

GIVING THE JUDGE AND JURY THE BIG PICTURE IN A CONDEMNATION CASE

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I. Introduction

To paraphrase an oft heard quote: “The way to a man’s head is through his heart.”¹ Or, as I learned early on, the way to win a trial is to first make the judge or the jury *want* to rule your way, then give them the proverbial hooks to hang their hats on.

This axiom of human decision-making is recognizable in all parts of life. Humans have a difficult time doing what they know they should do, if they would prefer doing, or thinking, otherwise. And conversely, humans have a remarkable ability to rationalize and believe that what they want to do is also the right thing to do.

Consider a criminal trial in which there is very weak circumstantial evidence of the defendant’s guilt. A defense attorney would not likely be successful—in spite of the paucity of evidence—if he spent the trial taunting the jury, “Ha, ha, you can’t convict my client because the State doesn’t have enough evidence.” But a defense attorney will likely win the sought-after acquittal in such a case if she touts the importance of our constitution and explains how upholding its principles—including the obligation that the government prove a charge beyond any reasonable doubt before it may deprive a citizen of his life or liberty—protects all of our rights.

While it is important in a condemnation case to provide the jury with all the evidence it needs to find that the value of the property being condemned is as you claim, including foundational evidence and quality appraisal testimony—and present that evidence clearly and persuasively through qualified experts and using well designed exhibits and demonstrative evidence—it is equally, if not more, important to help the judge and jury understand the importance of the evidence and why it matters in the real world. It is important to both the condemnor and the owner to make the trial about more than “just money.”

A consistent theme which runs through your case and packages your evidence and arguments will make your case much more persuasive. And it will provide context for the jury to consider your evidence and let them understand why their decision is important. It will help the judge and jury want to do the right thing, because their decision concerns more than just “how much money” the government must pay the property owner.

¹ “The way to a man’s heart is through his stomach.” Sara Payson Parton, 1811-1872. Or Steven Colbert, “The way to a man’s heart is through his stomach.... Just be sure to thrust up through the rib cage.”

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II. A Powerful Theme Can Transform the Trial.

The specific theme you use in your condemnation case will vary depending on the facts. And the most persuasive themes are those that grow out of the specific facts of the case.

By way of example, consider a middle-aged couple approaching retirement age who owned approximately 11 acres of agricultural property upon which they had resided for over 30 years and raised their children. The couple had leased a large portion of their property to farmers over the years, but the property represented their retirement savings. Rather than invest in the stock market, or gold bullion, the couple had purchased and maintained the property, which was now being condemned, always with the intent that as they approached retirement they would rezone and subdivide the property in order to sell it and realize the money which they would need to live on in retirement.

Receiving the full just compensation they were due for their property in the condemnation case was critical to the couple having sufficient funds to support them in their retirement. They were not suggesting that their property was “reasonably likely to be rezoned to allow for residential development” because they were greedy and looking for a windfall. Rather, the rezoning of their property had long been planned by them and it was neither unreasonable, nor driven by the fact that the government was taking their property to build a road.

The above described trial then was not an antiseptic debate between land use planners and zoning experts debating the probability that the subject property would be rezoned in the near future. Rather, it became a righteous pursuit of the owners’ entitlement to the retirement income they had planned for and saved for all their lives. It was natural for the jury to *want* to make sure the owners received the full value of their property and unimaginable that it would permit the government to pay less than its full value.

III. Sample Themes for Condemnation cases.

Both owners and condemnors have righteous themes to assert in a condemnation case. The government is the steward of the public treasury. It may not carelessly or in sympathy favor one citizen over another and pay more than the property being acquired is worth. At the same time, the owner did not ask for his property to be taken. He is not a willing seller. He should not be expected to subsidize the public project by contributing his property to the cause for less than its full fair market value, plus all damages caused by the taking. This nation was founded on the principle of private property rights. It is a fundamental right of the owner to be paid full just compensation for his property, which is being condemned.

Often the “property owner’s” perspective and the “condemnor’s perspective” are two sides of the same coin. Through pre-trial preparation, discovery and negotiation, the disputed facts or law that causes any particular case to be one of the 5% that must be tried, rather than one of the 95% that is settled, are identified and known to each party. The trial then is the contest between opposing sides striving to persuade the jury to their view of reality.

A consistent theme that runs throughout your case—from *voir dire*, through opening arguments, direct and cross examinations, closing argument and jury instructions—should be the foundation upon which all aspects of your case are built. It will allow you to reach the jury’s heart and cause it to *want* to decide in your favor. And it will allow you to take maximum advantage of “primacy, recency and frequency,” the well-supported psychological finding that while jurors remember only a small percentage of what is said during a trial, they remember most that which is said first, last and most frequently.

An example of opposing thematic interests may be a property owner's desire to make the case about "more than just money," while the condemnor seeks to dampen the emotion in the case and persuade the jury that the trial is simply a dispute between experts about nothing more than the market value of a particular piece of dirt as of a certain date in time.

Just as these issues have competing sides, each of them may be employed differently by different trial counsel. Just as there is no single description of an "ideal trial lawyer," there is no single "magic bullet" for assembling a condemnation case for either a property owner or condemnor. Counsel must build the case to match not only the specific issues and evidence of the case, but also the strengths of counsel's personality and trial skills. Some trial lawyers may be gregarious and aggressive; others may be calm and methodical. Both styles may be equally effective, as long as their case is assembled consistent with not only the evidence, but their unique personalities. Consequently, the ideas that follow are suggestions for consideration only. They are not intended as magic bullets to be followed blindly in every case from either perspective.

A. Possible Themes for Either Condemnor or Owner

1. The owner is overreaching or exaggerating; or the government is trying to pay less than the property is worth.
2. The opposing party's opinion of value depends on why you are asking, e.g. the owner appealed his real estate taxes arguing that the property was not as valuable as he now claims; or the government has been assessing and collecting taxes based on a higher value than it now claims the property is worth.
3. The opposing side has failed to present the jury with unfavorable evidence, e.g. either party's appraiser has chosen not to use available comparable sales that undermine the appraiser's opinion.
4. The opposing side's appraisers or other experts have used different methodologies than they have used in the past, either when working for the other side or when engaged for purposes other than eminent domain.
5. The opposing party's attorney has told the experts what they should say.

B. Possible Themes for a condemnor.

1. The public project is important for the community and the condemnor has attempted to minimize the amount of acquisitions necessary and the impact on any individual property owner.
2. The verdict should be based on the evidence not sympathy.
3. The jury should follow the law even if they empathize with the property owner.
4. Fair market value is the amount which is not only fair for the property owner, but which is fair for the condemning authority. Just compensation is compensation which is not only just for the property owner, but is just for the condemning authority.
5. The award should reflect the fair market value of the property not its replacement cost.
6. The owner's asserted value is an amount greater than the owner could possibly receive in a private sale. The condemnor may not be required to pay more than the owner would receive in an arm's length transaction.
7. The owner's appraised value is based upon an asserted probability of rezoning, as well as the ability to secure necessary development approvals and permits and is simply too speculative to adopt. No reasonable and knowledgeable buyer in the open market would pay the price asserted by the owner and undertake the risk, cost and years of delay that would be necessary to develop the property as the owner

from some other defect that has caused developers to stay away.

C. Possible Themes for an Owner.

1. The taking will destroy the owner's vision for the property. The owner's vision, whether for development or solitude, is shared by the market and enhances the property's value.
2. The property has dramatically declined in value since the government announced its intention to condemn the land.
3. Fair market value is not simply the amount a willing buyer would be willing to pay for the property. Rather, it is also the amount for which a willing seller would be willing to sell the property. A hypothetical seller of the subject property would never be willingly to sell at the price suggested by the condemnor's appraiser.
4. The condemnor's appraisal does not sufficiently account for the most valuable amenity of the owner's property.
5. The condemnor has timed the condemnation to take the property during a down-market— at a time when no reasonable owner would sell if not forced to do so. Thus, the value of the property if it was sold today is not the fair market value of the property.

VI. The winning formula: Sell your case to the jury throughout the entire trial.

As noted above, a consistent theme should carry across all parts of the trial. Whether you are representing the condemnor or the condemnee, the winning formula is often the same: (1) identify your best theme or themes, (2) develop and stick to those themes, and (3) motivate the jury to return a verdict consistent with those themes. Create positive momentum as early as possible and maintain that momentum throughout the trial.

A. *Voir Dire*

Regardless of how extensive your *voir dire* may be, counsel should seek to begin to persuade the jury by introducing the jurors to the theme and major elements of your case (primacy). Condemnor's counsel may seek juror commitments to "follow the law" and "the court's instructions" while owner's counsel may seek similar commitments from the jurors to insure that the owner receives "full just compensation" for the "involuntary" taking of his valuable "private property." Condemnor's counsel may wish to begin persuading the jurors that they will be tasked to simply determine an objective fact—the value of the subject property, while owner's counsel may wish to empower the jury as protectors of the constitution and the owner's constitutional right to be paid full just compensation before the government can involuntarily take his property.

Counsel should consider using *voir dire* to begin exposing the jurors to the issues in the case: complete taking v. partial taking; severance damages, or any other issue relevant to your particular case.

B. Opening Argument

The opening is counsel's first opportunity to present a full picture of the case from each perspective. Experienced counsel may disagree on whether the opening is an "argument" or merely a "statement" or roadmap to familiarize the jury with the evidence to be presented. But all counsel may agree that full advantage should be taken of "primacy, recency and frequency" to insure that all important elements of your case are presented clearly to the jury in opening and packaged in a consistent theme.

Condemnor's counsel may seek to keep the issues objective (merely valuing a piece of dirt), while owner's counsel may wish to plant a flag on the moral high ground and explain to the jury how the owner has not been properly compensated and needs the jury to render justice. The strength of the owner's case may be enhanced by making the case about "more than just money." The juror's time is valuable and it should be made clear to them that they are needed for something important – to right a wrong, to insure the owner's constitutional right to full just compensation is protected, to keep the government honest, etc. And while generally it may be desirable for condemnor's counsel to keep the tone moderate and the subject restricted to merely the value of a piece of dirt, condemnor's counsel should not pass up the opportunity to claim the moral high ground for the government if the owner "over reaches" or seeks a windfall at the community's expense.

In contrast to owner's counsel's effort to make the case about "more than money" and that the owner is entitled to be treated fairly, condemnor's counsel should consider a theme built around the concept that this is an *in rem*, not an *in personam* action. The proceeding is about land, not people, and the courts have defined the measure of just compensation as fair market value. That provides an objective, not subjective, means to reach valuation. Then it is important to explain to the jury (in *voir dire* if you can to some small degree and certainly in opening and closing) that it is this objective means of determining value that makes the system fair. If the method were subjective, based upon personalities, then one landowner would be treated differently from another just because they might appear to be more likable, or because of any of a number of other subjective factors. The fair market valuation system based upon land and not persons helps insure that all citizens are treated the same. That is what fairness and justice require. While the jury might be inclined to be sympathetic for some personal reasons, they are honor bound to ignore such sympathy and measure just compensation based upon fair market value principles. When jurors understand *why* sympathy cannot be a factor, and are reminded of that, they really do try, at least, to follow the law and limit their consideration to fair market value.

Condemnor's counsel should be a guide for the jury—and a fair one. Help jurors understand technical terms and remember that even simple concepts—like “easement” may be technical to them. Jurors appreciate this and their ears prick up when those terms you have defined first come up in the case. Make full use of cardinal rules of persuasion to make your case as clear, memorable and persuasive as possible right from the outset: humanize the case, tell a story, use exhibits, simplify complex concepts, etc.

In summary, the opening is counsel's opportunity to present the case in the best possible light and convince the jury that if you prove what you promise to prove that the only just and fair inquisition is the amount you request.

C. Closing Argument

Closing argument is argument, but it should not be dictatorial. The jurors will have to debate and negotiate amongst themselves to reach a verdict. The strongest advocate for you in the jury room will *not* be a jury who argues: “The property owner thinks his property is worth X because Y” but a juror who argues that “*I* think the property is worth X because Y.” The goal from the outset of the trial, beginning in *voir dire*, is to educate the jury and get them to adopt your view of the case as their own, i.e. to *want* to rule in your favor. Then they will be arguing *their* beliefs not *your* beliefs in the jury room.

Thus, counsel should use closing argument, not to laboriously go through all the evidence chronologically, but to persuasively arm the jurors to debate the merits in the jury room but showing how the theme has been proven. The critical facts and issues that undergird your central theme should be covered (recency). Highlight the key instructions and key exhibits that support the critical pillars of your case and show how the law, fairness and common sense all converge to support your position.

Reprise (frequency) the big issues and main theme of your case. Reiterate the importance of full just compensation.

“Half a cup of justice is half a cup of injustice.” *Alice in Wonderland*, Lewis Carroll

From the owner's perspective, maintain the emotional and moral righteousness of your case, i.e. remind the jurors why the case is about “more than just money.” And use the opportunity to speak with the jury to insure that your case is clear, memorable and persuasive, so they may argue it clearly and persuasively when they retire. Finally, but certainly not least, counsel for the property owner should never fail to tell the jury what their inquisition should be! Preferably, the desired inquisition should have been front and center before the jury throughout the trial in an exhibit. If you are hesitant, or embarrassed, to say the amount of the inquisition you want, it is extremely unlikely that the jury will award it.