

ESSENTIAL EXHIBITS DEMONSTRATIVE EVIDENCE IN EMINENT DOMAIN

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I. Introduction

A trial presentation is a complete package. Exhibits are a critical part of the package. But all aspects of the package, including opening and closing arguments, witness examinations, instructions and exhibits, need to fit together and work together. Thus, what exhibits to use, their design, how to use them, and when to use them, should be considered from every perspective. The consideration of exhibits is not separate from the overall trial plan, but an integral part of it. As such the consideration of exhibits should begin early in the process as you analyze the case, identify the main issues of dispute and develop your theme.

Just as you should know what you intend to argue in closing before you give your opening, and just as you should know what information you want to get out of each witness and how that information fits into the case, each exhibit should be thoughtfully designed and used to advance your position.

And consideration of exhibits should be undertaken with full respect given to three basic rules of persuasion: (1) Primacy, Frequency and Recency; (2) the use of multiple senses enhance memory and understanding; and (3) consistency.

The nature of possible exhibits to be used in a condemnation trial varies widely and gives the attorney ample opportunity to enhance the trial presentation.

II. Purpose of Exhibits

The goal of every trial is to persuade the fact-finder. To this end, your presentation should seek to make your position on the issues clear, memorable and persuasive. Thus, exhibits should be designed and used at trial to clarify the issues, help the jurors remember critical facts, and persuade the jury that your position is correct. These concepts sound simple, but they are often ignored.

Two bedrock principles of perception and memory should be kept in mind throughout the trial preparation process, namely, (1) the Rule of Primacy, Recency and Frequency, i.e. that jurors remember that which they hear first, last and most frequently; and (2) jurors remember more information if they can see it and feel it than if they only hear it. Consistency is a related characteristic of a good trial presentation that is critical to a persuasive case. Inconsistent, or

“bad,” facts grate like a fingernail on a chalkboard. And all good trial lawyers know it is critical to incorporate what may appear at first blush to be an inconsistent fact, into your case presentation. All aspects of every trial should fit together, complement each other, and advance the effort of persuading the fact-finder to your view of the issues.

When considered with these basic principles in mind, the design and use of exhibits will be as natural as the identification of issues, necessary experts, and trial theme.

Let us consider the second principle first: that jurors will remember more information if they can see it and feel it than if they only hear it. There have been many psychological studies that demonstrate that jurors remember very little of what is spoken from the witness stand. And the little they do remember decreases quickly over time. Not only may jurors not remember testimony even if they hear it, people often “day dream,” or become distracted, or begin thinking about something that was just said and miss what is being said at the moment. On top of inattention or distraction, many of the issues in a condemnation trial may be foreign to lay jurors, so they may not understand the concepts even if they are focused and working diligently.

But a person’s comprehension of an issue is dramatically enhanced if in addition to being told about the subject, they are also shown the subject. And the comprehension and memory is enhanced further if in addition to being told and being shown they are able to experience the subject – feel it, or do it, or taste it. This basic psychological principle is readily understood. You may have an image in your mind as you hear the description of a piece of property, but if you are presented a photograph of the property as you listen to the description more detail will be apparent. But even a description and photograph will pale in comparison with a trip to the property where you can see it and walk it and feel the soft earth underneath your feet and smell the fresh air and hear the wind – or feel the hard concrete and smell the neighboring landfill and hear the highway traffic.

The first principle is equally important: that jurors remember that which they hear first, last and most frequently. Because of the risk that just one presentation of a critical fact may be missed by even a diligent juror, it is important that critical information be repeated many times through a trial. There are many skills that permit a trial attorney to do this that are beyond the scope of this paper. But the critical point is that any important issue should be presented to the jury repeatedly throughout trial. With a skillful examination, critical facts may be presented multiple times through a single witness, and then multiple times through each following witness, and in opening and closing. In short, with a well presented trial there should be no doubt that the jury will at least hear and see your critical evidence. Although they may miss it once, they should not miss it if it is presented to them multiple times.

This principle of primacy, recency and frequency coupled with the need to “show” the jury what the witnesses are testifying about, naturally leads to designing one or more exhibits that may be on display throughout the trial from opening through closing and, hopefully, with the jury during deliberations. What do you want the jury to look at for days on end? What image do you want to ingrain in the collective jury’s mind? Is it a map, or a ground level photograph, an aerial photograph, a damage calculation, a depiction of a critical factor impacting value? How do you present the image in order that it can be seen throughout the trial? An electronic projection may not work for this purpose. A large board may be hidden by other exhibits. Will the court permit you to publish individual jury copies? Should the image, or images, be presented in multiple formats to allow for frequent and varied presentations? Which witnesses will discuss the

exhibits? These are just some of the many questions to ask as you start to design the presentation of your trial.

The principle of frequency coupled with the importance of using multiple senses suggests that a critical fact should be presented not only frequently throughout the trial, but in different formats. If the location of the subject property is a critical issue in your case consider multiple maps and aerial photographs to show the location in varying formats and degrees of geographic area, or a Google Earth video tour of the neighborhood. If highest and best use of the property is an important issue, consider land plans, or models, or drawings of proposed developments, or photographs of similar completed developments.

The last thing you want a trial to devolve to is a debate over capitalization rates. Rather, design an exhibit to illustrate what the cap rate is supposed to reflect, namely, the risk of the investment. Show photographs of comparable successful projects, or contrarily, show photographs of the neglected and graffiti blanketed neighborhood.

There is no substitute for early and imaginative consideration of exhibits. And with months and months of consideration there is no limit to the possibilities. Of course, if you wait until the week before trial to consider what exhibits may be helpful in presenting your case, your options will be limited.

III. Types of Exhibits

Format

First, exhibits may be presented in multiple formats. No one format is perfect for every case. Indeed, if a rule were to be stated it should be that multiple formats should be used in every trial.

But whatever you do, don't have a discussion with a witness about an exhibit that the jury cannot see! It is remarkable how often this basic courtesy is ignored. Put yourself in the position of a juror. Trying to understand the distinction between comparable properties would be difficult enough without having to listen to a lawyer and witness discuss the intricacies of a comparison chart that only they can see. Common sense and common courtesy demand that you first introduce an exhibit into evidence and then display the exhibit to the jury so that the jurors may follow and understand the testimony.

Possible formats include: individual copies, enlarged boards, and projections (onto monitors, or a large screen) via Elmo or projectors.

Individual copies: Know the customs of your jurisdiction. If the court will permit the publication of individual copies of an exhibit, you should consider making individual copies available for distribution to the jury as soon as the exhibit is admitted into evidence. Then, you may continue your examination and have the witness discuss the exhibit. Each jury will have a personal copy of the exhibit to follow the testimony, plus the juror will have the exhibit to keep and make notes upon. Remember multiple senses – see it, feel it, write upon it.

Enlarged Boards: if the jurors are not going to have their own copy of an exhibit a large display should be used that each juror may easily read from the jury box. Boards may be used to depict photographs, charts, calculations, or any manner of information relevant to the case. But use BIG type. Keep the exhibit simple and focused on the key point you

want the jurors to remember. Boards may be left in front of the jury throughout the trial, even if they are moved “off to the side.” But this often leads to the not too subtle battle of boards, with one lawyer flipping the opponent’s board over, or placing one of her own in front, once the examination is concluded. But, both boards and individual copies have the benefit of being able to be taken into the jury room during deliberations.

Large Paper Pads: Similar to boards are blank paper pads that may be used to record and highlight critical testimony as it is given during trial. Such pads give the appearance of spontaneity, but it is important to design what you want the writing to look like in advance of trial. Write in big letters and numbers and keep it simple and uncluttered.

Projections: Technology now makes it possible to display very focused and impressive exhibits that will highlight and drive home any fact in the case. Videos, photographs, maps and writings may be displayed, highlighted, enlarged and zoomed in or out. One potential downside to projection exhibits is that it is not generally possible for the jury to take such a projection of an exhibit to the jury room to review during deliberations. But even this obstacle may be overcome if a particular projected exhibit is saved on a disk or video-tape and the court admits the disk or tape and provides equipment to the jury to enable them to view it. And, of course, individual “screen shots” may be printed and entered into evidence as ordinary documentary exhibits.

Caution: Be careful trying to be your own computer magician at trial. Consider the use of a trial consultant who will manage the display of the exhibits as you focus your attention on the examination at hand. And practice the presentation so it goes smoothly when the lights go on.

Checklist of Possible Exhibits for Consideration

As noted above, with sufficient time to consider and imagine, there is no limit to the nature and design of potential exhibits. The following is a necessarily non-exhaustive checklist of common types of exhibits used often in condemnation trials. But your exhibits are limited only by your imagination and the dictates of your case. In addition, each type of exhibit may be presented or displayed in any of the several formats discussed above.

Photographs, videos, and aerial photographs before construction, during construction and after construction.

Photographs

Of the subject property, comparables and the surrounding neighborhood

Video

With sound (depicting noise, traffic)

Aerial Photographs

Aerial videos – Google Earth Tours of property and surrounding neighborhood

Historical Google Earth Tours are now available of many properties

Property (legal and physical characteristics):

- Deeds
- Zoning maps
- Zoning ordinance
- Master Plans for the subject area
- Topographical maps

Property location:

- Maps
- Tax Maps
- Surveys
- Aerial Photographs
- Transparent Overlays

Highest and Best Use:

- Land Plans
- Approved Development Plans
- Models
- Drawings
- Photographs
- Photographs of proposed use
- Photographs of adjacent properties (compatible with neighborhood and surrounding community)
- Photographs or plats of similarly developed projects

Impact of Taking:

- Right-of-Way Maps
- Construction drawings
- Cut drawings
- Project design drawings
- Photographs of construction and “Before” and “After”
- Videos

Value:

- Photographs
- Deeds (multiple names – estate sale – possibly not an informed seller)
- Contracts (parties, investigate the background, confirm details, extraordinary construction costs, etc.)

Development Approvals (Approved Plans, Opinions and Orders)

Comparison Charts

Graphs

DAMAGE CALCULATION – DESIRED INQUISITION

Miscellaneous

Chronologies

Supporting data

IV. Sample uses:

As noted above, the nature and type of possible exhibits is limited only by your imagination and it would not be possible to provide an exhaustive list of possible exhibits or how they may be used. But a few examples will demonstrate the variety of uses and may spur more creative uses of your own.

Highest and best use: senior living facility at entrance to residential neighborhood.

In one case the owner's land planner determined that the highest and best use of the subject property would be to develop it with a residential senior living facility because the traffic to and from the facility by employees and for deliveries may be managed to avoid rush hour and traffic limitations on development. But the property was located at the entrance to a residential community and the government argued that the community would oppose such a use and it would not be approved.

But one of the comparable sale properties used by both appraisers was a very well-presented senior living facility located at the entrance to a residential neighborhood. And it happened that this particular property was close to the route that the jury would take to view the subject property during trial. Because it was important for the jury to understand the lack of merit to the government's argument, in addition to photographs of the comparable property, counsel for the land owner asked the court to permit the bus transporting the jury to the subject property for the view to also "view" the comparable property "because both parties' appraiser used the property as a comparable."

Remarkably, the government attorney did not object. Thus, the "view" of the comparable property became a critical exhibit in the condemnation trial.

Comparable land sales: finished product sale prices.

In the valuation of undeveloped land, both appraisers determined that the highest and best use of the property was for townhouse development. Each appraiser sought comparable sales of undeveloped land purchased with the intention of developing townhome communities. But the government appraiser used the sale of property far from the subject, which the owner contended was not in a comparable market. Finished townhomes in the subject's neighborhood sold for over \$700,000.

The development of the allegedly comparable property was completed before trial and the developer had a large sign trumpeting its new "luxury" townhomes "from the Upper \$200's." The photograph of the marketing billboard advertising the price of finished homes easily drove home the difference in the two markets.

Historical Google Earth Tour.

The latest version of Google Earth Provides access to historical aerial photographs, which make it possible to create a tour of the property that depicts the change in the area over time and through construction.

Test the appraiser's income factors:

The two appraisers each valued the subject commercial property using both the comparable sales approach and income approach. And they both used three of the same comparable sales. But their income analysis resulted in dramatically disparate value estimates. Although they agreed on the market rental rate, the government appraiser used a higher vacancy rate, higher stabilized expenses, higher reserve, and higher cap rate, all of which drove a dramatically lower estimate of value.

The owner's counsel prepared a chart and applied the respective income formulas to the comparable sales the appraisers used in common. The owner's appraiser's income formula accurately "predicted" the actual sale prices of the comparable properties, while the government appraiser's formula "predicted" a sale price 33% lower than actual. A chart applying the formulas to actual sales demonstrated the inaccuracy of the government appraiser's formula.

Caveat: such a chart may contain an overwhelming amount of information. Consider presenting the information to the jury in "bite-sized pieces" in order to maintain the jurors' focus and educate the jury along the way. An example of a build of such an exhibit is attached.

Let the jury hear it.

The issue was the severance damage caused by the noise of heavy traffic on the widened road after construction. To permit the jury experience the damage themselves the owner prepared a video before and after construction with sound that "let the jury hear" the noise for themselves.

Location, Location, Location:

Both appraisers noted that the subject property was favorably located in close proximity to two different stops on the metro subway system in suburban Washington, D.C. In addition, the County Council had recently adopted development criteria that favored intensifying development in the vicinity of mass transit points.

But hearing and seeing are two different things. So the owner prepared maps and aerial photographs clearly showing how close the subject location was to, not one, but two stops on the metro line – and showing the many new high-rise condominium and commercial projects under construction in the immediate neighborhood to depict the value of the subject property for redevelopment to a much greater use.

Probability of rezoning:

One of the critical factors in the probability of rezoning a property is whether the proposed new zoning will be compatible with the surrounding neighborhood. Thus, aerial photographs with a wide enough perspective to show the nature of the surrounding neighborhood may be very persuasive. Focus the photograph on the issue you want to drive home to the jury.

IV. Pre-trial Planning

The possibilities are endless. But you can only take advantage of the possibilities if you plan ahead. Consideration of possible exhibits should be a continuous process as you analyze and prepare your case. New ideas will pop up. And early preparation will allow you to take advantage of them, including getting your experts to prepare compatible exhibits, or help in the design of yours.

You should include exhibits in your trial notebook and preparation checklist to insure their admissibility. Relevance, authentication, fairness and accuracy should all be considered. Will you need a witness to authenticate the exhibit? How will you authenticate an aerial exhibit, or Google Earth video if the authenticity is challenged? Will opposing counsel stipulate to the admissibility of your exhibits if you stipulate to theirs?

Make sure your exhibits are consistent and compatible with each other. What is the specific point you are trying to make with each exhibit? Does it make it clearly? Is it too cluttered? Can it be seen from the jury box? Is there another compatible exhibit that may be helpful? Can the information be reduced to highlight the key points? Can the exhibit be projected digitally, which will allow for the key points to be high-lighted and enlarged during the witness' testimony? What format for each exhibit will be most effective? How will the exhibit be used during trial? Do you need an assistant or a trial consultant to run the equipment during trial?

Will all the information in a chart be supported by testimony, or will your opposing counsel be able to keep a chart out of evidence by objecting that it depicts "facts not in evidence?" What is your back-up plan if the substance of the entire chart is not authenticated? Consider layered exhibits that will allow you to remove unsupported information, or building the exhibit in court as the testimony is given.

What will you do if your technology fails?

Plan! None of these issues are issues you will want to deal with a week before trial, or during trial.

V. Use of Exhibits at Trial

A. Opening

Consider using some key exhibits in your opening. If you are permitted an opening prior to the jury view, consider maps, photographs, or a Google Earth Tour of the subject property to show the jury what they should be looking for during the view.

B. View

Remember that the view may be your most important exhibit! Make sure the property is presentable. Consider your spokesperson. What features should be highlighted? What are the disputed issues in the case and what should the jury be focused on that is relevant to those issues?

C. Cross-examination

Can you make an opposing party exhibit your own? Did the opposing party make effective use of exhibits, or did he discuss them without displaying them to the jury? What exhibit(s) will you use to impeach the witness? Will you build it from scratch on a large blank paper pad, or digitally projected document?

D. Direct Examination

Use exhibits to enhance the credibility of your witnesses. Show the jury that what they say is accurate. Numerous exhibits may be used to convey the weight and substance of the witness' testimony, but the key exhibits should be few and impressive.

E. Closing

Don't forget to tell the jury what the inquisition should be! Do you have an exhibit, preferably one that has been evident throughout trial, that boldly states the amount that the jury should award? Take your time and use the key exhibits. Use recency and frequency to your advantage. The jury will remember that which they hear again and last.

F. Jury Room

Make sure the jury has exhibits to review that they will be able to use in their deliberations to convince their fellow jurors. If the exhibits do not tell the story they will be left with just their memories of testimony.

VI. Conclusion.

Exhibits are a critical part of the trial presentation package. They should be designed and used to corroborate and illustrate the critical factors in the case that will drive the jury's conclusion. The nature and breadth of exhibits is limited only by counsel's imagination. Plan early and thoughtfully to get as much persuasive assistance out of your exhibits as possible.