Opening Statements In Eminent Domain Cases

Brandee Caswell, a partner with Faegre Baker Daniels in Denver, litigates complex and high value real estate-related matters. From real estate development and finance disputes in excess of $75 million to energy corridor projects over 100 miles long, Brandee brings a rare combination of litigation and project management experience to clients of Faegre Baker Daniels. She is an experienced first-chair trial lawyer who has successfully litigated numerous cases in both state and federal court. As a lead member of Faegre Baker Daniels' Corridor Acquisition Practice, she has considerable expertise in the acquisition and protection of easements and rights-of-way for utilities and energy companies. Brandee is also considered an expert on the Federal Telephone Consumer Protection Act and its state analogues. She can be reached brandee.caswell@FaegreBD.com.

Joseph P. Suntum, is a principal in the litigation department of Miller, Miller & Canby, in Rockville, Maryland. Mr. Suntum handles a wide variety of substantive areas of litigation including, eminent domain and condemnation, complex business litigation, and appellate advocacy. In addition to complex business litigation, Mr. Suntum focuses his trial practice on real estate disputes, most particularly eminent domain and condemnation. The trial of condemnation actions requires full knowledge of the substantive issues concerning land valuation, as well as the unique procedural rules applicable to such matters. Mr. Suntum's knowledge in this area permits him to work effectively with experts such as appraisers, land planners, brokers, developers and others to maximize the compensation paid to his clients for property taken by governmental agencies. He can be reached at jpsuntum@mmcanby.com.

Brandee L. Caswell and Joseph P. Suntum

Make it clear, memorable, and persuasive.

THE OPENING ACT in a trial — after the jury is seated and given introductory remarks by the trial judge — is the opening statement. And, although judges like to emphasize that opening statements "are not evidence" that admonition is both potentially inaccurate and unhelpful to a trial lawyer. Inasmuch as the lawyer would like the jurors to keep an open mind and be receptive to the lawyer's message, implicitly advising a jury that it can ignore what the lawyer is getting ready to say, because it "is not evidence" is unlikely to advance the lawyer's goal. So, whether one believes the psychological literature suggesting jurors may begin forming opinions or even conclusions about the case during opening statements (which once set will be difficult to dislodge) there is no good reason to risk testing the hypothesis. Rather, a trial lawyer should use the opening, as every other part of the trial, to advance the theme and facts of the case.

It is important for all to recognize that the procedural and substantive rules applicable to trials and opening statements vary from state to state and federally. Consequently, whatever may be the rule or tradition in Colorado or Maryland, counsel should

check the rules of your particular jurisdiction. For example, in Maryland, by Rule, the jury view of the property must take place before any evidence is presented. In Colorado the practice is to the contrary. The jury view can be undertaken at any point during the presentation of the case, but generally occurs either at some point during the presentation of the evidence or after all of the evidence has been presented. In Colorado, the property view is mandatory for a trial by commissioners (three property owners who typically have some real estate knowledge and may include a retired judge) and is discretionary in jury trials.

Likewise, in Maryland, the courts have been open to providing counsel two opening statements: the first to discuss the view and what the jurors will see and should seek to observe; and a second after the view is completed and the traditional trial is set to begin. (Counsel may be prohibited from speaking to the jury at the view, so a pre-view opening statement is helpful to direct the jurors' attention.)

What is most important here is to learn how procedures vary in other jurisdictions in order to recognize when arguing for a change in your jurisdiction may be appropriate. While the trial judge may not grant a motion to alter historical practice, once raised and preserved, counsel may be able to "make new law" in your home jurisdictions by persuading the appellate court that the rational of another state is persuasive.

PROCEDURAL ISSUES • The purpose of an opening statement is to help the fact finder understand the case to be tried and to inform the fact-finder in a general way of the nature of the action — in a condemnation case, usually that means telling them they have one issue to decide — just compensation. 88 C.J.S. Trials §261. Trial judges are allowed broad discretion in conducting the trial, which may be exercised to limit the length of opening statements and even, possibly, whether to allow opening statements at all. *See Clark Advertising Agency v. Tice*, 490 F.2d 834, 836-37 (5th Cir. 1974) (holding whether to allow an opening statement in federal court is within sound discretion of trial court); *United States v. 5 Cases More or Less Containing "Figlia Mia" Brand*, 179 F.2d 519, 522 (2d Cir. 1950), *cert. denied*, 339 U.S. 963 (1950) (same).

Generally, of course, opening statements are permitted with the introductory admonition to the jury — from the judge not the lawyer! — that what the lawyer says is not evidence, but a road map to explain what the case is about and what the evidence will be.

The first procedural issue is which party goes first. Here, again, the practice varies across the country. In Maryland the condemnor opens and closes both opening statements and closing arguments. In Colorado the practice is reversed. Colorado, apparently, reflects the majority practice. It may be instructive to review and consider the rationale behind each practice.

Many courts justify their practice by reference to the applicable burden of proof. The authorities across the country differ on the question of where lies the burden of proving the value of land in a case of eminent domain. 5 Nichols on Eminent Domain §18.02[1] (Matthew Bender, 3d ed. 1989). *See also* 29A C.J.S. Eminent Domain §344 (2007). A majority of jurisdictions hold that, if the sole issue at trial is the amount of money to be paid, the condemnee has the burden of proof and the right to open and close. Other jurisdictions accord the condemnor the right to open and close regardless of the issues presented, and burden of proof is not relevant. Still other jurisdictions place the burden of proving adequate compensation on the condemnor. In these jurisdictions, the landowner may offer countervailing evidence

both as to the value of the land and the damages caused by the taking, but is not required to do so until the condemnor has met his or her burden of proving the value. *See* 5 Nichols §18.5.

The Florida court's discussion of the issue in *City of Ft. Lauderdale v. Casino Realty, Inc*., 313 So. 2d 649, 652-53 (Fla. 1975) illustrates the issues involved:

"In many instances, the issue concerning the value of the land taken is nominal in comparison to the asserted claims for severance damages or business loss. *Parker v. Armstrong*, supra, illustrates one such situation. There, although the property owner had the burden of proving the substantial issue to be presented to the jury, the condemning authority had the privilege of opening and closing in final argument because it had the duty of going forward to establish initially what land was being taken and its value."

Thus, in Florida, which party has the burden of proof and, therefore, the right to open and close the case depends on what the "primary" issue is in the trial.

"Compensation in condemnation proceedings in [Florida] includes both usual and unique items of damage. The burden of proof varies depending on the specific item of damage. The items of damage in a condemnation proceeding in this state and the party that has the burden of proof are set forth as follows:

Item of Damage	**Party Who Has the Burden of Proof**
1. Value of the land taken	Condemning authority
2. Damage to the land remaining or severance damages	Property owner
3. Special enhancement to remaining land by improvement	Condemning authority
4. Moving expenses	Property owner
5. Business loss	Property owner

In Illinois, the condemnor has the burden of proof and the right to open and close at all stages of the trial. *Dep't. of Bus. And Economic Dev. v. Brummel*, 288 N.E.2d 392 (Ill. 1972). But, if the condemnee has filed a counterclaim for damages, the condemnee then has the right to proceed first at all stages of trial. *See id,* at 395. Failure to file a motion to requesting the right to proceed first at all stages in the trial can result in a waiver. *See Commonwealth Edison Co. v. Danekas*, 433 N.E.2d 736 (Ill. App. Ct. 1982).

As further illustration, Maryland holds that the traditional concept of burden of proof is not applicable in a condemnation case. The Court extensively discussed the issue and the different traditions in *Solko v. State Roads Comm'n of State Highway Admin*., 570 A.2d 373, 376-79 (Md. Ct. Spec. App. 1990):

"In their brief, the Solkos baldly claim that the trial court erred by refusing to instruct the jury that the burden of proof in a 'quick-take' condemnation case is on the condemnor. They offer no direct support for this statement and arguably have waived it. Nonetheless, because this is an important issue which we have not previously addressed, we explain why we disagree with the Solkos….

"The State has and agrees that it has the burden of proving the necessity of taking and the public use to be made of the property. Initially, the State argues in its brief that, once it has shown the necessity for the taking for public use, the burden of showing damages is upon the property owner….

"We hold with a minority of jurisdictions that the usual burden of proof instruction as to value has no place in a condemnation case. Not only do we find the minority position better reasoned, but our case law in this area supports this result as well. Once the necessity for the taking has been established, the focus of the fact finder is upon 'just compensation' which the State is required to pay for that taking. It matters not who bears the burden of proof as the concept has no place in the inquiry.

"Condemnation cases are fundamentally different from other kinds of cases where value is concerned. There is no 'fact' which one party is attempting to show; rather, there are experts who provide testimony tending to give credence to the value each party has assigned to the property.…

"If the landowners disagree with the State's estimate of the property's value, they need to produce evidence that the land is, in fact, worth more. The trial court's refusal to instruct the jury that the State has the burden of proof was not error; such an instruction would have constituted error had it been given."

SUBSTANTIVE LEGAL ISSUES • There are several substantive legal issues surrounding opening statements worthy of consideration including objections, misconduct, and remedies for misconduct.

Objections In Opening Statements And Appellate Review

Objections in opening statements are usually rare, but can be important from an appellate perspective. Constant objections in opening statements tend to annoy everyone because this is the jury's opportunity to hear an overview of the case and interruptions are a distraction. However, objections must be made to ensure the purposes of an opening statement are maintained. *Kehr v. Smith Barney, Harris Upham & Co.*, 736 F.2d 1283, 1286 (9th Cir. 1984) (non-condemnation case involving improper statements of counsel during opening and closing where no objections were lodged). If no objection is made, and misconduct continues throughout the course of trial and in closing statements, it will negatively impact your ability to argue error on appeal. *Glenn v. Cessna Aircraft Co.*, 32 F.3d 1462, 1464 (10th Cir. 1994) (where no objection is made, appellate courts typically review for "plain error"); *Sutkiewicz v. Monroe County Sheriff*, 110 F. 3d 352, 361 (6th Cir. 1997) (conduct complained of on appeal must "permeate" the entire trial).

Further, absent proper objections, a trial court is not required to determine whether evidence in support of factual assertions in an opening statement will be admitted during trial. *Melton v. Larrabee*, 832 P.2d 1069, 1071 (Colo. App. 1992).

Misconduct In Opening Statements

Misconduct in opening statements can occur in various ways. In addition to the overriding "rule" that one cannot argue in opening statement, there are additional prohibitions, and these are similar to what is prohibited in a closing argument.

For example, statements of fact concerning matters which are not admissible or not established by the evidence are grounds for a mistrial if prejudice denying the other party to a fair trial is the result. This often occurs via counsel referencing a fact which is the subject of an in limine order, or a fact which counsel cannot admit into evidence, such as

a condemnor's offer of compensation during the good faith negotiation process. *See Ruth v. Dept. of Highways*, 359 P.2d 1033, 1035 (Colo. 1961) (holding references to offers made as part of good faith negotiations or settlement are improper).

Referencing source of funds to pay the condemnation award is also prohibited. Case law is replete with examples in which condemnor's counsel have tried to persuade a jury to make a smaller condemnation award by telling the jurors that their tax money will be used to pay the award. *See, e.g., Denver Joint Stock Land Bank v. Bd. of County Comm'rs*, 98 P.2d 283, 285 (Colo. 1940) (ordering new trial where improper statement that "Any payment that is made to respondents in this case will come out of your own pockets" made in closing argument, curative instruction by court was inadequate).

Referencing the financial status of a party is also improper. *See Commonwealth v. Davis,* 400 S.W.2d 515 (Ky. 1966) (ordering a new trial where owner's counsel appealed to passions and prejudices of jury during closing argument by referencing cost of condemnor's lawyers and amount of taxes being collected by condemnor).

Remedies For Misconduct

If misconduct occurs during opening statements, the trial court may take a number of remedial actions. The court can admonish counsel (and may do so in the presence of the jury). The court may also provide an instruction to the jury to disregard the improper statement. Or, the court may provide (and counsel may request) a curative instruction to the jury at the close of evidence. *Weese v. Schukman*, 98 F.3d 542, 551 n.6 (10th Cir. 1996); *West v. Carson*, 49 F.3d 433, 436 (8th Cir. 1995). The offending lawyer may want to solicit the curative instruction as a means to avoid a negative appellate outcome. Finally, the court may order (and again, counsel may seek) a mistrial.

STRATEGIC ISSUES • One of the most important things to think about in the preparation of the opening statement is strategy. It is the jury's introduction to the case, so it should be clear, memorable, and persuasive. Its strength will lie in how successfully you paint a picture of the case that the fact finder can keep in mind throughout the case.

Opening Statement Versus Opening Argument

The opening is counsel's first opportunity to present a full picture of the case from each perspective. Experienced counsel should 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 ensure that all important elements of your case are presented clearly to the jury in opening.

The debate over whether counsel may "argue" in opening statement is often one of semantics. What counsel should do is communicate his or her message as persuasively as possible. This requires clarity of thought, speech and message. It may also be advanced by an insistent or "argumentative" tone. The difference between what constitutes argument versus what is simply a statement of what the evidence will show is tone. And an objection or judge's admonishment not to "argue" may be overcome either by changing one's tone, or by adding the palliative phrase, "the evidence will show" or "we will prove," in the front of your statement. For example:

Owner's Counsel: "My client's property is more valuable than the government contends because it is in a recognized growth area and is well suited to be rezoned and developed as…."
Owner's Counsel: "The evidence will show that my client's property is more valuable than the government contends because it is in a recognized growth

area and is well suited to be rezoned and developed as…"

Thoughtful counsel should consider the most persuasive way to communicate your message to the jury and if that requires a strong tone in places, counsel may evade objection or sanction by carefully introducing your indictment with the gate-opening phrase "We will prove…."

Tips for Orienting The Jury Or Factfinder

Opening statements are part of the art we practice. Because of this, there is no formulaic approach to an opening statement. The opening statement is a strategic opportunity to accomplish a number of goals, chief among them is to advance your theme of the case. However, we find there are a number of considerations one should keep in mind in preparing every opening statement:

- First, thank the jurors immediately and sincerely. Their time is valuable and they would probably rather be somewhere else (and they have probably just spent considerable time in voir dire detailing other time commitments they have which they think are more pressing than this task);
- Second, get them interested in what they are going to do and the importance of doing it. Sitting on a jury is an important task. Jurors are tasked with ensuring that a very important Constitutional right is upheld, so tell them that is their task;
- Third, clearly explain where the fight is and where it is not. Your fact-finder will want to understand what it is they are being asked to decide (or not decide as the case may be). They will also appreciate knowing where the fight really is;
- Fourth, tell them what to think about or what to listen for when they hear the evidence. The fact-finder will not be able to distinguish the clutter from the important details unless they know what to listen for;
- Fifth, help them to not feel overwhelmed. After the jury selection process, jurors often feel overwhelmed, and this is before the trial has even really started. It is a very foreign process and jurors don't know what is coming next. You need to tell them and put them at ease;
- Sixth, let them know that while this is important, it is not complicated. Underscore why it is not complicated, and understand it is your job to simplify the complex. If you can't explain the case to a perfect stranger in five minutes, you have not simplified it enough. Keep trying. Along these same lines, don't use legalese or terms of art unless you have to, and when you do, tell the fact-finder what those terms mean. Don't leave them guessing and don't talk above their heads;
- Seventh, establish your credibility as the person with the answers, the person who has done the work and the person they should believe. Done correctly, each of the six items above will go a long way in helping you achieve this.

Setting Up The Evidence

Make promises you can and will keep where the evidence is concerned.

Fact-finders report that one of the primary ways lawyers gain credibility is making and keeping promises. Saying that "the evidence will show…" or "We will prove that..." in opening statement means you really need to do it. If you don't keep those promises you will lose credibility.

Don't forget use this opportunity to tell a story — your client's story. Researchers consistently report that jurors understand cases through storytelling. If you are the condemnee's counsel, tell a compelling story about the land, your client, and what plans may have been disrupted by the government. If you are the condemnor's counsel, tell the story of

the project, its importance, and how this piece of property fits into the picture.

Condemnor's counsel should consider telling 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.

Setting Up The Closing

Some lawyers approach trial preparation by preparing their closing statement first. They consider carefully what they want to say in closing to the jury and this helps them identify the evidence they will need to present, which in turn helps formulate the opening argument which in turn will help the jury understand the issues and the evidence they will hear.

From a strategic viewpoint, you can use your opponent's opening statement to your advantage. You should listen carefully to what "evidence" your opponent is most keen to point out and rely on. Keep a tally of what your opponent promises and then point out in closing argument anything that your opponent failed to deliver on when they presented their evidence. If you assume that your opponent is doing this to you too, you can better avoid mistakes that can cost you credibility. Regardless of how you prepare your case, you should give careful thought to the interplay between opening statement and closing argument.

CONCLUSION • 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, and simplify complex concepts. 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 award is the amount you request.