

**18th Annual ALI-ABA Course of Study
Eminent Domain and Land Valuation Litigation**

January 4-6, 2001
Coral Gables, Florida

**TRIAL PREPARATION
AND
DEMONSTRATIVE EVIDENCE
IN
EMINENT DOMAIN**

By

Andrew Prince Brigham



and

Michael Boucher
Executive Director, Trial Consulting Services
Special Counsel

Demonstrative Evidence

Demonstrative evidence is essential in an eminent domain trial where, often, the jury's verdict is as much a measure of the jury's understanding of the case as it is a measure of monetary compensation. Showing *what, how,* and *why* is the work of demonstrative evidence. Thus, the use of demonstrative evidence is one of the best tools for organizing, synthesizing, and ultimately educating a jury to assist them in arriving at their opinion of value. The exhibits used in the courtroom should not be an afterthought of the eminent domain practitioner, nor should the preparation of exhibits be left solely to retained experts. The practitioner should not abdicate the important role of preparing exhibits for trial. Below are ten practice tips on trial exhibits.

1. Building Blocks

Often, testimony at trial features a process of building upon one predicate opinion followed by another. Jurors need to see the connection between exhibits. This involves care by the practitioner both in exhibit preparation and presentation.

- ▶ **Step by Step:** At times, a stipulation from an opposing party or ruling by the Court will permit various experts in sequence to testify as to a single exhibit. However, this is not always possible or practical as some information is better presented step by step.
- ▶ **Cross-Reference:** To demonstrate the connection between two exhibits, the practitioner should “cross-

reference” exhibits in presentation. This can be accomplished by putting two exhibits side by side and explaining the differences in scale, point of view, or concept, and then elaborating upon the connection. For instance, the combined presentation of right-of-way maps, construction plans, and aerial photographs can assist a juror in putting it all together. Likewise, a subsequent overlay of an exhibit previously presented exhibit can be effective.

2. Grouping Exhibits

Few people, outside of eminent domain practitioners themselves, agree that eminent domain trials are exciting. Unfamiliar terminology, fairly detailed comparative analysis, a menagerie of facts and figures can eclipse a juror's understanding. The practitioner should always be looking for ways to break the monotony and avoid juror frustration.

- ▶ **Adam and Eve:** These two had a similar problem. Surrounded by all created things, nothing had a name. Everything started making sense when the two began naming the animals. When analyzing more than a few sales transactions, it may be of assistance to name the sales rather than using O.R. Book and Page references.
- ▶ **Color Coding:** If having various distinct types of sale transactions, (i.e. vacant/improved sales, wetland/upland sales, etc.) then group the sales together. Color

code the groupings so as to be recognizable to the jury when moving between location maps, sale data sheets, summary comparison tables, and the like. Do so with colored acetate, sticker dots, or simple highlighting. So, too, this can be accomplished when having more than one expert real estate appraiser or comparing two different valuation approaches.

2. Layering

When looking at exhibits individually or in groups, it may be strategic to “layer” demonstrative evidence.

- ▶ **Avoiding Objections:** If anticipating objections from an opposing lawyer, layer an exhibit so that an adverse trial ruling does not prevent the use of an entire exhibit. A series of overlays or even a back-pocket substitute may be of assistance. Unlike peeling an onion, if one loses a layer there may be no need to cry.
- ▶ **Flexibility:** In keeping faith with maintaining a case’s simplicity, having exhibits prepared which are to be used only if an issue is raised which needs to be rebutted is another layering concept. For instance, having mathematical calculations prepared just in case a conclusion is challenged may be a better way to proceed than throwing everything at the jury all at once.

3. High-Tech or Homemade?

With ever increasing technological advancements available for courtroom use, the use of either “high-tech” or “homemade” exhibits becomes an intriguing question. Consideration should be focused on the audience, the jury. What plays well in one locale may not in another. Likewise, not all practitioners can be James Bond. At times it is the country lawyer with the cardboard model that tops the city slicker with computer graphics. We should all remember that the third grade science projects, constructed from toothpicks and tinfoil, were too simple in construction to afford a lie and were often extremely helpful in bringing home truth.

- ▶ **ETP** (Electronic Trial Presentation) Notwithstanding the fact that some jurors are unfamiliar with how to use a computer themselves, most all jurors are used to what computers can do and the presentation electronically of factual information through such medium. Indeed, “homemade” today includes what is made with the use of a computer. ETP can assist not only in communicating evidence, but in communicating with evidence.
- ▶ **LAN** (Local Area Network) The cost of establishing a local area network within the courtroom is now affordable. Many modern courtrooms are designed specially for the use of such equipment which involves not just one monitor for the jury, but monitors for judge and legal counsel as well. Evidence need not be

published prior to a ruling on admissibility. Nonetheless, the practitioner should consider whether such evidence can be made available to the jury during their deliberations.

- ▶ **V T S** (V i d e o - t o - T e x t Synchronization) The process of matching video to text provides additional control so as to make use of video testimony far less cumbersome.

4. **The Few or The Many?**

Without a doubt, demonstrative evidence serves well as both teleprompter and security blanket. However, experienced practitioners have the ability not only to use fewer banker boxes at trial, but also fewer exhibits. Avoiding tangents and recognizing the essentials are keys to the balance between too much and not enough.

- ▶ **Paring Down:** Preparation for trial should include the attempt to pare down exhibits to only those which follow a critical path of evidence to be presented. Framing the picture to be presented by cropping out the unnecessary objects for jury consideration is both a product of discipline and hard work.
- ▶ **Confusion Factor:** While the previous comment relates to jury understanding, the practitioner should not forget that there are those that would employ the technique using a plentiful number of exhibits to confuse issues at trial. As the lay of the

land in eminent domain is perfect terrain for such a battle scheme, the practitioner should prepare for trial a full arsenal of motions in limine to prevent the obvious assault based on distraction or decoy.

5. **Size Matters**

GO BIG . . . Always make sure that demonstrative evidence can be read by the juror who must view same at a distance.

6. **Hands-On/Live Presentation**

Demonstrative evidence is best when it becomes a live demonstration. An experienced witness may be comfortable working with more than just a pointer.

- ▶ **Walk-through:** Having an engineer show the turning movements of vehicles by holding up a transparent turning template to a site plan may be effective for showing an impairment of access. Having a land planner list the pro's and con's of a property for a particular highest and best use may be another effective technique to employ just prior to a jury view of the property. A "walk-through" exercise may not only aid understanding, but add to the credibility of the witness.
- ▶ **Command Performance:** In addition to building up credibility, having an opposing expert give a command performance may be excellent impeachment. Requiring an expert to perform a mathematical

calculation already known to be in error, or having an expert identify something on her own exhibit which cannot be found, may be compelling. As well, try asking an a real estate appraiser with a low opinion of value to list all the good things about a property on a note pad — the list is probably a short one, or non-existent, and may be the thing which “tags” the expert in front of the jury.

- ▶ **Pass the Sugar:** One step beyond live demonstration in front of the jury is placing something tangible in an individual juror’s hands. The most significant discovery of the past century - velcro - allows construction of larger, organized exhibits which can be broken down to smaller, individual parts. An individual puzzle piece can then be published to the jury. So, too, a handout provided to each and every juror becomes, in a sense, their own personal property. Some jurors prefer to have a smaller version in their hands to assist following along the presentation in front of them which features the same exhibit blown-up, fifteen feet away.

7. Unit of Comparison

In a valuation trial, there is nothing more important than the jury understanding units of comparison. Live demonstration from an experienced witness is a prerequisite for most jurors to understand. What a jury cannot plainly see, they likely will simply not believe.

- ▶ **Real Estate:** Both the selection of a unit comparison (i.e. *acre, sq.ft., lot, etc.*) and the evidence presented that buyers and sellers use the same measure of comparison are critical in the process of leading a jury to a conclusion of value.
- ▶ **Business Damage Calculations:** Jurors tend to understand the line items in an income statement more than they do the adjusted cash flows. If starting with the former and proceeding to the latter, comprehension is enhanced.

8. Specials/Boomerangs

Sometimes it is the preparation and presentation of exhibits that go beyond what readily comes to mind that makes a difference at trial.

- ▶ **Seal of Approval:** Demonstrative evidence which incorporates the principles or language of jury instructions is powerfully persuasive, receiving a seal of approval when same is read as instruction from the trial judge rather than being perceived as solely argument from the lawyer.
- ▶ **Final Conclusion of Value:** It is amazing, but some practitioners fail to have a final exhibit which encapsulates the bottom line. Much care should be employed in the preparation of such an exhibit and correlate same to the jury’s verdict form.

- ▶ **Boomerang:** There is no better exhibit than the one prepared and presented by the other guy. Look out for it in your own case and look for it in the opposing lawyer's case. Photographs are notorious in this regard. So, too, are location maps only intended to identify the location of sales, but which contain much more information available for impeachment. Part of preparation for trial becomes a more careful review of an opposing lawyer's exhibits at pre-trial.

- ▶ **Go on the View:** While most jurisdictions do not permit presentation of any testimony or evidence while on the view other than pointing out the physical limits of a taking, the lawyers trying the case should attend the view, and, if possible, drive the same route, at the same time, that the jury takes traveling to and from the subject property. It is always surprising to see what impresses individual jurors on a view and most jurors wear their expressions on their sleeves.

9. Jury View

The lawyer who does not consider the importance of the jury view is oblivious to the circus elephant which sits just outside the courtroom. No other piece of evidence can work a miracle or turn an otherwise successful presentation of a case into a nightmare.

- ▶ **Think Ahead:** Consideration should be given to the likely perception of individual jurors on the view. All demonstrative evidence in the courtroom should be directed at addressing both the positive and negative aspects of such likely perception.
- ▶ **Do You Care?:** The practitioner who cares should care enough to view the property anew immediately before trial and immediately before the view is to occur. Both condemning authority attorneys and landowner attorneys may discover conditions that can be cured if such care is given.

- ▶ **Reminisce with the Jury:** Because jurors from the first day of trial look forward to seeing the property themselves, jurors should hear from the lawyer on the last day of trial on how they should remember what they observed when on the view.

Closing Remarks

An exhibit should stand on its own. The issues of fact and law presented should, as much as possible, be self-evident when viewing an exhibit without verbal explanation. Much as an incomplete sentence begs for conclusion, an exhibit which leaves any room for an adversary to complete a thought begun by another lawyer becomes a dangerous invitation. In viewing a single exhibit, watch for the exhibit that *says too little* or *says too much*. In viewing an entire assemblage of exhibits prepared for trial, look for a single exhibit which, perhaps, *says it all*.

It is the hope of the authors of this article, that some of the practical suggestions provided as to trial preparation or demonstrative evidence have encouraged the eminent domain practitioner

to prepare for trial in such a manner as to invite introspection and self-realization prior to trial rather than having flaws revealed by an opposing side in front of a judge and jury. So, take a look in the mirror, and see who is looking back at you.