

# THE JURY'S VIEW: HOW JURORS SEE YOUR CASE



**JEREMY P. HOPKINS** is a partner at Cranfill Sumner LLP in Raleigh, North Carolina. He has spent his entire legal career defending property owners facing the power of eminent domain and protecting the right to private property. Since 2002, Jeremy has defended property owners in direct condemnation, inverse condemnation, and other constitutional property rights cases at all levels of the state and federal courts against a vast array of condemning authorities. He has obtained some of the largest annual jury verdicts and settlements in his state, and he has successfully defended property owners against unlawful takings. In addition to his work in the courtroom,

Jeremy has taught and trained other lawyers, written extensively in the field, with his work being cited by state and federal courts, appeared on local and national television and radio, testified in legislative committees, and helped obtain significant legislative and constitutional reform. He is the North Carolina representative of Owner's Counsel of America, a national network of condemnation attorneys dedicated to protecting the rights of property owners, is a co-planning chair for the American Law Institute's national Eminent Domain and Land Valuation Litigation 101 conference, and an advisory board member for the Brigham Kanner Property Rights Conference at the College of William and Mary.



**JOSEPH P. SUNTUM** is principal in the firm Miller, Miller & Canby as well as the firm's Eminent Domain/Condemnation Group Leader. His decades of trial experience and his in-depth knowledge of real property valuation and the law of eminent domain allow him to protect his clients' property rights and maximize their compensation when their properties are targeted for condemnation. Joe is the Owners' Counsel of America member attorney for the State of Maryland and former Chair of the Owners Counsel Board of Directors. The Owners' Counsel of America is a national network of experienced condemnation attorneys who represent property owners against federal, state and

local governments. Membership in the Owners' Counsel is selective and restricted to one member attorney per state. Joe has been recognized by Super Lawyers as within the top five percent of Litigation Attorneys in the state of Maryland, designated Lawyer of the Year in Eminent Domain and Condemnation Law for Best Lawyers (2023), and listed in Best Lawyers, 2022-2025.

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## Jury Trials: One of the Oldest Forms of Legalized Gambling

A jury trial is risky, unpredictable, and often unsettling for the parties and counsel involved. A litigant can win or lose big, and sometimes both parties come away losers. Gambling is defined as the betting or staking of something of value, with consciousness of risk and hope of gain, on the outcome of a contest or uncertain event whose result may be determined by chance, or accident, or an unexpected result due to the bettor's miscalculation. That definition applies equally to jury trials as a means to resolve disputes. A jury trial is, at its essence, quintessential gambling, with each party betting that the jury will view their side more favorably than the other.

Every experienced trial lawyer can affirm that no one can guarantee the outcome of a jury trial or

how a particular juror may view a case. Proper preparation and a carefully selected jury (along with a little prayer) can reduce the risks and improve your odds, but risk will inevitably remain. And that risk is often large. For example, in a recent case this author tried on behalf of two business owners, the condemnor offered approximately \$41,000 and refused to budge from its appraised value. As a result of the taking, the owners were forced to either relocate to a new site or to rebuild a portion of their existing building on an adjacent parcel (if they could acquire that parcel). Consequently, their appraisal was exponentially different than the government's appraisal. If these owners lost at trial, their litigation expenses would have eaten all their compensation; if they accepted the government's offer, they would be forced to close their doors, because they lacked the funds to rebuild which would be necessary to continue their business.<sup>1</sup> The risk was enormous, but

the government's action left them no choice but to bet on 12 strangers.

The risk of a jury trial is exacerbated by the fact that victory often requires a unanimous or super-majority decision by strangers. These strangers come from different backgrounds, different walks of life, and different political and ideological positions. And their primary qualification is that they know absolutely nothing about the dispute to be resolved. It is difficult to get two people to agree on anything. It is exponentially more difficult to get 12 strangers to agree on something, especially something with which those individuals have little familiarity. And this task can be further complicated by the increasing division among members of society—the same members who are pooled together for jury service.

In condemnation cases involving just compensation, there are two numbers: the condemnor's value of just compensation and the owner's value of just compensation. For an owner or condemnor to get their number, several things must go their way. Obviously, every juror must agree to their number. Oftentimes, a party must also convince the judge to rule for them long before the jurors even have an opportunity to hear the case. A judge's ruling on motions in limine and objections to the admissibility of evidence will filter the evidence a jury may consider. Consequently, the level of risk presented by a jury trial may increase or decrease as the process proceeds.

The rising costs and risk of trial has led to increasing use of mediation, more settlements, and fewer trials. Nevertheless, attorneys for owners and condemnors alike must stand ready to try the case when needed. They must also work to minimize the risk of jury trials to the greatest extent practicable. Trying to pick a jury—or trying to predict what strangers will do in light of limited information about them—may seem like voodoo, but there are things attorneys can do to minimize the inherent risks.

### **Know Your Jurisdiction**

The first step in evaluating the risk of a jury trial is to know your jurisdiction's rules pertaining to juries

and jury selection. It is important for counsel to know the rules in their jurisdiction and in each case, as these procedures vary by state and by statute and discretionary practice. For example, in states like Maryland, counsel is not permitted to ask questions in voir dire.<sup>2</sup> That exercise is reserved for the court. In most states however, counsel is permitted to directly question the jurors about their specific views and potential biases.<sup>3</sup>

The charts in the appendix illustrate the wide disparity of these practices among the states.

Knowing these rules is especially important for attorneys who practice in different jurisdictions. In Virginia, for example, the jury is comprised of five jurors and all jurors must own property in the jurisdiction in which the case is tried.<sup>4</sup> The judge randomly selects 13 jurors from the jury pool. The parties each get four peremptory strikes until a jury of five is seated, and three of five jurors can decide the case.<sup>5</sup>

Go north into Maryland, and the jury is comprised of six jurors none of whom has to be a property owner.<sup>6</sup> The parties each get three peremptory strikes, and all six jurors must unanimously decide the case.<sup>7</sup>

Go south into North Carolina, and the jury is comprised of 12 jurors none of whom has to be a property owner.<sup>8</sup> The parties get eight peremptory strikes, and all 12 jurors must unanimously decide.<sup>9</sup>

Just as the location of property can greatly affect its value, location matters when it comes to selecting a jury. Counsel must know the rules for whatever location or jurisdiction in which their case is being tried.

While every jurisdiction appears to allow peremptory strikes, the process or mechanics of exercising those strikes also varies greatly. Although property owners bear the burden of proof in Virginia and North Carolina alike, the process of selecting the jury can be quite different. In Virginia, both parties question the jury before either party engages in the process of exercising their strikes. After each side has completed its questioning of the jurors, the parties engage in the process of exercising their strikes.

The parties strike one juror at a time in an alternating process. This rotation of alternating strikes continues until a jury is selected.

In North Carolina, the owner questions the jury first. The owner then exercises its strikes until it is satisfied with the 12 jurors. The owner may reserve all or any number of its strikes. Once the owner is satisfied with the jury, the jury is passed to the condemnor who then questions the jurors for the first time. The condemnor then exercises its strikes until it is satisfied with the jury. If the condemnor strikes any jurors, the owner (if it has not already exercised all its strikes) gets to start all over with the newly seated jurors who replaced the jurors struck by the condemnor. The jury selection process then starts all over for the newly seated jurors as the owner will question and strike (or not) the jurors followed by the condemnor's questioning and strikes (or not). This process repeats for any new jurors who are seated in place of a juror that has been struck.

In addition to peremptory challenges, all jurisdictions allow challenges or strikes for cause. A juror in any jurisdiction should be excused if he or she is unable or unwilling to render a fair and impartial decision, is unable to impartially consider the evidence, has a bias for or against either party, has an interest in the outcome of the case, or has a financial relationship with either party. Counsel should ensure that the jurors do not hear the challenges and related arguments involving challenges for cause.

### **To View or Not to View**

The jury view is seemingly benign, but it too carries risk, especially for the unsuspecting property owner and his or her counsel. Some states require the jury to view the property while others do not allow a jury view. In jurisdictions where a view is required, it is important for owners and their counsel to prepare for the view. They must ensure the property is in good order and ready for presentation. A poor showing at a jury view can be difficult to overcome.

Attorneys are not permitted to speak with jurors during the view. Consequently, it is important to ask the

judge, prior to the view, to inform the jurors that the attorneys cannot speak with the jurors. That ensures that an inquisitive juror does not think the attorney is being rude if the attorney refrains from communicating with the juror. If a juror approaches the attorney, the attorney should be prepared to inform the judge and to ask the judge to let the juror know that he or she is prohibited from speaking with the juror. A bad impression on the view could be just as devastating as a poor showing of the property.

### **Contingency Plans: Prepare for the Unexpected**

Trials are time-consuming and expensive. The last thing any party wants to do is get to the end of a long, well-fought trial only to have an issue that prohibits the jury from rendering a decision. Anything can happen to a juror while a multi-day trial is ongoing—jurors can suddenly fall ill, have a medical emergency or death in the family, or experience another emergency. Unless the parties ensure the court has a contingency plan at the outset of trial, such a situation could render everybody's time and efforts futile, resulting in another, costly trial.

There are two primary ways to plan for such circumstances. Many courts require a certain number of alternate jurors to participate in the entire trial. Then, just before the jurors begin deliberation, the court excuses the alternate jurors. If there is an emergency that requires the exclusion of one or more primary jurors, the alternate jurors take the place of those primary jurors during jury deliberation.

Another way to plan for such circumstances is a pretrial agreement that a certain number of jurors can decide the case in the event jurors are excused or dismissed prior to the jury rendering a decision. For example, in a jurisdiction that requires 12 jurors, the parties could agree at the outset of trial that no less than 10 jurors would be permitted to decide the case if two or fewer of the jurors are excused or dismissed prior to the jury beginning its deliberation.

### **Questions to Consider**

Eminent domain cases are unique among all other cases. The owner is involuntarily thrust into court

despite the fact that he or she is not even alleged to have done anything wrong, but only because another person or entity wants the owner's property.

Despite the fact that the condemnor takes the owner's property against the owner's will, the law often shoulders the owner with the burden of proof. Moreover, in many jurisdictions, the owner is not reimbursed for litigation expenses. This rule holds true even if the owner proves the condemnor failed to make a legally sufficient offer.

Another unique aspect of condemnation cases is that each side has a constitutional duty toward the property owner. A condemnor's obligation in an eminent domain case is not to win; it is to ensure that the owner is justly compensated.<sup>10</sup> Although the condemnor's agent and its counsel are often stuck with the appraisal they receive, they are not required to agree with the appraisal (or at least all of it) in every case.

The unique nature of an eminent domain case and the mutual obligation to ensure owners are made whole should cause all to think about the jury selection process. Which jury selection process is fairer to owners forced into court and who face the burdens imposed upon them? Should it be a process more like Virginia where each side exercises alternating strikes, or a process like Maryland where each side exercises its preemptory strikes in the blind? Should an owner's counsel have a right to question jurors or should voir dire be restricted to questioning by the court? These questions are important as the jury selection process has a huge impact on the rights of property owners.

### **General Tips and Pointers**

Attorneys and jury consultants have written many articles about jury selection and proposed questions for jurors. The following recommendations seem common among all these articles, and, while these suggestions are basic, they are important. Jury selection is often the attorney's first impression with the jurors. The following suggestions will help ensure that impression is a good one.

1. Be organized and ready.

2. Be yourself.
3. Introduce your client.

Counsel should also make sure the jurors understand what is coming and the key terms they will be asked to consider. To this extent, the following suggestions are helpful.

1. Explain key legal terms, but speak to the jurors in plain language.
  - Just Compensation;
  - Full Take v. Partial Take;
  - Fair Market Value;
  - Fair Market Value Before v. Fair Market Value After;
  - Highest and Best Use; and
  - Case Specific Terms (i.e., project influence, access, adjustment costs, etc.)
2. Give the jurors a roadmap of what is coming. By the time voir dire is concluded, they should also have a general understanding of what is important.
3. Listen carefully. Watch for body language, tone, interaction, or eye contact with other jurors, either party, or their counsel.
4. Be respectful even if the juror is hostile toward your client or your position.
5. Do not interrupt a juror.
6. Do not repeat questions with the same juror.
7. Have a second person there to take notes while the attorney is speaking with the jurors. It is difficult for the attorney questioning the jurors to take notes or to otherwise compile or compartmentalize the responses.

While much uncertainty exists in jury selection and predicting how various jurors will see a case, attorneys can do several things after jury selection to minimize the risk of jurors viewing their side of the case in a negative light. First, be prepared. This point cannot be overstated. Everything starts with preparation. As

this author's mentor has repeatedly professed, preparation is to law what location is to property.

Second, maintain credibility with the jury. Do not make promises that cannot be fulfilled. Do not stretch the truth. Do not make statements that cannot be backed up by the evidence.

Even with the most careful and extensive voir dire, jurors can be surprising. Yet, an attorney who is prepared and who maintains credibility with the jury always has a chance of success.

### Post-Trial Feedback

While winning is exhilarating, some of the best lessons and opportunity for growth often come through our losses. Interviewing jurors after a trial—win or lose—provides tremendous feedback and opportunity for improvement. A candid and open juror can be the best teacher.

### Don't Hold Them and Don't Fold Them

Given the risk of trial, mediation and settlement has become increasingly important. The attorney must be ready, willing, and able to try the case, but settlement is the only way to eliminate risk. Many attorneys, especially those seasoned in the art of poker, believe it is best to withhold their cards. Hence, they hold them.

But this approach may work to the client's detriment. If the other side does not know about certain theories, evidence, caselaw, or positions, it may never truly understand the risk it faces. It may consequently not be willing to move from its position, because it does not know or even perceive the risk it faces.

Lastly, never fold your cards. Never give up. If the other side remains obstinate even in the face of a substantive conversation that discusses the potential strengths and weaknesses of each side, you must fight. When the other side gives you no choice, the risk of trial is necessary.

There may be times where the days seem long and the odds of victory seem low, but do not give up. This situation is especially true when a hostile court makes

rulings adverse to your client's position. In the face of such a situation, stand your ground and fight. Be sure to preserve your record for appeal even in the face of a hostile court, but remember that those strangers seated before you—the jurors—are your last and final hope. They, not the judge or the other side, will ultimately determine your client's fate. And sometimes the greatest risk brings the greatest reward. ■

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### Notes

- 1 Fortunately for these owners, the risk paid off. Not only could it have ended differently, but, even with victory, their gamble came with much toil, stress, emotional trauma, countless sleepless nights, and litigation expenses.
- 2 *Williams v. Mayor and City Council of Baltimore*, 632 A.2d 505, 98 Md. App. 209, 216 (1993) (stating voir dire is limited "solely to discovering a basis for challenging jurors for cause and not to assist counsel in the exercise of preemptory challenges").
- 3 *Hyundai Motor Co. v. Vasquez*, 189 S.W.3d 743, 749 (2006) (stating the "primary purpose of voir dire is to inquire about specific views that would prevent or substantially impair jurors from performing their duty in accordance with their instructions and oath").
- 4 Va. Code § 25.1-229.
- 5 *Id.*
- 6 Cts. & Jud. Proc. Art. §§ 8-206 and 8-421.
- 7 Rules 4-313 and 4-327.
- 8 N.C. Gen. Stat. Ann. § 9-3.
- 9 N.C. Gen. Stat. Ann. § 9-9.
- 10 *United States v. Certain Property Located in Borough of Manhattan*, 306 F.2d 439, 452-53 (2nd Cir. 1962) (stating "the Government's interest . . . is not that it shall win a case, but that justice shall be done . . . [and] its interest as a taker in eminent domain is to pay 'the full and perfect equivalent in money of the property taken,' neither more nor less—not to use an incident of its sovereign power as a weapon with which to extort a sacrifice of the very rights the Amendment gives").

## APPENDIX

|                                 |    |                    |                                |            |
|---------------------------------|----|--------------------|--------------------------------|------------|
| <b>Number of Jurors on Jury</b> | 5  | 6                  | 12                             | NO JURY    |
| <b>States</b>                   | VA | LA; MD; MI; NJ; TX | AL; FL; HI; MO; TX; MS; NC; SD | NY; Canada |

|                                          |                |                                    |
|------------------------------------------|----------------|------------------------------------|
| <b>Number of Jurors to Reach Verdict</b> | Unanimous      | Majority                           |
| <b>States</b>                            | AL; FL; NC; MD | HI; LA; MI; MO; MS; NJ; TX; SD; VA |

|                                   |                                            |                             |       |
|-----------------------------------|--------------------------------------------|-----------------------------|-------|
| <b>Loss of Juror During Trial</b> | Alternates empaneled                       | Less than full jury verdict | Other |
| <b>States</b>                     | AL; FL; HI; LA; MD; MI; MO; MS; NC; NJ; SD |                             | TX    |

|                  |                    |                                |
|------------------|--------------------|--------------------------------|
| <b>Jury Pool</b> | Voter Registration | Driver's License               |
| <b>States</b>    | HI; MO; MS; SD     | AL; HI; LA; MD; MI; NJ; TX; SD |

|                                    |                                |            |       |
|------------------------------------|--------------------------------|------------|-------|
| <b>How is Voir Dire Conducted?</b> | By Counsel                     | By Court   | Other |
| <b>States</b>                      | AL; FL; LA; MO; NC; TX; SD; VA | MD; NJ; SD | HI    |

|                           |                             |         |            |
|---------------------------|-----------------------------|---------|------------|
| <b>Peremptory Strikes</b> | 3                           | 4       | Other      |
| <b>States</b>             | FL; HI; LA; MI; MO; TX; SD; | MD; MS; | AL; NJ; TX |

|                           |                          |                         |                |                    |                    |
|---------------------------|--------------------------|-------------------------|----------------|--------------------|--------------------|
| <b>Right to Jury View</b> | Regular Condemnation YES | Regular Condemnation NO | Quick-Take YES | Quick-Take NO      | By Motion NO       |
| <b>States</b>             | FL; MD; NJ; TX           | AL; MI; MO              | FL; TX         | AL; MD; MI; MO; NJ | HI; LA; MS; NJ; SD |