

**WORKING WITH APPRAISERS AND OTHER EXPERTS –
MAKING IT REAL FOR THE JUDGE AND JURY**

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1. INTRODUCTION

Eminent Domain practitioners and the experts on whom they rely to convey valuation and other opinions to a judge and jury can face daunting challenges in presenting a message that is both "attention-grabbing" and foundationally complete. Eminent Domain trials have been euphemistically referred to by some as "a battle between experts." (See e.g., *State of California Ex. Rel. State Pub. Works Rd. v. Turner* (1979) 90 Cal.App.3d 33, 40 (dis.opn.).) In one recent experience, a superior court judge nearly apologized to the jury in his opening remarks for impaneling them on a case that would be tantamount to "watching grass grow." It is difficult to reconcile these sentiments with the Court of Appeal's labeling a condemnation trial as "a sober inquiry into values." (*Sacramento & San Joaquin Drainage District v. Reed* (1963) 215 Cal.App.2d 60, 69.)

Public perception of both current market conditions and the judicial process can create an additional head wind for the eminent domain trial practitioner. With respect to market conditions, there is little room for doubt that the economy has been contracting over the last several months. Prospective jurors may struggle with the notion of "highest price" under the fair market value definition in light of this contraction, lest we even speak of the expert's struggles in measuring fair market value. This may be particularly true where the date of value precedes the current decline in market conditions by months, if not years. Prospective jurors may even harbor animosity towards appraisers due to a perception (whether right or wrong) that those individuals who valued single-family residences for lending purposes played a role in the "mortgage meltdown" of the past several months.

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Undoubtedly, the media is partly responsible for shaping the public's views on the judicial process. We live in an era where access to global market information is both immediate and constant. Prospective jurors are inundated with glitzy legal dramas (both real and artificial) that are aired almost daily in media "sound bites" and television sitcoms. These same potential jurors are compelled to appear "en masse" on a date certain to commence the selection process. Not surprisingly, tapping into an individual's sense of civic duty as a sole means of encouraging lively participation and service may no longer suffice. In short, many jurors enter into a trial situation looking to be entertained, ala Boston Legal, CSI and in some cases...Night Court.

Prior to the United States Supreme Court's controversial opinion in *Kelo v. City of New London* (2005) 545 U.S. 469, declaring economic objectives as an acceptable public use to support the taking of private property, few prospective jurors likely had ever encountered words like "eminent domain" and "condemnation" in their everyday vernacular. Those individuals that were familiar with these terms might mistakenly assume that the property owner was somehow at fault for having his or her land "condemned" (a word that literally carries a negative connotation: "...to punish, disapproval, unfit for use"). Some post-*Kelo* jurors likely carry into the courtroom negative perceptions of a public agency's power to condemn, fueled in part by the media frenzy that followed the Supreme Court's decision. Regardless of the propriety of these perceptions, they can create a hostile environment for the unwary and the timid.

Judges presiding over condemnation trials also occasionally add to the eminent domain practitioner's/expert's burden of presenting a captivating and thorough valuation analysis. Few judges have significant background in presiding over eminent domain trials and may have difficulty applying the quirky procedural rules in the condemnation setting. In addition, sensitive to the individual juror's time commitments (coupled with usually truncated trial weeks), a judge might strongly encourage counsel to stipulate to foundational facts and/or impose time constraints on the testimony by each expert. Although these tactics may ultimately shorten the length of trial, they also diminish the valuable "face time" between the testifying expert and jury.

It is against this general backdrop that the presenters of this segment wish to project their discussion. The fundamental question is this: How can we, as eminent domain practitioners and valuation experts in the field, "make it real" for the judge and jury when the very premise of the eminent domain trial is predicated largely on fiction and hypothetical? Consider first the fact that the proceeding involves the involuntary sale of property, presumed to be voluntary. How can one "make it real" when the reality is few sellers in their right minds would, without necessity or compulsion, voluntarily list a property for sale in today's market with the intent of securing the "highest price" in a sea of insurmountable waves, distress and confusion? To make matters more "unreal," we ask twelve disinterested persons to arrive at the "highest" purchase price that would be agreed to in a hypothetical sales transaction between a fictional knowledgeable buyer and seller on a specified date (usually backwards in time). "Making it real for the judge and jury," especially in the current climate is a tall order. No wonder so many magicians prefer smoke and mirrors to create the illusion of "reality!"

In this panel's view, the "reality" emanates from *preparation*, *personalization* and *passion* (which we may refer to as the "Three P's" of making it real). In this regard, the trial lawyer and the experts must adequately and thoroughly **prepare** their case. They must make every effort to

personalize as many aspects of the "hypothetical sales transaction" as possible. This includes personalizing the property, the owner(s), the condemning authority, the relevant market, and the project for which the property is acquired. Personalization is the byproduct of an effective and **passionate** presentation of the facts and valuation theories throughout the proceeding. The development of this presentation commences long before the first day of trial. A good expert believes in his or her opinions and when delivered with confidence and passion, will generate credibility and trust among the Court and jury.

2. ASSEMBLING THE TEAM AND DEVELOPING A "GAME DAY" STRATEGY

It is no mystery that an eminent domain trial, as with most every trial, is not an individual sport. It requires a minimum of two participants (i.e., the attorney and the appraiser). Depending on the unique facts and circumstances of any given case, additional "players" may be necessary to effectively communicate the "valuation message" to the judge and jury. The importance of assembling the team early cannot be overstated. Condemnors have an advantage when it comes to timing of "team assembly." As part of the pre-filing process, condemnors have already valued the property from an eminent domain perspective. Although these valuations may not ultimately form the basis of trial testimony, they should "educate" counsel and subsequently retained experts of the nature of the appraisal problem in the particular case. Counsel for the condemnee should consider retaining an appraiser as soon as possible once the complaint in eminent domain is filed.

It is also important to anticipate the opponent's theories such that a counter-strategy can be developed. In keeping with the sports analogy, "winning" a condemnation trial requires both a strong offense and a well-strategized defense. Early expert retention will more readily foster development of a trial strategy.

A. Meetings/Communications between Appraiser and Counsel

The starting point for presenting a cohesive valuation analysis at trial is in the retention of and early communications with the appraisal expert. As an advocate, the eminent domain trial lawyer is called upon to retain an appraisal expert who will (hopefully) advance the position of his or her client. Of course, the expert is not and cannot be viewed as an "advocate" (other than perhaps as an advocate of his/her opinions). Rather, the appraiser must, at all costs, maintain his/her status as an "independent" (lest their opinions be viewed as valuation by design – or the forbidden "MAI" acronym: "Made As Instructed"). There is a natural tension between the "advocate" and the "independent." However, this tension should not frustrate the cooperation between the attorney and the expert that ultimately will be necessary to present the client's case. Counsel must be mindful of the broad discovery rules that all but guarantee subsequent disclosure of any communications between attorney and the designated expert. The mere appearance of an "over involved" attorney in terms of the valuation analysis may seriously undermine the credibility of the expert's opinion. The reality is that, at least from the valuation perspective, the case is ultimately shaped around a well-tooled expert opinion, not vice versa.

B. Finding Motivation Through Development of a Theme

One method actors use to make scripted dialogue become "real" is to focus on understanding their motivation for participating in a particular scene. In an eminent domain trial, the lawyer (and, to a lesser extent, the expert witness) is well served by finding his/her "motivation" through the development of a theme. In short, consistent themes throughout the trial provide context to the evidence and create a more memorable presentation. "Making it real" cannot be accomplished without an underlying theme. Eminent domain proceedings are rife with possible thematic elements: "David vs. Goliath," "public safety and welfare vs. individual property rights," "city hall vs. property owner," honesty vs. confusion," "fairness vs. overreaching...etc." As the theme evolves, the lawyer and experts should tailor their presentation to ensure it remains consistent with the underlying message.

C. Identify Potential Legal Issues and the Possibility of Retaining Additional Experts

It is incumbent upon the lawyer, through consultation with the appraiser, to identify potential legal issues that may need to be addressed prior to the commencement of trial. Issues unique to condemnation valuation such as highest and best use, probability of rezoning, project influence, and project enhancement are frequently in dispute and often the subject of pre-trial motions. The existence of these issues cannot be determined until after the appraiser has conducted a significant amount of the investigation. Through early expert retention, the lawyer maximizes his/her time to anticipate and address potential conflicts in the analyses undertaken by each side's appraiser. It may be necessary to corroborate certain aspects of the appraiser's conclusions through the testimony and/or opinions of "non-valuation" witnesses. Where a legal determination on any conflict cannot be secured prior to the exchange of valuation data, consideration must be given to identifying alternate valuation scenarios.

D. Developing Useful Exhibits

There is no better way to "make it real (i.e., valuation testimony) for the judge and jury" than through the use of illustrative evidence. Presenting a condemnation trial invariably requires some testimony that is, by its very nature, tedious and bland. After all, there are only so many ways that the appraiser can "tell the jury about sale number 1" as to keep otherwise repetitive testimony interesting. Likewise, it is nearly impossible to try an eminent domain case without at least some "number crunching" testimony. Testimony that is prone to be "bland" or "technical" should be broken up through the use of charts, graphs, diagrams and other similar demonstrative exhibits. The expert and counsel should work together to develop exhibits that are both eye-catching and easy to follow. Several suggestions relative to exhibit preparation are set forth, *infra*, under the "Trial Time" section of this presentation.

E. Challenging the Appraiser's Analysis and Opinions

Most condemnation lawyers and appraisers understand the importance of preparing a well-orchestrated direct examination. A direct examination that is crisp and organized (and incorporates well-tooled visual aids) is more likely to be remembered during juror deliberations.

However, this form of preparation only accounts for a fraction of the necessary legwork to make the entire presentation "real." As the trial date approaches, considerable time should be devoted to "cross-examination" of the expert's assumptions and opinions. By playing "devil's advocate," the lawyer assists the expert in appreciating potential weaknesses in his/her analysis. This will also help the appraiser and/or other experts see the case from a different vantage point, which will ultimately generate testimony that is more credible.

3. ORCHESTRATING THE BIG EVENT

A. To Call or Not To Call The Property Owner – That is The Question

Many condemnation lawyers attest to the importance of calling the property owner either as a "fact" witness or to provide valuation opinion testimony under California Evidence Code section 813. While putting the property owner on as a witness may have the desired effect of "personalizing" the proceeding, it also could backfire. Property owners can be wonderful witnesses. However, they can also be dangerous. Because they are likely the most emotionally vested individuals in the proceeding, they can be difficult to control. Moreover, most owners are likely "rookies" when it comes to testifying. When their big moment to take the stand occurs, they may just "strike out" (assuming, of course, they're swinging and not watching the drifting curves, change-ups and fastballs whizzing by). Before any decision is made as to whether the property owner ought to testify, make certain they have been thoroughly "vetted." It should not be assumed that just because he/she owns the property at issue, the owner is an indispensable witness in the case (although convincing the property owner of this may present a challenge). Consider subjecting the property owner to a "mock cross-examination" by a colleague (preferably someone unknown to the owner) on one or more significant issues in the case. If the owner also proposes to offer valuation opinion testimony, the mock examination is crucial. Discuss the highlights and lowlights of the owner's performance well in advance of deciding whether to call him/her.

B. Who Goes First – Does It Matter?

Nearly every trial lawyer agonizes over the appropriate sequence for presenting his/her evidence to the jury. The order in which the facts of a story are presented can and often does affect how that story is perceived by the listener. It is no different in the trial setting. The sequence in which the evidence is presented can affect the outcome at trial. This is true whether each side calls but one witness (and the question is how to organize that witness's testimony) or the presentation is made through multiple witnesses (and the issue is in what order those witnesses should be called). If the testimony is to be made "real," it must be presented in a logical and "easy to follow" manner.

(1) Condemnor versus Condemnee

Most eminent domain trial practitioners believe that the condemnee has a distinct advantage on account of being the first side to present valuation testimony. The perceived

advantage is rooted in the notion that the witness who goes first has the greatest opportunity to educate the jury about the case and the issues important to the condemnee. Often, first impressions are memorable impressions, so make it count. This allows for the condemnee's attorney to rhetorically ask the jury in closing argument: "Who taught you more about the appraisal assignment and the facts concerning how that assignment was undertaken?" However, an opportunity squandered is an opportunity lost. Thus, the advantage is equalized to zero if the condemnee's appraiser presents only a cursory analysis. In this instance, the condemnor could tip the advantage in its favor by pointing out the shortcomings of the opponent's analysis. The concept of "cleaning up someone else's mess" comes to mind. If a condemnor is fortunate enough to ever be in this situation, the attorney and expert must be hyper vigilant in presenting as thorough an analysis as possible to undermine the weakness of the condemnee's value conclusions.

(2) Foundational versus Valuation Expert

The experienced eminent domain appraiser wears many hats in conducting his/her analysis. The appraiser is part land surveyor, part title expert, part engineer, part land use planner, part economist and part mathematician to name but a few. Almost invariably, an eminent domain appraisal assignment requires skills in each of these disciplines. However, no matter how deft the appraiser, in some cases a non-valuation expert might be needed to further support the appraiser's opinions. If that expert might also be called upon to testify, trial counsel must determine in what order those witnesses will be called. Some practitioners believe it is generally best to start with the primary (i.e., valuation) expert. This approach ensures that the entire valuation analysis is communicated to the jury by a single witness. Depending on how the evidence comes in, the attorney might then decide the "non-valuation" expert's testimony is no longer required. In complex valuation cases, there may be a benefit to first soliciting opinion testimony from the "non-valuation" expert (i.e., land use planner, engineer, economic or development feasibility expert...etc.) This strategy provides a nice entrée for the jury to hear some of the case-specific concepts and terminology before the valuation witness takes the stand. Thus, it may accentuate the appraiser's testimony. Counsel should be cautioned, however, that this strategy might draw a "cumulative" objection from the opponent, possibly limiting (or prohibiting altogether) the valuation expert's testimony on that same subject matter.

C. More Is Not Necessarily Better

Some lawyers believe that there is an advantage to presenting multiple valuation witnesses to present alternate theories and opinions. Although there may be a complex case where this strategy is appropriate, this should be the exception and not the rule. Jurors may become confused over why one side called multiple experts with seemingly conflicting value conclusions. This makes it difficult for the jury to award a "high" or "low" verdict in light of the additional value conclusion admitted. Moreover, calling more than one appraiser may undercut any argument that the initial valuation opinion testimony is "more accurate." Indeed, this strategy may even allow for the opponent to point out how "not even two independents hired by the same side can agree on the values or the methodology to employ." Of course, this admonition against calling multiple appraisal witnesses does not discourage testimony from other "non-valuation" experts as may be necessary. It is not uncommon for developers, real

estate brokers, engineers and other types of experts to offer corroborative testimony in support of the appraiser's conclusions.

4. LEGAL ISSUES TRIAL/EVIDENTIARY HEARINGS – THE "PRE" BIG EVENT

A. Motions to Resolve “Evidentiary or Other Legal Issue(s) Affecting the Determination of Compensation”

Code of Civil Procedure section 1260.040 provides a powerful tool for the eminent trial practitioner. It presents an excellent opportunity to frame a legal issue for the Court in advance of any exchange of valuation data. Not only can such motions help to streamline the presentation of evidence, they can also serve to educate the trial judge who may have limited experience in the condemnation arena. As the moving party, the proponent on any given legal issue is able to frame the relevant facts and law in such a manner so as to assist the trial judge in “seeing the bigger picture.” Although the Court may not rule on the motion at the time it is brought, the judge may provide insight as to how the particular issue is viewed. In addition, counsel may learn important components of the other side's case through the papers filed in opposition to the motion. The combined insight gleaned from the Court and the opposition papers might prove invaluable in preparing the case for trial and/or deciding whether a subsequent motion in limine is warranted. Moreover, just as the appraiser needs “face time” with the jury, the trial lawyer can also benefit from early interaction with the trial judge. In this regard, the lawyer’s best ally is credibility with the Court. Establishing credibility takes time and requires interaction between counsel and judge. The legal issues motion/trial affords a vehicle to commence building that credibility.

Of course, motions under Section 1260.040 are not a panacea. There may be legitimate reasons for not pursuing such a motion. Counsel must evaluate the merits of the motion and the danger of actually alienating the trial judge. Credibility lost is not easily recovered. Another significant drawback to bringing a motion under Section 1260.040 is it may serve to educate the opponent.

B. Exposing Foundational Cracks

Disputed preliminary facts and assumptions in support of the appraiser's opinions may give rise to a foundational hearing under California Evidence Code section 402. Like the motion for legal issues determination under Code of Civil Procedure section 1260.040, an evidentiary hearing may ultimately streamline the presentation of evidence. Such hearings, however, also carry the same inherent risks of educating the opponent and alienating the Court. Since it is rare for a Court to entirely eviscerate an opponent's case at the conclusion of a 402 hearing, counsel must again evaluate the pros and cons of pursuing this course of action. Depending on the nature of the faulty assumption, a stronger impact might be achieved by raising the issue in front of the jury (i.e., taking the witness on voir dire prior to stating his/her opinions or through cross-examination).

5. TRIAL TIME

A. Jury Selection – First Impressions Are Lasting Impressions

Jury selection is much more than a process of choosing twelve individuals who will (hopefully) render the most favorable verdict. It is the trial lawyer's first opportunity to introduce elements of his/her themes. Seasoned eminent domain trial attorneys inject notions of credibility, fairness and full compensation throughout the voir dire process. It may be appropriate to solicit comments on the prospective juror's views concerning the current state of the economy and the power of the government to involuntarily seize private property. Similarly, a line of inquiry might focus on whether any prospective juror has had previous conflicts with the "government." The answers to these questions are sometimes not as important as the underlying message they are meant to convey (i.e., this is a "real" case, involving "real" parties, with "genuine" conflicts). As the individual panelists listen to counsel's questions, they are developing initial impressions that may be hard to break. More importantly, an effective voir dire should result in the selected group being sufficiently vested in the proceeding so as to create a friendlier environment for the lawyer and experts to "make it real."

B. Opening Statement – A Promise Meant for Keeping

If trial counsel has conducted an effective voir dire, the selected jurors should already be somewhat familiar with the case before opening statements begin. Hopefully, they have discarded most of their preconceived ideas about the type of case to which they have been assigned and await counsel's remarks with an open mind. But, make no mistake about it; they still are looking for some drama. By all means, give it to them. Remind the jurors that the case has its roots in the Constitution. Incorporate words that "personalize" the property and the players. Use visual aids (i.e., aerial photographs, maps, site plans etc.) to help "make it real." Tell the jury where the fight is (and, perhaps more importantly, where it is not). Focusing the jury on the true conflict in the case will assist in building credibility. Forecast the evidence as though it were a personal promise. Counsel should tell the jury in opening what he/she intends to present by way of the evidence and then remind the jury at closing argument that they have fulfilled their promise. Jurors should be invited to hold counsel accountable for the promises made during opening statement.

Opening statement is also an excellent time to personalize your appraiser and other experts. Provide some general background on who they are and why they are considered experts in their particular field. Remind the jurors that they are there not only to listen to the experts but to judge their credibility as well. Tell them that credibility is not necessarily about the expert's official title or the amount he/she charges by the hour. Rather, credibility is earned based on the quality of the investigation and analyses, who did the work, who had the most complete and direct answers and, in short, who made the most sense.

C. Calling The Appraiser to Testify

The appraiser's testimony begins from the moment counsel rises and announces to the Court that the next witness is "Appraiser X." If the trial has been going as planned, there has

been much build up and anticipation to this moment in the proceeding where a key witness is called. Ideally, jurors should be looking forward to this part of the case. The appraiser's entrance into the courtroom should be marked by a relaxed confidence. Provided it is not too cumbersome, consider having the appraiser "wheel-in" his/her file on the first entrance. The appraiser should be appropriately dressed in light of the venue in which the action is pending. What might be an acceptable "dress code" in downtown Los Angeles could be considerably different than downtown Barstow. Image is a factor in the credibility equation. Once he/she gets situated at the witness stand, counsel should greet the appraiser with a friendly smile and launch into the general background portion of the examination.

There are two schools of thought as to whom the appraiser ought to direct his/her responses to counsel's questions on direct examination. Some experts believe that because it is their job to help "educate" the jury, the responses should be directed at the panel. Under this approach, the expert focuses on the attorney as the question is asked, but then turns to face the jury to provide his/her response. In this author's view, that approach looks staged and could be perceived by the jury as condescending. It is much more natural for the appraiser to respond directly to the party asking the question such that the jury is more an observer of a conversation between lawyer and expert (or perhaps a mixture of both). However, this is a matter of opinion and personal style. Moreover, when it comes time to refer to demonstrative exhibits, it is more natural to speak directly to the jurors (which can be precipitated through the form of counsel's question: "Please refer to the aerial photograph and point out the features of Mr. Jones' property for the jury...").

Foundational testimony can be tedious. However, it is vital to a "real" examination. The jurors need to understand the thoroughness of the appraiser's analysis in order to evaluate the strength of the opinion(s). Since it is widely known that an opinion is only as good as the reasons that support it, counsel must ensure that the jury fully appreciates the reasons that underlie the opinions. Detailed foundational testimony also allows for a certain level of suspense as the moment for the appraiser to state his/her opinions draws near. Of course, the appraiser's testimony should be broken up through the use of illustrative evidence so that the jury hears and sees the extent of the appraiser's labor. This will help maintain the jury's attention and minimize the risk of dozing.

Stating the valuation conclusions can be somewhat anticlimactic. This is especially true where the appraiser does so while referring to an exhibit prepared in advance of trial summarizing his/her opinions. Consider preparing a "blow-up" table with open spaces for each "line item" of the expert's opinion. Ask the witness to fill in the chart (preferably with permanent marker) as the examination proceeds. Although the exhibit may not be as "professional looking" as the one prepared in advance of trial, the jury will feel more connected to the chart that is completed "in action" or "on the fly." Making the verbal statement and the visual statement simultaneously is likely to have a greater impact, which translates into a more memorable presentation.

D. Demonstrative Evidence – Less is More

Next to the words we chose to make our points known, there is no stronger method of communicating a "real" thought or idea than through the use of illustrative evidence. Countless studies have shown that where communication is both verbal and visual, the recipient of that communication will likely process it quicker and retain it longer (as compared to mere verbal statements). Thus, demonstrative evidence is crucial to effectively communicate a valuation analysis to the judge and jury in an eminent domain trial. However, there is a "demon" in "demonstrative" and that "demon" is excessive information. If it is to be effective, the demonstrative exhibit must include only that information that is essential to the point of the exhibit. Too much information will lessen the impact of the exhibit. The expert and trial counsel should work closely together in formulating illustrative exhibits that clearly and concisely "speak" the message they were intended to convey.

The method of publishing the demonstrative exhibit to the jury should also be a point of consideration. With the advance of computer technology more and more trial lawyers are projecting images onto a screen or through an Elmo. However, this method often requires dimming the lights, which could result in creating an environment where jurors are studying the backs of their eyelids rather than the information on the projected exhibit. More problematic is the fact that these exhibits are instantaneously removed from the jury's view through the click of a button in the same manner as the exhibits are first displayed. As such, unlike foam core blow-ups, the projected image does not linger in the jury's view while the case is being presented. Consider incorporating multiple methods of displaying demonstrative evidence in order to break up the trial and make the presentation more interesting. Counsel must also evaluate the use of technology based on the location of trial. Juries in certain jurisdictions might view the use of technology as too "flashy," which could undermine the presentation. Regardless of the method for publishing the exhibits during trial, by all means, include these same exhibits in small "handy" versions for the jurors to take into deliberations for quick reference and resource.

E. Closing Argument – Packaging the Three "P's"

"Making it real" requires the eminent domain practitioner and the expert alike to master the three "P's." Namely, they must *prepare*, *personalize* and be *passionate* about their particular valuation message. So must the closing argument also pay homage to the three "P's." Prepare the summation, personalize the message and deliver it with passion. For example, don't just say this is a case about Constitutional principles. Pull out a copy of the document and hold onto it at the commencement of the summation. Tell the jurors that the founders of this great country devised the Fifth Amendment to protect the rights of private citizens like them (or to protect both private citizens and to empower public agencies to acquire private property where absolutely necessary to promote a greater public good). Place the Constitution on the jury box and tell them that these words are now in their hands.

Return to the familiar demonstrative exhibits and continue to personalize the property and/or the project as the case may be. If severance damages are at issue, juxtapose the "before" and "after" condition photographs and point out the impacts, or lack thereof. Refer to the appraiser's summary exhibit and highlight the strengths of the testimony. Pull out a blow-up of

the jury verdict form and manually fill in the numbers as the argument progresses. If counsel has properly prepared, the jury verdict form and appraiser's summary exhibit should practically be mirror images of one another. Place the two exhibits side by side so the jury can see how they are expected to "fill out" the verdict form.

Remind the jury that part of their function is to evaluate witness credibility. Ask them which appraiser was more thorough? Which appraiser taught them more about the property, the surrounding market, the applicable appraisal methodology? In short, who did a more credible and thorough job? Some attorneys will use the appraiser's opinions and facts as a mixed set of tools, hand them to the jurors, and make them carpenters of fair market value. This allows them to become active participants in the analysis. Depending on how strong the case, consider "boxing the jury in" by telling them there was no evidence or testimony of a "split" between the two appraisers' figures. Tell them what is expected in that regard: "You have heard the government's number as X and Mr. Jones' number as Y. Nobody testified to a valuation of Z. So your choices are X and Y. If you believe we have not proven our case, your award must be X. If, however, you think our evidence is more believable, you must award Mr. Jones every penny to which he is entitled...and that amount is Y...." Obviously, this strategy must be carefully evaluated in light of the particular case after all the evidence is in.

Thank the jury for their time and attentiveness. Underscore how important this case is to whomever the client may be.

6. CONCLUSION

There is no "right" or "wrong" way to "make it real" for the judge and jury. Just as there is no magic formula to trying a condemnation case. Eminent domain counsel and the experts on whom they rely to convey valuation opinions can, however, focus on the three "P's" outlined herein to maximize their chances of success at trial. They should prepare the case with diligence. Every effort should be made to personalize the parties and the property/project in the eyes of the judge and jury. Finally, they should deliver their respective messages with passion. Through adherence to this trifecta, both counsel and the expert will be well on their way to presenting a case that is both "real" and memorable.