Introduction

It is evident from the topics of this seminar that the effective presentation of an eminent domain case requires both the substantive knowledge of eminent domain law and well-honed trial skills. And the effective presentation of a valuation witness is no exception. There are legions of books and articles written on cross-examination and closing arguments, as those subjects and activities are the glorified aspects of trial work. How to conduct an effective direct examination is more often overlooked than studied and understood. But to win an eminent domain trial requires that either the owner or condemnor prove the property’s value, otherwise the most likely inquisition will be the all too frequent compromise verdict. The valuation witness, which in most cases is an expert appraiser, is a critical witness in that effort.

Of course, the effective direct examination of a valuation witness – just like all aspects of trial work – begins long before the trial starts. It is during the pretrial phase that the foundation for an effective presentation of valuation testimony at trial is laid. This preparation begins with the first analysis of the case, and continues through the identification of issues, the selection of the valuation expert, working with the appraiser in the analysis of the case and preparation of his or her report, discovery and deposition of the witness, preparation of demonstrative exhibits, and finally preparing the witness to testify at trial. Once in court, the attorney’s trial skills are used to effectively examine the valuation witness and argue the case through that witness to the jury.

Each of these subjects (selection of an expert appraiser, working with the appraiser through the preparation of his or her report, discovery and preparation for trial, etc.) qualify for separate seminar topics of their own. So would, quite obviously, the trial skills necessary to generally conduct an effective direct examination. This paper must necessarily be limited to a discussion of the melding of trial skills and the unique aspects of a valuation witness to effectively conduct a direct examination of such a witness in an eminent domain trial.

I. The Goal of Direct Examination.

It is important to understand at the outset that the goal of any direct examination is NOT to simply elicit information from the witness to permit the attorney to ride to the rescue and “wrap it all up” for the jury in closing argument. If the jury is not already on
your side before you stand up to give your closing, chances are good that the case is already lost. Rather, the purpose of the examination of every witness in a trial, both direct and cross examinations, as well as opening argument (not opening statement), jury instructions and closing argument is for the trial attorney to argue his or her case to the jury. Understanding this fundamental premise sets the proper perspective and foundation for an effective direct examination.

If the attorney understands that every witness, even an expert witness, is a vehicle through which the attorney must argue the case to the jury, counsel will not relinquish responsibility to the witness to carry the water. Rather, the attorney will retain control of the witness and guide the witness through the subject matter in order to make the points the attorney needs to convincingly make to win.

With this perspective the trial attorney will understand that the last thing he or she wants the trial to be is “a battle of the experts.” Every condemnation trial is a battle over value. And most often the primary witnesses in an eminent domain case on the value issue are the opposing appraisers. But, as a trial attorney, you do not want the jury sitting back and judging which appraiser is better or more qualified at the end of the case. If this happens the jury has not been co-opted and brought over to your side, which should be your goal. If the direct examination of your appraiser and the cross-examination of the opposing appraiser go as planned, the jurors themselves should already hold an opinion of what the subject property’s value is before the attorneys deliver their closing arguments. And, if the jurors themselves believe that your appraiser’s opinion of value is accurate, if in other words your appraiser’s opinion of value just happens to be also what the jurors believe the value to be, then your opposing counsel in closing will not merely be trying to convince the jurors that your appraiser, i.e. a third-party witness, is wrong, but he or she will be trying to convince the jurors themselves that their hard-felt opinion of value is wrong. Good luck with that.

Thus, the goal of the direct examination of a valuation witness at trial is to convince the jurors of the value of the property. If effective and successful, the jurors will be strongly inclined to your opinion of value when you complete your direct examination. This is accomplished by making sure the direct testimony is clear, memorable, credible, and resistant to cross-examination. Further, it is important to remember the basics of trial presentation, including the rules of primacy, frequency and recency, i.e. that jurors remember that which they hear first, last and most frequent.

II. Attorney Preparation.

It is axiomatic that in order to conduct an effective, as opposed to elementary, direct examination, the attorney must be conversant in and knowledgeable of the subject matter. If an attorney tries to guide an expert witness through testimony of subject matter about which the attorney is ignorant the attorney will not be able to do much more than ask very general questions and hope the witness can provide helpful answers. If you are going to try an eminent domain case you should learn the subject matter. An eminent domain trial attorney’s well-read library should have on its shelves the “bibles” of
eminent domain and condemnation litigation, including, Nichols on Eminent Domain, The Appraisal of Real Estate, Real Estate Value in Litigation, Uniform Standards of Professional Appraisal Practice (USPAP), as well as property-specific publications on topics relevant to your particular cases. For example, the Appraisal Institute publishes books for appraisers discussing appraisal procedures and techniques, as well as how to appraise almost every type of property, for example hotels, golf courses, distressed commercial real estate, shopping centers, senior housing, health care facilities, rural property, industrial property, conservation easements, apartments, condominiums, and recreational vehicle parks.1 (See exhibit 1 at the end of this article.) The effectiveness of any examination will be enhanced with a thorough understanding of the subject matter of the testimony. Such a knowledge base will permit the attorney to conduct a free-flowing and conversational examination.

In addition to understanding the issues impacting the value of the particular property at issue, legal issues may arise during the course of any case requiring additional research and support. For example, attached as exhibits 2 and 3 is a sample objection and response to a particular methodology used by an appraiser to reflect adjustments to comparable properties in an appraisal report. The resolution of this particular issue depended upon both appraisal standards and the law applicable to expert testimony generally.

III. The Subject Matter of Direct Examination.

The subject matter of the direct examination of a valuation witness should cover:

- The expert’s qualifications;
- A description of the appraisal process;
- A description of the specific work the appraiser undertook to value the subject property;
- A description of the property at issue;
- The highest and best use of the property;
- A discussion and explanation of each approach to value used by the appraiser (e.g. income approach, comparable sales approach, cost approach); and
- A final reconciliation of value.

As each subject area is covered, the opportunity should be taken to educate the jury and convince them of the merits of your position. As we consider these topic areas, it

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1 Of course, many appraisers specialize in appraising particular types of property. This should be a consideration in selecting an appraiser at the outset.
becomes apparent how great an opportunity exists to educate and how easily the opportunity may be squandered.

**The Expert’s Qualifications.**

Although, as stated above, we do not want the jury at the end of trial to be left deciding which appraiser to rely upon in reaching their judgment, convincing the jury that your valuation witness is the most credible, professional, diligent and objective of the two is a critical component of convincing the jurors themselves of the property’s market value. In short, conveying the professionalism and reliability of your valuation expert through the expert’s testimony is a step on the journey, not the end. But it is the first and a most critical step.

The admissibility of expert appraisal testimony in a condemnation case is generally accepted. Most States provide certifications for appraisers. In addition, there are recognized professional associations that further credential and self-regulate the industry. Thus, a well qualified and legally certified appraiser should be able to qualify as an expert before most courts. But the field of appraising real estate is not so well known that the validity of appraisal principles and the rigor of a quality appraisal are well known to most jurors. Consequently, the first object of any direct examination of a valuation expert in an eminent domain case is to introduce the witness to the jury and convince the jury of the witness’ competency, diligence, objectivity and credibility. In short, you should make sure the jury understands that your expert is an expert, is recognized by the government, the court and his or her peers as an expert, and that the witness did a quality job (was diligent) and objectively appraised the market value of the property at issue.

It should go then without comment that an attorney should never accept a stipulation to the witness’ expertise. Rather, the attorney should fully communicate the witness’ expertise through testimony. Here, skill will be required to “bring the witness’ expertise to life” without causing the witness to appear boastful, or putting the jury to sleep. Contrast two examples of direct testimony on this subcategory of a direct examination.

| Q: Please tell us your name. | A: John Expert. |
| Q: What is your profession? | A: I am a real estate appraiser. |
| Q: Will you please describe your professional experience to the jury. | A: I have been certified by the State as an appraiser since 1983 and I have been a practicing appraiser since that time. |
| Q: Do you have any professional designations? | A: Yes, I have the designation of MAI by the Appraisal Institute which is a professional association. |
| Q: Have you ever testified as an expert before? | A: Yes, I have been accepted as an expert in many different courts and testified in many different cases as an expert. |
Contrast the above, which is a not-too shortened example of many expert qualification colloquies, with the following sample voir dire of the same valuation expert.

Q: Please tell us your name.
   A: John Expert.
Q: What is your profession?
   A: I am a real estate appraiser.
Q: How long have you been engaged in that occupation?
   A: For over 27 years now. I first started in the practice in 1981.
Q: Please explain to us what the profession of real estate appraising entails.
   A: The accurate appraisal of real estate involves a study of the market, knowledge of all the characteristics of a property and how those characteristics affect its marketability, as well as the laws and regulations concerning land use, because each of those factors will impact a property’s market value.
Q: What is your educational background?
   A: I received my undergraduate degree from the University of Maryland in 1979.
Q: What field was your undergraduate degree in?
   A: Business Administration with a minor in Environmental Studies.
Q: Did you work in that field before pursuing your profession in real estate?
   A: I did. I worked for a Land Planning firm for several years and during that time I became more interested in the valuation and value of the various properties the firm was engaged to study. Consequently, I began the formal study of real estate appraisal and have been engaged in this specific field full-time since 1981.
Q: Is the profession licensed by any government body?
   A: Yes, the State regulates, certifies and licenses appraisers and one must be licensed in order to practice in the field without supervision by a licensed appraiser.
Q: What is entailed in achieving State certification and license as a professional real estate appraiser?
   A: (Details, not just “education and pass test”)
Q: When did you become certified and licensed by the State?
   A: 1983.
Q: How did you practice in the field between 1981 when you started and 1983 when you achieved your professional certification and license?
   A: Initially, I apprenticed with Harold Expert, who was one of the preeminent appraisers in this area at the time. Mr. Expert was my mentor in all aspects of the profession and he guided me through my continuing education and certification, at which time I continued with the firm as a principle.