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TAKING YOUR CONDEMNATION CASE TO THE NEXT LEVEL
WINNING IDEAS AND BEST PRACTICES

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HONOR THE FUNDAMENTALS

As young trial attorneys, we were surprised at how "easy" it was to beat more experienced attorneys at trial. We came to understand that the explanation for this apparent anomaly was clear: some eminent veterans did not do the hard work necessary to prepare the case. Rather, the "proven veterans" got lazy and tried to rely on their experience to carry the day. It doesn't work, unless you are fortunate enough to have an equally unprepared opponent.

Now, with years of trials under our proverbial belts, we fight the same temptations that felled our early opponents. But, a successful trial is built upon thorough preparation. As tired as the saying is, "a successful trial is 95% perspiration and only 5% inspiration." And the inspiration does not come, unless you perspire first.

Bottom line: to raise your practice to the next level – or maintain it – work every case, from start to finish, as if it was your first one.

Be a student. Read appellate decisions in condemnation cases, in your jurisdiction and around the country, as a part of your practice, not only when researching a particular issue. As evidenced below, the appellate decisions are filled with instances of imaginative and inspired lawyering that may be applicable to your cases. Likewise, brainstorm your cases with other lawyers, in your firm and around the country. Renew the acquaintances you make at this seminar and call another practitioner to discuss an issue.

Be bold. Push the envelope. Challenge entrenched rules and laws that deny recovery of full compensation and full indemnity for the damages suffered.

Always remember you are protecting your client's fundamental constitutional rights. Fight with the same vigor and tenacity that death row lawyers bring to their cases. That's the perspective that will fuel your drive to "reach the next level." It is not "just about money."

Make your case what you want it to be. A condemnation case is a unique animal in litigation. In most civil and criminal cases trial counsel are presented the facts and must present those facts in the most persuasive manner possible to the court. Prosecutors often argue that "they don't get to choose their witnesses," the drug dealers and paid informants that often parade to the stand in a criminal case. Likewise, most civil trial attorneys must use the facts and persons, who by mere chance witnessed the critical events bearing on the dispute. But owners and counsel in a condemnation case are largely free to create their own facts and opportunities and then retain the most knowledgeable and persuasive witnesses to present their case. They can preserve evidence years in advance of the taking; undertake partnerships and agreements with adjacent landowners to affect the value of the property, and develop or maintain their property to enhance its value. There are a multitude of strategic and substantive decisions that may significantly impact the value of any case. Don't sit back and let your case evolve without thought. To take your practice to "the next level" put in the effort and thought to make your case what you want it to be.

What follows is an admittedly incomplete discussion of some Winning Ideas and Best Practices which we hope will help you take your condemnation practice to "the next level."

1. Undertake pre-condemnation planning.

The condemnee's representative is often behind the government when he or she is first consulted. The condemning authority may have planned the subject project for years before the owner is directly notified that his or her property will be taken. Often, the pre-condemnation planning on the condemnor's side can extend for decades and become very complex. It is not uncommon for a major highway project, for example, to be "on the books" and in the Master Plan for decades before the funds are finally appropriated for acquisition and construction.

Such delay may require the owner to challenge the government's use of the zoning process to preserve future right-of-ways free of development. See, e.g. *Carl M. Freeman v. State Roads Commission*, 252 Md. 319, 250 A.2d 250 (1969) where Maryland's highest court held that the practice of withholding zoning and development of land within the right-of-way of a

Master Planned road and valuing the property based upon its less intense zoning was an unconstitutional denial of the landowner's right to receive just compensation. The *Freeman* court held that a condemning authority could not rely on restrictive provisions in a zoning ordinance, which prohibited rezoning of land in a future right-of-way, to depress land values.

But jurisdictions are loath to rezone, or permit development of, property that is slated for future public use. Such situations present complicated strategy issues, including the evaluation of the viability of an inverse condemnation action, or the measure of damages in a delayed condemnation action. Regardless of the state of the subject property when you are first consulted, owner's counsel should investigate and understand the history of the property and the surrounding area. Such an investigation may disclose valuable issues.

- Collect general and specific information about the condemnation project and determine the effect of the project upon the surrounding area in general, the property in particular, and obtain a timetable for completion of the project.

- If the decision is to contest the taking, is the proposed taking the least intrusive alternative? Is the taking for a public purpose, as opposed to a public use, post-*Kelo*? Is it necessary? If the project affects a number of property owners similarly situated, can you form an organization to oppose the taking as a part of the political process or, in the alternative, to share costs in hiring experts if the condemnation will be contested in court.

- If the project is slightly relocated at your request and your client's property is not taken, consider the detrimental effect that the project might have after it is constructed – will it significantly depress the market value of the property? Property owners are not entitled to compensation if none of their property is taken.

- Collect all of the descriptive data about the property: any plats, building plans, topographic materials and any planning documents. Use these materials and consult with a land planner to evaluate the highest and best use of the property.

2. Undertake a thorough case evaluation.

The constitutional right of a property owner to be paid just compensation[1] for property taken through the exercise of eminent domain has not generally been interpreted to require the complete indemnity of the losses sustained. Rather, "just compensation" has traditionally been limited by court decision to require only that the property owner be paid the fair market value of the real property that is taken (and damages to any remainder). And, even though flowery and expansive language is often used to state this constitutional principle,[2] in practice the constitutional right to just compensation is often equated to the value of the real property taken and it does not provide a basis to recover other costs and losses incurred, such as attorneys fees, business losses, moving expenses, and the like.[3]

Thus, in reality the artful phrases used to describe an owner's entitlement to just compensation carry less meaning than their words would lead one to believe. The language "put the owner in the same position as he would be in if no condemnation had occurred" has not been applied to require reimbursement of the owner's attorney's fees, or business losses, or moving expenses, or the loss of personal property. Rather, an owner must assert his entitlement to recover for such losses based on other authority.[4] Nor does it mean value the property being taken as measured by the maximum price that may be paid if the property were effectively prepared for market and marketed efficiently for a sufficient time and in the most advantageous manner and market conditions. Rather, it means the price a hypothetical buyer would pay on a date selected by the condemnor.

These realities underscore the importance of quality lawyering in the representation of owners in condemnation actions. The burden is on the owners and their counsel to understand the valuation rules, condemnation procedures, additional statutory entitlements and how they may all be used to maximize the total compensation paid by a condemnor to close the

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[1] "Nor shall private property be taken for public use, without just compensation . . . ." U.S. Constitution, Amendment V.

[2] E.g. *United States v. Miller*, 317 U.S. 369, 373 (1943) ("[Just] compensation means the full and perfect equivalent in money of the property taken.") and *United States v. Reynolds,* 397 U.S. 14, 16 (1970) ("The owner is to be put in the same position monetarily as he would have occupied if his property had not been taken."). *Reichs Ford Joint Venture v. State Roads Commission*, 388 Md. 500, 880 A. 2d. 307 (2005) (The goal of just compensation is "to place the property owner in as good a financial position as if eminent domain had never happened.")

[3] Check the law in your jurisdiction. Some jurisdictions, e.g. Florida, provide by statute for the recovery of additional damages, such as business damages and attorneys fees.

[4] E.g. relocation benefits, or statutes specifically providing for the recovery of such losses in condemnation actions that provide for payments beyond the constitutional right to "just compensation" for the property.

significant gap that often exists between just compensation and full compensation.

It is critical for owners and their counsel to fully evaluate each taking to identify all damages and factors that will impact valuation of the property. With equity as a guide star and full indemnity of all losses sustained by the owner as the goal, owners' counsel should fully examine all impacts that a taking may have on the owner and consider various means to recover compensation for all the losses actually sustained. Counsel should examine the subject property, the owner and the owner's particular circumstances, the applicable valuation issues and alternative sources of compensation.

Condemnors do not intend to under compensate owners in condemnation actions. But they do not, generally, look for reasons to pay more than the fair market value of the property being taken, in its present condition, "as is" "as used" and "as zoned." It is incumbent upon owners and their counsel to identify and prove all unique characteristics and factors impacting the determination of just compensation in order to maximize the compensation paid. Just compensation is an equitable concept. It bears remembering the classic equity maxim: *Nulla injuria sin remedia est.*[5] Counsel's job is to find the remedy.

A non-exhaustive list of some considerations:

1. First, consider the property, its location, surroundings, and all factors impacting its value. The first issue to be determined is what is the parcel(s) to be valued. It may not be the parcel as identified by the condemnor. Is the taking actually a complete taking, or is the subject property integrally connected to another parcel such that its loss would cause damage to the value of the second parcel? If so, may an argument be made that the taking is not, in reality, a complete taking, but rather it is a partial taking of a larger economic unit and the owner is entitled to severance damages? The classic case illustrating the principle of the economic unit is *Baetjer v. United States*[6] where the owner argued that 1,700 hundred acres being condemned on the island of Viegues near Puerto Rico was integrally connected to 19,500 acres on the island of Puerto Rico and part of a single business operation. The Court ruled in favor of the owner and held that the trial court erred in excluding the property owners' evidence that "their [entire] holdings [on both islands] by reason of the uses

[5] No injury without a remedy.

[6] 143 F.2d 391 (1st Cir. 1944).

to which they are being put, or would be put in the reasonably near future, constituted a single, integrated unitary tract." [7]

2. Conversely, should the property be valued *separately* from other contiguous parcels owned by the same owner that are also being condemned to maximize just compensation? [8] This issue presents opportunity for the owner of multiple parcels. If considering several parcels together may maximize the total value, the owner may be able to demand such a valuation. But at the same time, the argument may be made that the value of property should not depend on who owns it and, therefore, if the total compensation would be greater if separate parcels are valued separately, the owner should argue that they should be considered as if they were owned by different owners. In short, what is the economic unit that should be valued? How can the compensation be maximized?

3. Even if the property is not presently being used in connection with another parcel such that they comprise a single economic unit, is the possibility of assemblage such that damage to other parcels should be considered?[9]

4. What is the highest and best use of the property? How is it being used presently? May it be used more productively? Even if the property is improved, it may have a higher and better use that would justify the cost of demolition. If it is a single parcel, does it have a single use, or may its value may be maximized if the uses are split, such as commercial use fronting on a major road, with residential or industrial use in the rear.

5. What is the zoning of the property? What uses are permitted in that zone as a matter of right? What alternative uses may the property be put

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[7] For a more recent discussion of the issues and proof necessary to prevail on such a claim, see *Commonwealth Transportation Commissioner of Virginia v. R.S. Glass*, 270 Va. 138 (2005) (The court reversed the trial court that had permitted proof of severance damages and held that the owner had not met its burden of proof on the element of unity of use.).

[8] See, *Bernice Spiegelber v. Wisconsin,* 717 N.W.2d 641 (Wis. 2006).

[9] Generally, in order for a court to consider the market value of a property pursuant to the assemblage doctrine, the following must exist: (1) the prospective, integrated use is the most advantageous use of the condemned land; (2) the most advantageous use can be achieved only through a combination with another parcel or parcels; (3) the combination of parcels is reasonably probable; and (4) the prospective, integrated use is not speculative or remote. See also the discussion in *City of Norwich v. Styx Investors in Norwich, LLC,* 887 A.2d 910 (Conn. 2006) (Court held that it was not necessary for the owner to prove that he would undertake assembly of separate parcels himself, but only that the possibility of assemblage would impact the market.). Note: Some jurisdictions permit an assemblage argument to be made even if different owners own the parcels. Other jurisdictions require unity of ownership. Of course, the law of the applicable jurisdiction should be checked and, possibly, challenged.

to by special exception, which is often a lesser obstacle than rezoning of the property?

6. What is the possibility that the property could be rezoned to permit a more valuable use? The condemnor when assessing highest and best use of property often overlooks alternative uses. Look beyond the present use and step into the shoes of the developer, the broker, and the market.

7. If the highest and best use of the property is for development with town homes, what kind of town homes? Moderately priced, narrow, 2-story, on-slab town homes, with street parking, or luxury, wide, 45' high, 4-story, town homes, with basements and 2-car garages?

8. What are the unique characteristics of the subject property that differentiate it from properties that the condemnor contends are "comparable?"

9. Is there even a market for the property? Or is the property a special use property, such as a church, or clubhouse, that will require other valuation methodologies to be used?[10] If so, the absence of a market presents opportunities to enhance the valuation for the benefit of the owner.[11]

10. Does the property contain minerals, sand, timber, crops or other deposits that add to the market value of the property?[12]

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[10] "If a property's current use is so specialized that there is no demonstrable market for it, but the use is viable and likely to continue, the appraiser may render an opinion of use value if the assignment reasonably permits a type of value other than market value. Such an estimate should not be confused with an opinion of market value. If no market can be demonstrated or if data is not available, the appraiser cannot develop an opinion of market value and should state so in the appraisal report." The Appraisal Institute, *The Appraisal of Real Estate* P. 26 (12th Ed. 2001).

[11] Often special valuation rules may be applied. In Maryland, a church is valued based upon its replacement cost less depreciation. Md. Real Property Code Ann. § 12-104 (2006). This may greatly exceed the property's market value under any scenario. Example: former school building owned by a religious organization condemned for a neighborhood park. The condemnor contended the property was a run down school with a market value of $500,000. The owner, a religious organization that used the building for both its administrative offices and religious services, contended that the property was a church and its replacement cost, less depreciation, was $2,000,000. The condemnation trial was not as much a trial over value as it was a determination of what the building was – was it a dilapidated school, or a church? Inquisition: $2,000,000.

[12] See e.g., *Commissioner of Transportation v. Bartholomew Lorusso*, 2006 Conn. Super. Lexis 2355 ("The many taking cases described by the Supreme Court over the years establish that, although elements of takings, such as lost profits on personal property, are not independently compensable because they do not constitute real property, the value of such elements nevertheless may be considered

11. What is the impact of the taking on value? If the owner actually wanted to sell his property, what would he do, and what would he accomplish towards that end that he is prohibited from doing because of the condemnation?[13]

12. Is there an operating business on the property? If so, can it reasonably be relocated? What will the costs of relocation be and how will the relocation impact the business? Because business losses are not recoverable in a condemnation action absent specific statutory authority it is important to "push" as much value into the "real estate column" of the ledger as possible, as opposed to the "business" column.[14] Operating businesses present the issue concerning how to separate the value of the business from the value of the real estate, e.g. hotels for example. An operating Marriott

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in determining the fair market value of the land. Citing *Edwin Moss & Sons, Inc. v. Argraves*, 148 Conn. 734, 173 A.2d 505 (1961).") and *Ark. State Highway Comm'n v. Delaughter*, 250 Ark. 990 (1971) ("When a tract of land taken by eminent domain contains ore, stone, coal, sand, gravel, peat, loam, oil, gas or other valuable deposits constituting part of the realty, the existence of these features can be taken into consideration in determining the compensation so far as they affect the market value of the land. The same rule would be applicable where the land is covered with growing crops or trees capable of being converted into lumber. But even in such case, the market value of the land as land remains the test. Hence, there can be no recovery for any of the foregoing elements valued separately as saleable items additional to the value of the land.") The valuation of crops is somewhat different. This depends on whether the crop is immature or ready to harvest. If the crop is mature, its value is generally determined by examining the market harvest value of similar crops in the same locality on the date of taking. With immature crops, they are valued by estimating the net revenue that would have been earned had the crop been allowed to mature. From these estimates, a gross revenue estimate can be made and the court then estimates the cost of labor and other expenses that would be incurred in order to arrive at net revenue. Because the prospective revenue comes from the property itself rather than from a business operated in a particular location, the courts are willing to permit this as a form of additional compensation. See *Lee County v. P & H Associates, Ltd.*, 295 S.2d 557 (Fla. 2nd District, Court of Appeals 1981), Nichols, Section 13.13[6]. Some states, such as New Jersey, have special statutes dealing with compensation for farm losses. Note: Christmas trees have another wrinkle, which permits additional compensation.

[13] Consider, for example, a property that is very likely to be rezoned and the process would take 12 months to complete. If the owner wished to sell his property at its highest value he would either: (1) complete the rezoning of his property before he sold, or (2) contract to sell the property subject to it being rezoned. In either event, once the rezoning was achieved the owner would realize the full value of his property. If condemned, however, the likelihood of actual rezoning is minimal. (Governments are not known to rezone property to a more valuable use in advance of condemnations.) And the valuation rules applicable to "probability of rezoning valuations" prohibit valuing the property as if it was actually rezoned. Rather, they require a discount to be applied to reflect the cost, delay and risk of the rezoning process. In such a situation then, the owner losses value over what he would have been able to obtain absent the condemnation. May the owner argue that the inability to achieve rezoning is a diminution in value caused by the condemnation, or that there should be no discount for risk?

[14] Consider for example the valuation of a hotel. How much of the income is attributable to the efficient operation of the business and how much is the product of the hotel's location?

Hotel is more valuable than an operating no-name hotel in the same building. How much of the business is due to the physical improvements, which should be paid for in a condemnation, and how much is due to the name, franchise, operating system, marketing and other business attributes?

13. What fixtures are there in the property? Can they be reasonably removed and relocated? Will greater compensation be obtained by including the fixtures in the valuation of the real property, or through relocation benefits?[15]

14. Is the property particularly suited to the use for which it is being condemned? Generally, the property must be valued without regard to the project for which it is being condemned. But if there is a market for the property for the same use for which the condemnor wants it, that market may be used to determine its value.

15. What is the state of the market? Is the value of the property increasing or declining as the condemnor delays? If the market is declining consider arguing that the decrease in value between the time of the announcement and the date of take is a recoverable damage, because "but for" the announced condemnation the owner could have sold the property at the height of the market.[16]

16. In a quick-take case, where the condemnor's estimate of just compensation is paid into court and the property is taken long before trial, consider whether interest at a rate greater than the statutory minimum may be obtained on the balance the jury determines is due.[17]

17. Are their multiple owners or tenancies. Most jurisdictions follow the undivided fee rule and unit rule in valuing property for purposes

[15] *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470 (1973). ("Because these fixtures diminish in value upon removal, a measure of damages less than their fair market value for use in place would constitute a substantial taking without just compensation. 'It is intolerable that the state, after condemning a factory or warehouse, should surrender to the owner a stock of secondhand machinery and in so doing discharge the full measure of its duty.'")

[16] See, *In Re: De Facto Condemnation and Taking of Lands of WBFAssociates by Lehigh-Northampton Airport Authority*, 903 A. 2nd, 1192 (Pa. 2006) where the Court stated: "In summary, once a property owner has been deprived of the 'full and normal use' of his or her property, the owner is entitled to delay damages from the date of the taking. In the instant matter, we hold that WBF (the property owner) is entitled to delay damages from the date of filing its petition for a board of viewers, to include all mortgage interest actually incurred until the date of payment of the award."

[17] See, *King v. SRC,* 298 Md. 80, 467 A.2d 1032 (1983) (Prejudgment interest may exceed the statutory amount of 6%.) Note: although the recovery of attorney fees, costs, and business losses has been deemed a matter of legislative grace, the recovery of interest is a constitutional mandate.

of condemnation. This rule requires that the entire property including land, buildings, fixtures and other improvements, be valued as a single property even though it may have a variety of separate interests. This means the value that is determined for the fee simple unencumbered property will then be carved up between the fee simple owners, the tenants, lien holders, easement holders and others with an interest in the property as their interests may appear and be valued. The owner may come out the worst for this process. Sometimes the sum of the parts, if valued separately, exceeds the value of the whole and when that happens, then the owner's just compensation is in jeopardy. Although Maryland generally follows the unit rule, the case of *Heritage Realty v. City of Baltimore*, 252 Md. 1, 248 A.2d 898 (1969), recognizes that under certain circumstances the total cost of the acquisition of separate interests in property by the condemning authority could, in the aggregate, be greater than the value of the property as a single parcel or unit. This is still a problem and should be mitigated or avoided, if possible, prior to condemnation.

3. Protect and enhance the value of the property.

If the property is improved, be sure that it is in good shape and makes a good appearance prior to its being appraised by the condemning authority's appraiser. Particularly in residential situations, it is wise for the property owner to clean up the property, do any repairs and maintenance and consider touch-up painting and aesthetic items, too, which would be done if the property were being listed for sale. Take color photographs that reflect the house and neighborhood at its best, preferably on a sunny day in the spring with flowers blooming or in the autumn with the leaves turning color. These photographic images of the property and the neighborhood will be very valuable during a condemnation trial. The opposite is also true. If a property is left to stagnate and deteriorate, then not only is it less saleable, but it will not show well at a jury view. If the property, or neighborhood, deteriorates between the time of the announcement of the project and trial consider objecting to a jury view. See, e.g. *Bern-Shaw Limited Partnership v. Mayor & City Council of Baltimore,* 377 Md. 277, 833 A.2d 502 (2003).

Carefully consider the value of making improvements to the property beyond normal maintenance. Will these improvements enhance the value of the property as of "the date of take"? In many jurisdictions, owners are entitled to use and enjoy their property while a condemnation is pending and they are entitled to continue to improve their property and increase its value in the face of an inevitable condemnation, even after a standard condemnation petition is filed. See, *Matthews v. Maryland-National Capital Park and Planning Commission*, 368 Md. 71, 792 A.2d 288 (2002) (the court held that the property owner was free to continue to develop his property after the condemnation suit was filed up to the date of trial (the date of take) and to introduce evidence of the enhanced value of the property post-petition.) Check the applicable law in your jurisdiction – and consider challenging it if it does not permit an owner to use the property prior to the date of take.

4. Characterize the damages suffered strategically.

There are many unique rules and statutes applicable to determining what is and what is not compensable in a condemnation action. It is important for counsel to understand these rules and statutes in order to find a way to present the owner's actual damages to insure their recovery if at all possible. For example, many jurisdictions do not consider damages resulting from circuitous access to property after a condemnation a compensable injury. Rather, the general rule is deny such damages because determining

road access is an exercise of the sovereign's police power and limiting access is a public safety issue, not a taking. In such cases, consider redefining the nature of the impact to avoid this bar.

If the impairment of access changes the highest and best use of the property, due to its new "location," i.e. a location that is no longer reasonably accessible to the public, the value of the property after the taking may be reduced. A property located on the corner of a busy intersection may be a perfect location for a bank or other retail business. The same property inaccessible to the retail public may have a dramatically different highest and best use. Reframe the characterization, or cause, of the damage to avoid the summary application of the "police power" bar.

Similarly, contingent contracts are generally inadmissible to prove value based upon the fact that either side may walk away. But consider a situation where the property owner has entered into a contingent contract to sell his property subject to development approval and the consummation of that contract is thwarted by an intervening condemnation. In such an instance, the non-binding contract may not be admissible to prove value in the normal sense, but it should be admissible to prove damages (as opposed to value) resulting from the condemnation.

A recent case from Maryland's highest court, *Reichs Ford Joint Venture v. State Roads Commission*, 388 Md. 500, 880 A. 2d. 307 (2005), is another example where consequential damages were held to be recoverable. In the *Reichs Ford* case the State of Maryland authorized road improvements that would require the condemnation of property that was leased for use as a gasoline station. But, the State's need for the property was not imminent. Indeed, the State's consideration of the project dragged on for well over 10 years. But the delay in taking the property and constructing the road did not stop the State from negotiating relocation benefits with the owner's tenant, the gas station operator, which caused the tenant to vacate the property years before construction began, rather than renew its lease, and leave the property vacant and unrentable years before it was condemned. Of course, the owner suffered significant losses due to the State's action and delay, including lost rent, mortgage carrying costs, taxes and the like, which it sought to recover. In its decision the appellate court discussed the compensation available to owners generally in a condemnation action and specifically addressed the issue of whether the precondemnation damages sought by Reichs Ford were included in Maryland's statutory definition of fair market value.

First, the court noted that an owner has a constitutional right to be paid just compensation and that just compensation is generally measured by

the fair market value of the property being taken. But, importantly, the court also noted that "just compensation" is rarely full compensation. Rather, it is merely the "constitutional minimum" that a property owner is entitled to receive.

> Although just compensation traditionally has been measured by the concept of fair market value, this conceptualization is merely the constitutional minimum. Fair market value was defined at common law as "what a reasonable owner, willing but not obligated to sell would accept and a reasonable buyer, willing but not obligated to buy, would pay." (citation omitted) This standard, however, as previously observed, may not compensate fully a property owner for all of his or her expenses relating to a condemnation proceeding. *Shipley*, 34 Md. at 343 (noting that it is for the Legislature to decide what, if any, other incidental damages are to be awarded beyond the Constitutional minimum of just compensation in a condemnation case). In order to bridge the gap between "just" compensation and "full" compensation, States and other governments are free to expand the range of available compensable damages by statute or regulation.

Thus, the Maryland court identified the problem that confronts all owners faced with a condemnation of their property, namely, that there may be "a gap" between just compensation and the actual damages the owner will sustain. The *Reichs Ford* court then proceeded to explain that the Maryland legislature had expanded the measure of compensation that an owner is entitled to receive when it liberalized the statutory definition of "fair market value" to include any diminution in value proximately caused by the public project for which the property condemned is needed. Indeed, in its decision the Maryland court applied equitable principles to conclude that the legislature intended "to include all possible damages caused by public announcements regarding public projects in the assessment of fair market value at the time of the ultimate taking." [18]

> In keeping with the stated goal of just compensation, to place the property owner in as good a financial position as if eminent domain had never happened, it follows that fair market value, as contemplated by the definition provided by the legislature includes related lost rental income. We conclude, therefore, that the legislature intended to

[18] *Reichs Ford Joint Venture v. State Roads Commission*, 388 Md. at 523.

> compensate property owners for a wide range of detrimental effects that the exercise (or threatened exercise) of eminent domain might have, including those categories of damages apparently sought by Reichs Ford in this case, from the time that the governmental body or agency vested with the taking power decides to take the specific property until the date of the actual taking. Under the statutory scheme of [MD Real Property Code] Section 12-105, any compensable damages resulting during the period prior to the formal condemnation ordinarily should be considered and awarded, where appropriate, in the condemnation action.[19]

The *Reichs Ford* case is significant in that it reminds us that "fair market value" is merely an often used short-hand description of just compensation,[20] but that measure may not be appropriate in every case.[21] Moreover, even if fair market value is an appropriate measure, there are many variations on the definition[22] and numerous factors that may be considered in determining what "fair market value" is, including, possibly, as in Maryland, a broader definition than that commonly applied by the courts. *Reichs Ford* also reminds us to imaginatively consider pushing the

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[19] *Reichs Ford Joint Venture v. State Roads Commission*, 388 Md. at 522-523.

[20] *United States v. Miller*, 317 U.S. 369, 373-74 (1943) ("It is conceivable that an owner's indemnity should be measured in various ways depending upon the circumstances of each case and that no general formula should be used for the purpose. In an effort, however, to find some practical standard, the courts early adopted, and have retained, the concept of market value.")

[21] *United States v. 564.54 Acres of Land*, 441 U.S. 506, 512 (1979) ("The concept of fair market value has been chosen to strike a fair balance between the public's need and the claimant's loss upon condemnation of property for a public purpose. . . . The standard [of market value] is most accurate with respect to readily salable articles such as merchandise, because the value of such property is ordinarily what it can command in the marketplace. . . . But while the indemnity principle must yield to some extent before the need for a practical general rule, this Court has refused to designate market value as the sole measure of just compensation. . . . For there are situations where this standard is inappropriate.") and *Township Dep't. of Util. v. Even Ray Co.*, 716 A.2d 1188, 1195 (N.J. Super. Ct. App. Div. 1998) ("There is no precise and inflexible rule for the assessment of just compensation. The Constitution does not contain any fixed standard of fairness by which it must be measured. Courts have been careful not to reduce the concept to a formula. The effort has been to find working rules and practical standards that will accomplish substantial justice such as, but not limited to, market value. Thus, it is apparent that market value should not be the sole means of valuation in eminent domain cases.").

[22] See, Real Estate Valuation in Litigation, J.D. Eaton, (2d Ed.) pgs. 17-18 where the author sets forth varying definitions of market value given by Nichols, Uniform Appraisal Standards for Federal Land Acquisitions, and the appraisal industry and then notes that "[v]arious jurisdictions have different definitions of market value."

limits of present law in the appropriate case using the overriding principle that just compensation is, in the end, an equitable principle.[23]

The fact that just compensation is an equitable principle and that all factors that may affect the valuation of property should be considered in a condemnation case was also recently confirmed by Connecticut in *Commissioner of Transportation v. Bartholomew Lorusso:*

> *[T]he question of what is just compensation is an equitable one rather than a strictly legal or technical one.* The paramount law intends that the condemnee shall be put in as good condition pecuniarily by just compensation as he would have been in had the property not been taken . . . We have stated repeatedly that [t]he amount that constitutes just compensation is the market value of the condemned property when put to its highest and best use at the time of the taking . . . *In determining market value, it is proper to consider all those elements which an owner or a prospective purchaser could reasonably urge as affecting the fair price of the land* . . . The fair market value is the price that a willing buyer would pay a willing seller based on the highest and best possible use of the land assuming, of course, that a market exists for such optimum use.[24]

The *Reichs Ford Road Joint Venture* case provided new grounds for recovery in Maryland. It was the result of imaginative and creative lawyering seeking to find a way to recover every damage the owner actually suffered. In other words, it took a good deal of "perspiration" and resulted in a valuable inspiration that benefited the owner. The damages would not have been recovered if the attorney had not pressed the envelope and worked to appropriately describe the nature of the damages suffered to fit, arguably, within the Maryland statutory definition of just compensation.

5. Obtain access to public records and insist on due process.

Challenge the condemnor on important issues. Challenge the condemnor's right to take. Until 2007 there was no reported appellate

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[23] *Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299, 304 (1923)"Just compensation rests on equitable principles and it means substantially that the owner shall be put in as good position pecuniarily as he would have been if his property had not been taken.") and *United States v. Fuller*, 409 U.S. 488, 490 (1973) ("The constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness as it does from technical concepts of property law.")

[24] *Commissioner of Transportation v. Bartholomew Lorusso*, 2006 Conn. Super. Lexis 2355 (emphasis added)(Case is officially unreported.).

decision in Maryland which found the condemnor lacked authority, or necessity, for the taking. But this lopsided history led to abusive practices, which the appellate court, finally, has moved to reign in. The obvious lesson is that the law is not static. It swings much like a pendulum and owner's counsel must push their cases to keep it in constitutional equilibrium.

The case of *City of Baltimore Development Corporation v. Carmel Realty Associates, et al*., 395 Md. 299, 910 A.2d 406 (2006) illustrates how blatant urban renewal agencies are in denying their public body status and how far they will go in attempting to screen their activities from public view. In that case, Carmel Realty was a private property owner whose property had been designated for acquisition via condemnation by the urban renewal agency. Carmel Realty was attempting to access the records and meetings of the agency in order to establish what plans existed to convey the property to private developers and to get other information relating to the public versus private use of its property after Baltimore City acquired the property. Carmel Realty sought information that would aid it in challenging the "public use" plans of the proposed acquisition. The agency denied Carmel Realty access to its meetings and records on the grounds that it was not a public entity subject to the Open Meetings/Public Records statutes of the State and City. The Court of Appeals held:

> As far as we have discerned, from the record before us, there are no purely private functions of the BDC [Baltimore Development Corporation] for the purposes of the Open Meetings Act. As such...the deliberative process of the BDC... to include all deliberations preceding the final decisions made by the Mayor or the City Council, must be open to the public to the same extent as would any proceeding of the Mayor or City Council of Baltimore City. This is because every step of the process comprises the consideration or transaction of public business...
>
> With respect to the BDC, the following aspects of its relationship with the City make it an instrumentality of the City: The BDC's Board of Directors, to include the Chairman of the Board, are nominated or appointed by the Mayor of Baltimore; he has the power to remove members of the Board...; the Mayor also has the power to fill vacancies; the City's Commissioner of the Department of Housing and Community Development and the City's Director of Finance are permanent members of the Board; the BDC receives a substantial portion of its budget

> [approximately 87%] from the City; the BDC has a tax exempt status under the Internal Revenue Code... if it [BDC] should cease to exist, the City would control the disposition of the BDC's assets; BDC is also authorized to prepare and adopt Urban Renewal Plans, Planned Unit Developments, Industrial Retention Zones and Free Enterprise Zones which are traditionally governmental functions... Therefore... the BDC is, in essence, an instrumentality of the City.[25]

Similarly, the owner in *Mayor and City Council of Baltimore City v. Valsamaki*, 397 Md. 222, 916 A.2d 324 (2007) challenged the City's condemnation of his property and its denial of basic due process. In the Valsamaki case Mr. Valsamaki owned the Magnet Bar at 1924 North Charles Street in Baltimore, which the City sought to condemn for urban renewal/economic development. Although the property is located in the Charles North Urban Renewal area, Mr. Valsamaki challenged the quick-take condemnation asserting that the City did not carry its burden to demonstrate a necessity for the immediate possession and title to the property. In addition, he argued that the taking was not for a "public use" and that the quick-take procedures followed in this case denied him due process of law by preventing him from having discovery or permitting him adequate time to prepare for the trial. Public Local Law 21-16 requires trial within fifteen days after filing an answer, and the Court denied a motion to shorten the time for discovery in this two-week window. The trial judge, having read our trial brief and the *Kelo* case, for the first time in Maryland history, denied the City's quick-take condemnation and stated:

> The plaintiff [City] impassively asserts that the Charles North Project will likely come to a temporary halt unless plaintiff is awarded the property in interest immediately. The Court, based upon all the evidence, is not satisfied that the plaintiff has met its burden. The plaintiff has failed to submit to the Court either a contract, a focused development plan as it pertains to the property in interest, or even a request for proposal (hereinafter 'RFP'), supporting its contentions and establishing necessity under Section 21-16.

Later in the trial court's opinion, the court ruled that there was no development plan for the property. This type of condemnation may be called an "RFP Condemnation" where the condemning authority condemns property for redevelopment and assemblage without having any plan for its

[25] *Carmel Realty*, 395 Md. at 331-36, 910 A.2d at 415 (2006).

public use or ultimate development. Rather, the City seeks to assemble properties and then issue an RFP to the private real estate development community and, based on their response, determine how the property will be used and to which private developer the property will be conveyed. This does not meet the constitutional requirements of *Kelo* or the constitutional or statutory requirements in Maryland.

The Maryland Court of Appeals affirmed the trial court utilizing language that now guarantees to Maryland litigants at least an opportunity to litigate the public use/public purpose issue in the exercise of eminent domain, something which had been hard to achieve previously. This decision powerfully disapproves of the common Baltimore City practice of condemning private property to bundle and market to private developers, particularly before it develops any plan for the property. Further, by requiring municipalities and other condemning authorities to show an immediate need for property under the quick-take authority, the Court of Appeals provided common sense protection for Maryland property owners and disallows the condemning authorities an unfair litigation advantage. The decision also strongly suggests that the City's underlying reason for acquiring the property is constitutionally suspect; noting that evidence of public use, a requirement of both the U.S. and Maryland Constitutions, was "sparse." The Court stressed in its opinion that private property owners must have an opportunity to challenge the public use aspect of the condemnation (as opposed only to challenging offered compensation).

> In essence, quick-take procedures can be used inappropriately to destroy altogether the right of a property owner to challenge the public use prong of eminent domain which, although greatly circumscribed by various state and federal cases, remains a viable aspect of the use of eminent domain powers, or otherwise the courts would be writing language out of the Constitution by judicial fiat.
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> . . .
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> While urban renewal certainly may be the basis for a government's taking of private property, a government entity must provide some assurance that the urban renewal will constitute a public use or public purpose for the property taken. It is not enough... for the City to simply say that it is conducting urban renewal and leave it at that.[26]

[26] *Valsamaki,* 397 Md. at 257-63, 916 A.2d at 345-348.

Another important aspect of this decision was the Maryland Court's express recognition that property rights are a cornerstone of our democracy and entitled to fundamental right status:

> The framers of the Federal Bill of Rights did not place the property rights clause in some obscure part of these documents. It was placed in an amendment considered by many to be among the most important sections of that foundation stone of our form of democracy. It is found in the Fifth Amendment, included with the double jeopardy clause and the privilege against coerced self-incrimination in criminal cases clause. Immediately alongside those cornerstones of our democracy lies the property rights clause: "No person shall...be deprived of life, liberty or property, without due process of law, nor shall private property be taken for public use, without just compensation. Reverence is due the property rights clause just as is due the other great provisions of the Fifth Amendment. It is a fundamental right.[27]

If you can get your high court to recognize property rights as "fundamental rights" it gives the property owner and his counsel powerful arguments against a variety of inequities which regularly crop up in the eminent domain arena. We are constantly faced with procedural problems, similar to the *Valsamaki* case. We also face serious issues of non-compensability which are illogical today and deny the property owner anything approaching indemnity. Consider loss of access (where direct access to the highway is taken and the property is relegated to a service road), or loss of business (where the small business is presumed to be able to relocate, but can't), or the refusal to permit consideration of project influence in an economic development/urban renewal taking (where the property values for every other property goes up because of urban renewal except the one that's condemned). Shouldn't fundamental right status attach to these cases? Why should these owners bear a disproportionate burden and not be in as good a position after the condemnation as they were before the taking? Good trial lawyers ask themselves these questions and in challenging the standard answers, move their practice to the next level.

6. **Preserve your evidence for trial**.

As noted above, a condemnation case is a unique animal in civil litigation. Counsel has a unique opportunity to build his or her case and

[27] Ibid. p. 258-259.

mold it to favorably highlight the critical issue in dispute. The owner is encouraged to maintain the property so it appears structurally sound and aesthetically pleasing. Photographs of the property should be taken to preserve the quality of the property and any special features which may be destroyed if the condemning authority files a quick take and the property is destroyed prior to trial. In addition, if there are tests, which the property owner would wish to run prior to giving up possession, then those should be undertaken. If there is a question concerning whether the property has been contaminated by oil, gas or PCB's and it is an industrial property, then the property owner should consider whether to make tests prior to the condemnation to establish its environmental status or, if there is a minor spill to seek to remedy it before condemnation. Also, in cases of farming or mining where surface or subsurface materials may need to be valued, then tests to establish that value should be undertaken. These tests and photographs should be taken as close to the date of take as possible since this increases their relevance and admissibility at trial.

Also, the property owner and counsel should be prepared to begin collecting comparable sales, sales contract information, rental information and any other economic data which would be of value to an appraiser. Although it may not be advisable to have a formal written appraisal done prior to the condemnation being filed, it is important to collect basic data for your appraiser to consider.

In addition, if there has been a lengthy period of time between the time the project is announced and the proposed taking and any condemnation blight has occurred, it is important to document that blight with photographs showing how and when the property and adjoining properties have deteriorated. The definition of fair market value in Maryland in the Real Property Article, §12-105(b) includes, "any amount by which the price reflects a diminution in value occurring between the effective date of legislative authority for the acquisition of the property and the date of the actual taking if the trier of facts finds that the diminution in value was proximately caused by the public project for which the property condemned is needed, or by announcements or acts of the plaintiff [condemning authority] or its officials concerning the public project, and was beyond the reasonable control of the property owner." (Clarification added.) In the pre-condemnation period, those actions should be documented as well as those actions of the property owner to mitigate those damages, if any.

7. Avoid problems with tax appeals and refinancing issues.

Consider the advisability of potentially negative actions. Property owners have a right to protest their taxes upon notice of reassessment or upon a petition to review the taxes on an annual basis. If the owner's property has been identified for condemnation, then it may be inadvisable for him to protest the real property tax assessment. The attorneys for the condemning authority may seek to use his statements in the tax appeal urging a lower value as an admission when the condemnation case comes to trial and when the owner testifies as to his opinion of its fair market value. If the value put on the tax assessment appeal differs from the value he used in the condemnation case, then this inconsistency may be exploited to his detriment. See, *Baltimore City v. Himmel*, 135 Md. 65 (75-76), 107 A. 522 (1919) (held that statements of the owners to the assessor showing the value of the property is admissible to impeach the owner and as independent evidence of value.) And generally, 39 A.L.R. 2nd 209 (Valuation for Tax Purposes as Admissible to Show Value for Other Purposes) and *State ex. rel. Mendez v. American A.M. Support Foundation*, 100 P.3d 932 (Ariz. 2004). Normally, the condemning authority cannot use the assessed value of the owner's property as an indication of its fair market value. However, the property owner may put the assessed value of the property into evidence if it is supportive of his opinion as to fair market value.

In addition to tax appeals, refinancing can also be problematic for similar reasons. If the owner seeks to refinance his property after it has been targeted for condemnation and the bank hires an appraiser, he may get a value which is less than the full fair market value which he may be required to disclose to the condemnor. See Rule 12-206. Frequently, appraisers for financial institutions take a very conservative view of value in order to protect the lending institutions and this, from time to time, can become a detriment to achieving full fair market value in a condemnation case.

8. Insist on market rate interest on underpayments.

An owner is entitled to be paid the investment return, or prejudgment interest, on the amount of any deficiency of funds paid into court in a quick-take case. After filing the quick-take action and taking possession of the property, the case continues to trial to determine the amount of just compensation to which the property owner is entitled and, if that amount exceeds the condemnor's estimate of just compensation, which was paid into court, the property owner is entitled to receive that sum, together with statutory pre-judgment interest on the excess in an amount equal to 6% (in Maryland) or the market rate of interest, whichever is higher. See, *King v. State Roads Commission*, 298 Md. 880, 467 A2d 1032 (1983).

The *King v. State Roads Commission* case is another illustration of inspired lawyering. The taking occurred during a period of high rates of return on investments. The owner properly complained that Maryland's statutory rate of pre-judgment interest (6%) was well below what an investor would have earned on reasonably invested funds during the period between the quick-take and the trial determination of full just compensation. The owner argued that he should be paid the amount he would have earned on the compensation if the condemnor had paid the amount it should have paid when it filed its petition. It was an imaginative and appropriate argument founded in the practical reality of the investment market at the time.

9. Make effective use of mediation and settlement.

It is no secret to those involved in the court system that approximately 95% of all cases filed in court, including condemnation actions, settle without a trial. The reasons for this statistic vary from case to case. Often it is simply that the cost of litigating erodes the economic benefit of continued litigation. But, more substantively, through the pretrial discovery and negotiation process, each party comes to learn more about its own case, as well as the opponent's, and the probable outcome of a contested trial becomes easier to accurately handicap. Once both parties appreciate the likely outcome of a trial it is easier for them to reach agreement on a resolution. Therefore, quality representation requires a complete understanding of, and an ability to effective manage and use, the pretrial preparation and negotiation process to obtain the most favorable result possible for your client. And, because approximately 95% of cases will settle without a trial, you will be doing 95% of your clients a disservice if you fail to effectively manage their cases to this conclusion.

Before we move forward to discuss how to successfully settle a condemnation case we should discuss what we mean by "successful settlement." To many attorneys and clients, "settlement" is synonymous with "compromise" and "compromise" means less than full recovery. Indeed, a common saying heard in the hallways and offices of mediators is that "a good settlement is where both sides go away unhappy." We do not endorse that mindset. Rather, from an outside perspective, a good settlement is a settlement where the condemnor pays what it believes is just compensation and the property owner receives what the owner believes is just compensation. When that happens neither side should walk away unhappy.

A successful settlement does not always require compromise. Rather, it requires convincing your opponent that your view of the case is correct. Then, if your opponent settles based on that understanding, both parties should be satisfied. On rare occasions, you may come to understand that your opponent's view of the case is correct and you will, then, modify your settlement position accordingly. Thus, a fully successful settlement is a settlement that achieves a fair recovery for your client without a trial. And, if the cost savings of a trial are considered, a fully successful settlement should actually provide a greater economic return for your client than a fully successful trial.

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This idea of a full recovery through settlement is not merely aspirational. It can be achieved. Indeed, for reasons discussed below, a fully successful settlement is easier to achieve in a condemnation case than in other civil actions.

A. The foundation of a successful settlement is hard work and preparation.

There is no short cut to maximizing a settlement. It is easy to settle a case – just give in and take what the opponent offers. But if you want to maximize the settlement value of a case, i.e. if you want to achieve a "successful settlement," you need to do the work necessary to convince the other side that the position you have taken is correct and that if the case goes to trial your position will prevail. Then, the other side will move toward you and make a successful settlement possible.

The 95% figure noted above not only reflects the approximate percentage of cases that settle without trial, it also reflects, of those cases that are tried, how many are won or lost before the trial even begins. Another way to say the same thing is that 95% of the work required to effectively try a case occurs before the trial starts. The trial is just the culmination of your pretrial preparation. It is difficult to make up for a lack of preparation once the trial begins.

And just as preparation is critical to successfully trying a case, both preparation - and demonstrating to the opposition that you are prepared - is critical to successfully settling the case without a trial. All trial attorneys know that it is necessary to be prepared if they expect to try a case well. But this applies to everyone. If they know *they* cannot try the case well if *they* are not prepared, they also know that *you* will not be able to try the case well if *you* are not prepared. And if they know you are not prepared they will not be motivated to offer you maximum value to settle. Consequently,

in order to maximize the settlement value of a case, you need to demonstrate to your opponent that you are, or surely will be, prepared to try the case if necessary.

These rules are simple. But they are honored more in the breach than followed, because many attorneys look at a case from the wrong perspective. Many attorneys consider these statistics and ask, "If there is a 95% chance that this case will settle without a trial, why should I do all the work necessary to prepare it for trial? Why not procrastinate and wait and see if this case will be one of the 5% that must be tried?" If both parties engage in this practice, which is common, it will lead to either an unnecessary trial, or, more likely, guessing and more compromise than may be necessary, because a clear handicapping of a trial is not possible. This, frankly, is where the vast majority of settled cases fall. And this is the origin of the comforting incantation of professional mediators that "a good settlement is one where both sides walk away unhappy."

If you have not analyzed and prepared your case well enough to have confidence in the outcome of a trial, you will compromise and accept less than that which would otherwise be satisfactory, in order to avoid the risk and uncertainty – in order to avoid losing. In such a case you will leave the settlement table unhappy with the agreement you have reached. But the mediator will sooth your wounds and tell you that the fact you are dissatisfied proves that the settlement was "a good one." On the other hand, if you prepare and your opponent does not, you have the upper hand and it will likely be your opponent who will compromises greatly to avoid the risk and uncertainty of going forward, and settle on terms that are, in fact, satisfactory to you. And you and your client will then leave the settlement "fully satisfied."

B. A condemnation action is a unique civil action for purposes of settlement.

Condemnor's counsel occupy a position that is in some ways similar to criminal prosecutors. Prosecutors are charged to achieve justice. Prosecutors should not prosecute a criminal defendant they know is innocent, simply because they may be able to win at trial. Nor should a prosecutor over charge a defendant, or seek excessive punishment, if a lesser-included offense or sentence would be just. Likewise, condemnors' counsel should not pay less than what they are convinced is just compensation, merely because they may be able to convince a jury to award a lesser amount at trial.

Condemnor's counsel's righteous goal is not to pay as little compensation to owners as possible, but to pay *just compensation*. Just compensation is a constitutional obligation. Condemnor's counsel's objective is not to violate the constitution; it is to abide the constitutional obligations of the governmental authority they represent and pay just, but not excessive, compensation. This obligation alters the usual positions in a civil case and makes it easier to achieve a fully successful settlement in a condemnation case than in other civil actions.

The question to be weighed in most civil actions is simply whether the settlement demand, or offer, is more or less than the party will likely achieve at trial. But, in a condemnation case the question is different. The proper question in a condemnation case is "What is the amount of just compensation to which the owner is constitutionally entitled to receive?" When the settlement question is properly framed in that manner the perspective of the parties and the issues to be discussed are altered. The condemnor should consider whether the settlement demand is just, not simply whether it may achieve a lower inquisition at trial. Of course, this does not resolve all issues. There may be a wide range of "just values." It is not improper for a condemnor to hold out for a settlement at the lower end of the range, if it is confident in its position and evaluation of the case.

This different perspective of condemnors' counsel also favorably alters the negotiation process by lowering the adversarial temperature of negotiations. In many civil actions the parties have been 'wronged." The plaintiff demands full compensation for an injury the defendant may not believe he caused. In such a situation the settlement negotiations are unavoidably adversarial and often this additional layer of dispute makes settlement difficult to achieve. And, it makes a "successful settlement," as we have defined it, i.e. a settlement where you and your client walk away happy, difficult to achieve.

In most condemnation cases, however, both parties seek the same goal, namely, to quantify the amount of just compensation that the owner is entitled to receive.[28] This common goal permits a more substantive discussion of the merits and enhances the possibility of a successful settlement – for both parties.

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[28] In some condemnations the owner contests the condemnor's authority, or need, to take the property. In such a case, even full payment of all that the owner believes his property is worth may not satisfy the owner. These cases are more similar to the standard civil case and present similar adversarial obstacles to settlement.

C. Mediation and other settlement considerations.

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Mediation has been proven to be an effective way to break negotiation stalemates and achieve settlement of contested actions. Again, inertia plays a powerful roll. Once the parties have prepared for mediation and convened with a quality mediator, there is inertia that helps move the discussion forward. This inertia, resulting from the parties' preparation and commitment to the process, is difficult to achieve with a telephone call to opposing counsel, or even a face-to-face negotiating session. Use this inertia to your advantage.

Prepare for the mediation and be in a position to "prove" your case and discuss each issue in detail. Know the facts. Know the law on the critical issues. If the opinion of an expert is important, bring the expert to the mediation, so he or she may talk to the opposing party and counsel directly.

Here are a few additional factors to consider:

1. A quality mediator is essential.

It seems everyone wants to be a mediator. Many attorneys and seemingly every retired judge aspires to a second career mediating disputes. But mediation is a skill and it requires effort and tenacity to be successful. A mediator that simply tries to make each party "compromise" or "meet in the middle" and then gives up when one, or both, refuse to do so is a waste of everyone's time and energy. Demand a quality mediator who has earned a good reputation before you schedule the mediation.

2. The decision makers must be present.

Mediation is a process. Often it is a long process. Positions are changed slowly over time as the bases and merits of the positions are stated and discussed. The person who has ultimate authority to settle the case should participate in the process, or all of the effort expended may be for naught.

3. Do not hesitate to reconvene.

As stated above, mediations are a process. They may not succeed in a single session, or two. We have successfully settled mediations that continued over multiple sessions with substantive exchanges in between. The mediator often helps this process by refusing to concede defeat and requiring both parties to continue discussing the substantive merits of positions and not simply refuse to move for no good reason.

4. Frame the question.

As we discussed above, the question in a condemnation case should be "What is just?" It should not be "What will a jury decide?" If the question is the latter it may lead to a lower settlement value. Owner's counsel should press for a just settlement that indemnifies their client for all the damages the owner will suffer.

5. Keep the discussions substantive.

Closely related to framing the question is the necessity to discuss the substantive merit of your client's position, not whether a jury will adopt it. Your goal is to convince opposing counsel that your client's position is just, not that a jury will necessarily agree. Every experienced trial lawyer knows that every jury trial is a gamble. Even if you have a "slam dunk" case, a jury may not agree. If you base your settlement discussions on "what will the jury do" you must necessarily discount the amount of just compensation you are entitled to be paid! Assume for illustration purposes, that there is little dispute after discussion that the fair and just value of your client's property is $100,000. But the condemnor's appraiser concluded it was worth $50,000. If the settlement discussion is over what a jury might do, well, a jury might only award $50,000, or less, even though both counsel agree that $100,000 is a fair and just value. In such a situation the owner should argue that he is entitled to be paid what is just, not a discounted amount because a jury might not agree. A successful settlement in that situation would be $100,000, not $90,000 or some other lesser amount. And both the owner *and the condemnor* should be "happy" with a $100,000 settlement.

6. There are no rules of procedure or evidence in settlement discussions.

Use your imagination to present your case in the best possible light. Use exhibits, hearsay statements, videos, pictures, etc. Move from one subject to the next with persuasive organization. At trial you are restricted to putting a witness on the stand and exhausting that witness's knowledge through questions. Then you move on to the next witness. And then the next. You are not restricted in such a fashion in settlement discussions. Put in time and effort considering these "presentation" and "persuasion" issues as you prepare to discuss settlement or mediate your case.

The vast majority of cases settle without trial. Counsel should strategically consider how to best present their case for settlement from the very beginning of the case. There are no rules of procedure or evidence in settlement discussions. Use your imagination and skill to marshal the evidence and law in the most persuasive presentation possible. Prepare to settle successfully. You can achieve a full recovery without trial.

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CONCLUSION

In closing, we hope that these suggestions will help you "take your practice to the next level". However, this will not be "easily" achieved without an abundance of hard work, sweat, boldness, and an understanding that your cause is righteous. Remember, you are defending your client's fundamental constitutional rights.
With the proper perspective and willingness to work, you will achieve your objectives and attain or maintain a high quality practice.