. Condemnee's property is particularly suited for residential development [echoing critical information]. Is there anything else about the property other than its location across the street from a new high-end, golf course residential development [linking again] that leads you to say this?

A: Yes. There are several other characteristics of the subject property that would make it particularly suited for single-family residential development and thus desirable to residential developers.

Q: Can you explain what these characteristics are and why a residential developer would find them of particular value.

A: Sure. First, the property is wooded with approximately 80 fully mature White Oak trees. The presence of these specimen trees would enhance the value of any new single-family lots as contrasted with the normal clear-cut residential subdivisions with newly planted 6' trees that will take decades to grow to full maturity. Such wooded lots demand a premium in market.

Q: Can you give us any examples of such subdivisions built around mature trees and the value of such lots as compared with clear-cut lots?

A: Absolutely.

Q: Are there any other characteristics other than its location and the presence of mature White Oak trees. [note the linking and echoing of critical information]

A: Yes, the subject property is fairly level. It has over 400' of frontage on Old Gunpowder Road and it has necessary utilities available.

Q: Please explain to us why these characteristics are beneficial or favored by residential developers and add to the property's market value.

A:

[Now let's repeat the testimony using demonstrative exhibits.]

Q: Mr. Expert, let me show you what has been marked as Mr. and Mrs. Condemnee's Exhibit no. 12 and ask you if you can identify this photograph.

- A: Yes. This photograph is a photograph of Mr. and Mrs. Condemnee's property that I took on October 13th of last year when I inspected the property.
- Q: Does this photograph fairly and accurately depict Mr. and Mrs. Condemnee's property when you inspected it?
- A: Yes.
- Q: Your Honor, I move Exhibit no. 12 into evidence.
- Ct.: It will be admitted.
- Q: Mr. Expert, does this photograph reflect any of the characteristics that you have testified make the subject property particularly suitable for residential development?
- A: Yes. You will note
- Q: Your Honor, may I publish the photograph to the jury so the jurors may follow Mr. expert's testimony on this point?
- Ct.: Of course.
- Q: Please continue and show the jury what you mean when you testified that Mr. and Mrs. Condemnee's property was suitable for residential development.
- A: (Showing the jury the large photograph) You can see here in the photograph many of the large White Oak trees I mentioned. In fact, since this photograph was taken in October the leaves of the trees are turning color and

Note how an attorney may emphasize whatever may be the particular critical characteristics or issues in the case by controlling the witness through skillful questioning. It is the trial attorney's job to argue the case through each witness. The attorney should not abdicate this responsibility and be satisfied with boring and forgettable, narrative testimony as first set forth above.

Each of the remaining subject areas for a valuation witness' testimony (highest and best use, discussion and explanation of each valuation method applied, and a final reconciliation of value) provides a skillful trial attorney with additional opportunities to emphasize and discuss the critical factors enhancing the value of the subject property. For example, each adjustment to a comparable sale property provides the attorney and witness the opportunity not only to emphasize critical factors enhancing the value of the subject property, but also an opportunity to bolster the expert's credibility by demonstrating that the expert made both negative and positive adjustments and thoroughly considered every relevant factor, i.e. the witness was diligent, professional and objective. The attorney should take the time necessary to fully address each subject area and not rush through the testimony or allow it to be presented in a summary fashion.

Again, the importance of each comparable may be discussed more than once by reviewing the comparable in detail with the witness first, then reviewing the critical factors again through the use of demonstrative exhibits to so the jury can "see" the evidence, as well as "hear" it.

As demonstrated above, not only does each new subject area allow for discussion and emphasis of each critical factor, but through skillful questioning and the use of demonstrative exhibits the attorney may control how often each factor is mentioned by each witness. By narrowing the questions to elicit more detail an attorney may stay on a critical subject for as long as it is necessary to make sure the point is understood by the jury. In addition, the use of demonstrative exhibits not only permits the repetition of important facts, but they make the testimony memorable as well by involving a second sense (sight). Once the jurors believe *they know* the value of the property, it will be nigh impossible for opposing counsel to dislodge them from *their* opinion.

IV. Making Testimony Resistant to Cross-Examination.

The process demonstrated above of using the rule of primacy, frequency, and recency, as well as skillful questioning to insure that each critical factor important to your case is heard and understood by the jurors is the best way to make your witness' direct testimony resistant to cross-examination. By bringing the jury along slowly and thoroughly through each step of the process, the concluding valuation will become theirs as much as your expert's. Then, having adopted as reasonable, if not downright irrefutable, your witness' valuation of the property as their own, the jury will be resistant to "changing their minds" and they will not be easily persuaded that your appraiser erred.

This opinion, of course, flies in the face of courts' admonition to jurors to "keep an open mind" and not decide the case until they have heard all the evidence and closing arguments and the court's instructions, and other such blather. But all trial attorneys know that "you cannot un-ring the bell." And many jury studies have confirmed that the vast majority of jurors hold strong opinions about a case by the end of opening arguments, which view then filters all the testimony they hear thereafter. In light of this scientific and psychological evidence, the importance of bringing the jurors along with you through the entire case and convincing the jurors that they know the value of the property, as opposed to the juror having to choose between two competing experts, is critical to the successful trial of a condemnation case.

But there is another important factor in making sure the jurors don't abandon your view of the case upon cross-examination. And that is to do everything possible to make sure opposing counsel cannot "jar" the jury and plant doubt in their minds by undermining your witness' credibility on cross-examination. This can only be done by carefully analyzing and preparing your case such that you can anticipate the attacks to come on cross-examination and blunt the attacks by addressing those subject areas on direct. The worst thing a trial attorney may do is try the case "like an ostrich" and hope that opposing counsel simply fails to ask your appraiser any difficult questions.

Opposing counsel must have some argument against your asserted valuation of the property, or the case would have settled without trial. You should know what that argument is and have a response. Whatever the response, it will be more likely accepted by the jury if it is discussed up front (in opening) and during your witnesses' direct testimony, than if it hits them as a surprise in cross-examination, or you "save up" your

counter argument for closing. Whatever your opposing argument may be, present it yourself and control how it is presented by addressing the issue during your witness' direct testimony. Then, opposing counsel's address of the same issue will seem like "old news" and have less adverse impact.

Counsel should also make sure that the witness knows he is not at the mercy of opposing counsel on cross-examination. He need not endure such heavy handedness as "answer just yes or no." There is no rule of evidence or procedure that requires a witness on cross-examination to "answer just yes or no" if such an answer is not accurate. The witness should not argue with opposing counsel (arguing damages credibility). But the witness may stand up for himself and explain that a simple yes or no answer would not be accurate. If the attorney or court insists that the witness answer yes or no without embellishment, the witness may reply that such an answer would be inconsistent with the oath, i.e. a simple yes or no would not be truthful. The issue will probably end at that point. But the witness should not lose the credibility he or she gains in such a colloquy by rambling on unresponsive to the original question. Rather, the witness should give a short and concise explanation why a simple yes or no would leave a false impression and stop.

V. Miscellaneous Suggestions.

Tone of Expert's Testimony.

The goal of direct testimony is to have your witness impress the jury as professional, diligent, credible, objective and reliable. A braggart is rarely so perceived. Therefore, the tone of the direct examination of a valuation expert should be like a conversation between a knowledgeable but humble expert (the witness) and an intelligent adult student (the attorney asking questions for the jurors). This, again, highlights the importance of the attorney controlling the testimony through skillful questioning. Abdicating responsibility and "turning the expert loose to educate the jury through narrative testimony" rarely works. Although, many experts believe that is the best way for them to testify – they know more than counsel. You are the attorney responsible for trial. If you lose, you will get the blame not the appraiser. Take responsibility for the outcome. Control the dialogue and testimony and present it to the jury as you know it should be presented: respectful, not condescending; thorough, not superficial; professional, not sloppy.

Use Examples to Illustrate Complex Principles.

Valuation testimony can contain complicated valuation principles that may not be readily understood by all jurors. The attorney and witness should be careful to explain such concepts with easily understood examples that the jurors will likely recognize in their own life. For example, capitalization rates and how they are derived and why they vary depending on the property are difficult concepts for most people to understand, especially through the medium of trial testimony. But most people appreciate the value of interest and the principle that investors who take more risk will expect a greater return if the risk proves out. Comparing the rate of return an investor may demand before

investing in a rundown building in a deteriorating neighborhood, as opposed to an investor investing in a high quality commercial building with a long-term lease to the government is an easily understood explanation of the relationship between rates of return and perceived risk. Likewise, the difference in risk between investing in treasury bills and junk bonds and the different returns an investor receives on such investments is readily understood. Counsel and the expert witness should discuss and develop such simple and understandable ways to convey complex concepts during the course of direct testimony. The attorney may then use the same questioning skills to repeat critical facts to make sure the concepts are well understood before the direct testimony is concluded.

Conclusion

Effective direct examination is an often overlooked skill. But an effective direct examination of the valuation expert is the meat of an eminent domain trial. An effective direct examination of a valuation expert will bring the jury along with counsel and the witness and help the jury understand and accept the reasonableness of every building block of your case. At the conclusion of an effective direct examination the juror should feel as if he or she knows the value of the subject property and why it has that value. In short, an effective direct examination will lead the jury to believe the witness' opinion of value is not an "opinion," but the natural result of a fair consideration of all relevant factors. If anyone disagrees with the valuation, that person must not be fully knowledgeable about the property. If counsel can succeed in getting the jury to believe the asserted value is what they (the jury) believes it is it will be difficult for opposing counsel to dislodge the jurors from their own opinion.

To accomplish this goal requires the skillful application of both trial skills and knowledge of the substantive areas of valuation of real property, as well as the eminent domain principles at issue. There is no substitute for knowledge, skill and hard work.