

ALI-ABA Course of Study

Condemnation 101: How To Prepare and Present an Eminent Domain Case

February 4-6, 2010
Scottsdale, Arizona

Voir Dire: Selecting a Jury in a Post-Kelo Era while in a Market Recession

By

William G. Blake, Esq.
Lincoln, Nebraska

Voir Dire: Selecting a Jury in a Post-Kelo Era While in a Market Recession

WHAT DO YOU REALLY WANT? HOW DO YOU GET IT?

Voir Dire. L. Fr. To speak the truth. Black's Law Dictionary.

"Everybody lies. Cops lie. Lawyers lie. Clients lie. Even Jurors lie.

There is a school of belief ...that every trial is won or lost in the choosing of the jury....There is probably no phase in a ... trial more important than the selection of the twelve citizens who will decide your client's fate. It is also the most complex and fleeting part of the trial, reliant on the whims of fate and luck and being able to ask the right question of the right person at the right time.

The bottom line in any trial is that I want a biased jury....I want them predisposed to be on my side. I want twelve lemmings in the box. Jurors who will follow my lead and act as agents."

Michael Connelly, *The Brass Verdict*, 2008.

He who knows only his own side of the case, knows little of that.

John Stuart Mill, *On Liberty*.

I. Guiding Principles:

- A. There's gold in them thar hills, and you've got to mine it!
- B. There may be a bomb sitting there ready to explode, and it's your job to find it.
- C. Don't worry so much about what you say – your job is to just get them to talk – and to listen to what they say.

Anonymous

II. The Rules. Do:

- A. Know everything you can about the members of the panel beforehand.
- B. Be prepared.
 - 1. Know the areas, subjects you want to discuss.
 - 2. Know the areas, subjects you do not want to discuss.
- C. Be human.
- D. Begin to tell the story your way, fairly.

- E. Know what the jury instructions are likely to be, and use them.
- F. Know your judge and local procedures.
- G. Give careful thought beforehand to who you are looking for and who to avoid.
- H. Be flexible.
- I. Think before you speak.

III. Don't:

- A. Argue your case.
- B. Argue about anything with anyone.
- C. Be insensitive, cold calculating (or rather, don't let it show).
- D. Try to become instant buddies.
- E. Put them on the spot or make them feel like they gave the wrong answer.
- F. Try to be a comedian.
- G. Try to extract promises.
- H. Try to be like someone else.
- I. Be theatrical.
- J. Let your ego get in the way.
- K. Be afraid of a clever theme, but also, don't overdo it and don't be too cheesy.
- L. Don't go off on irrelevant tangents.

IV. Remember:

- A. Pigeonholing people is very difficult to do with fairness and accuracy.
- B. Some pigeonholing is inevitable.
- C. Most people are very concerned with government waste and the taxes they pay to support it.

- D. Most people would not want to be in a situation where they have no choice in whether to sell, and little choice as to the price.
- E. If the judge's instructions of "the law" do not agree with what a person knows to be right and wrong, that person will find a way to follow what they know.
- F. Most jurors understand the judge's instructions only a little.
- G. If you talk about "preponderance of the evidence", the typical juror will hear "Blah, blah, blah".
- H. Most jurors have not read an appraisal, and almost nobody has heard one given orally. Most jurors will remember the bottom line, and about 10% of the rest. Eyes glaze over when you talk about the characteristics of comparable sales or capitalization rates.
- I. Do you want jurors who will split the difference due to "Gee, I don't know, they both had an appraisal"?
- J. You will get lip service answers to fairness or following the law questions, if you give them the chance.
- K. The more you talk and the less they talk, the less you will learn about them.
- L. The lawyers who claim to know the most about selecting a jury tend to be the ones who have learned from the most mistakes.
- M. Poisoning the panel by soliciting answers you don't want them to hear is a problem, but a jury poisoned during deliberations by a biased juror can be disastrous.
- N. Keep in mind that in some cases you may want the twelve least qualified people in the county to decide your case, while in others you would like to have twelve MAI appraisers.
- O. You are not trying to convince the prospective jurors of your brilliance. You are trying to not look stupid while learning about them.
- P. Frame the issue, and frame the questions. It is better today for the property owner's lawyer to talk about what the department of transportation has taken from Mrs. Smith than to frame it as what Mrs. Smith has lost. What she has lost sounds too much like entitlement, while taking something from her sounds unfair.

V. The View From The Bench.

This author recently worked with a retired trial judge on a project for a state bar association publication involving extensive interviews with a number of experienced trial judges in Nebraska. The subject was jury selection. What works and what doesn't work? What do the judges think, and how can the attorneys do a better job of working with the judges? The project was premised on the notion that few of us profess to be an expert at jury selection (in any era or market condition), and that we can't expect to be an expert at something like voir dire when we can't even feel comfortable that we know how to pronounce it.

The judges interviewed had almost one hundred twenty years of combined experience presiding over jury trials. The effort was essentially a voir dire of the judges: We wanted to get them to openly talk to us. The results confirmed many beliefs and observations of the lawyers, and provided one interesting surprise.

A. The Jurors, before and during the selection process:

1. Most are initially reluctant.
2. Service is an imposition on their daily routines
3. Service is a financial hardship on most.
4. The setting is unfamiliar. What if I have to go to the restroom? Where are the restrooms? Where can I smoke? Where do I go for lunch or for coffee, etc.?
5. They feel considerable apprehension and anxiety.
6. They want a good faith estimate of how long it will take.
7. They deserve and demand respect.
8. They dislike legalese.
9. They dislike people who talk down to them in explaining things almost as much as they dislike legalese.
10. They dislike irrelevant, time wasting questions even more.
11. They like a little humor to ease the tension.
12. They don't like lawyers who openly use the selection process to ingratiate themselves.

13. They do not want to be put on the spot unless they raise their hand.
14. They don't like being made to promise anything. It makes them feel like children.
15. They like to know what is going on, what the case is about, as soon as possible.
16. If the selection process is on the record, they want to know how the reporter can possibly keep up with the conversation, especially if it is in real time. (see numbers 4 and 15, above.)

B. The Judges:

1. Want the lawyers to talk to them about jury selection. They prefer questions beforehand to avoid mistakes during voir dire. They appreciate lawyers who want to know what to expect from the judge.
2. They recognize that each judge does it a little differently, and they do not expect the attorneys to know their individual preferences beforehand.
3. If they set a time limit, they expect it to be followed.
4. They dislike hypothetical questions, or requests to "put yourself in this situation".
5. They don't mind being requested to ask the sensitive questions instead of waiting for one of the attorneys to do so.
6. They do not understand how an attorney could appear before a panel for the first time looking and sounding unprepared, and they are surprised how often it happens. Some lawyers seem to believe it makes them look human. Judges tend to think it just looks slovenly, even disrespectful.
7. They often enjoy anticipating and hearing the attorneys' opposing views of the theme of the case.
8. The Surprise: They are generally willing to talk to counsel about the selection process after the trial. They often take extensive notes and are willing to critique the attorney's effort if asked to do so.

VI. The Economy and Kelo. Heard in the last year and a half.

- A. Government attorneys talking repeatedly about "In this economy...."

- B. Property owners' attorneys, referring at every convenient opportunity in a highway relocation condemnation, to the "needs and demands of the developer", which was an insurance company that was moving its headquarters. (I'm the guilty party.) After several references to the "benefits to be enjoyed by the private developer for whom this taking of private property was commenced", the judge, in a side bar, admonished "stop doing that." I still wonder whether the judge waited until he thought the point had been made.
- C. A professional engineer, who promised during voir dire to be fair, walked into the jury room for deliberations and immediately attempted to take over by asking "Why should we make him (the property owner) rich?"
- D. A prospective juror was asked in front of the entire courtroom, "When is your baby due?" She responded: "I'm not pregnant."
- E. A prospective juror who knew one of the attorneys was asked by the attorney: "But we don't visit with each other do we? I mean, we've never been in each others' homes? The response was: "That's not entirely true. I've been to your home, but you weren't home. Your wife was."
- F. A city attorney who asked at least six times during voir dire, if jurors would have any trouble demanding the property owner to "show me the money". If he would have been watching the facial reactions of the panel members as well as the judge and the rest of us, instead of reading his notes, he would have known after the first time that everyone was thinking "huh?"
- G. A Juror in a condemnation case in the summer of 2009 (not one of the author's my cases) said later: "I know we all kept thinking they didn't really need that much land for the project, but we couldn't stop it, so we made sure they paid for it. I thought: how would I feel if they took my land that way?"
- H. Following voir dire while representing a land owner in western Nebraska, a well seasoned local attorney advised leaving two well seasoned cattle ranchers on the jury. I disagreed, as they would have acquired their extensive land holdings practically for free as a result of their ancestors' use of the Homestead Act and the rest for a few dollars per acre. I thought they would not be likely to appreciate urban land values expressed in terms of value per square foot, but I decided to listen to the old guy, believing he knew his county better than I did. He did, and he was right.
- I. In Nebraska, condemnation cases are first heard by a Board of Appraisers, appointed by the County Judge for each case. They are required to be freeholders in the county. During the swearing-in at the beginning of a hearing, one of the appointees was asked to swear that he was a freeholder. After questioning the judge as to what that means (not an infrequent inquiry), he paused and finally said with obvious discomfort: "I guess, I mean I think, Ugh, you know maybe

not anymore.” His home had been sold through foreclosure several weeks earlier. The hearing was continued to allow for appointment of a qualified board member.

VII. Current Market Realities.

A. Unemployment Rates (all U.S. workers unless stated otherwise)

From United States Bureau of Labor Statistics

1929		3%
1933		25%
	Cleveland, OH	60%
	Toledo, OH	80%
1950 (Oct.)		4.2%
1990	“	5.9%
2000	“	3.9%
2008	“	6.6%
2009	“	10%
	Michigan	15.1%
	California	12.5%
	Florida	11.2%
	New York	9.9%
	Nebraska	4.9%
	North Dakota	4.2%

B. Home Value Decline

From various news sources

All U.S. homes, loss of value in	2009	9.8%
Las Vegas, loss of value in	2009	26.5%

Silicon Valley,	2008-2009	17%
Chicago,	2009	\$50 billion
New York	2009	\$49 billion

C. Underwater Home Mortgages, also known as upside down, or negative equity
From various news sources

All U.S. homes, as of Dec.	2009	23%
Las Vegas	“ 2009	69.5%
Michigan	“ 2009	37%
Florida	“ 2009	45%
Arizona	“ 2009	48%
Average negative equity, Dec.	2009	\$70,000.

D. Home Foreclosures/Repossessions.
from various news sources

Foreclosed/Repossessed since 2006, as of Dec. 2009	2.3 million homes
Estimated total by end of 2011	7.5 million homes
10% of American homeowners are behind in payments as of Dec., 2009	

E. In the Nation’s Headlines, Dec. 2009

“House Prices Still Have A Ways To Go”.	Home values will fall some more.
“Housing ‘Recovery’ Built on Sand”.	Predicts another downturn in 2010.
“Another Leg Coming Down in Housing”.	More of the same.
“Foreclosures: Those With Good Credit, Jobs Are Walking Away”	Go ahead, sue me.
“Home Sales Up In South Florida” From the Miami Herald, Dec. 15, 2009	Sales are up 26% in December, but prices are down 28%.

F. Directly From Appraisals.

1. **2003.** An MAI appraiser discussed his comparable sales in his report regarding a lakeside residential development in southeast Nebraska, stating:

“The appraiser concluded the increase (in value) is 3% per year for the period from 1998 to 2003.”

He used a subdivision income approach, factoring 10% annual profit as an expense of development, with the remark that:

“It is “the return to the person or entity that takes the risk to develop the land. 10% “is found to be typical in this type of development.”

(The lower the expenses, the greater the value).

2. **2009.** An MAI appraiser discussed his comparable sales in his report regarding a lakeside residential development in southeast Nebraska, stating:

“Market comparisons indicate a 3.4% increase for 2006-2008. However, the residential construction slowdown had a dramatic effect on new lot sales in 2009. The appreciation rate for 2009 is 0%. In the appraiser’s opinion, economic indicators do not justify projecting any increase through 2011, with perhaps a modest increase of 2% in 2012. **In today’s market** such projections are based upon too many variables to have a high degree of reliability.” (Also known as speculation and conjecture).

(Emphasis added).

His discussion of a subdivision approach used 15% as the expected annual profit, following this statement:

“Because of **the current downturn** in the residential market and the tightness in the credit markets, ... developers have been very conservative regarding acquisitions. The difficulty of raising capital for large projects and the long expected absorption times **in today’s market** combine to inhibit development.” (Emphasis added).

VIII. Fair Market Value.

A. Typical Jury Instructions.

“The Plaintiff is entitled to recover:

1. The fair market value of the property taken, figuring that value as of (the date the petition in condemnation was filed)....”
2. Any decrease in the fair market value of the remaining property taken, figuring that value as of (the date the petition in condemnation was filed)....

Nebraska Jury Instructions 2d, No. 13.01, 2008.

“The Fair Market Value of a piece of property is the price that someone ready to sell, but not required to do so, would be willing to accept in payment for the property, and that someone ready to buy, but not required to do so, would be willing to pay for the property. “

Nebraska Jury Instructions 2d, No. 13.02, 2008.

B. Appraisal Definition of Market Value.

“Market value is the amount in cash, or on terms reasonable equivalent to cash, for which in all probability the property would have sold on the effective date of the appraisal, after a reasonable exposure time on the open competitive market, from a willing and reasonable knowledgeable seller to a willing and reasonable knowledgeable buyer, with neither acting under any compulsion to buy or sell, giving due consideration to all available economic uses of the property at the time of the appraisal.”

Uniform Appraisal Standards for Federal Land Acquisitions, Sec. A-9. (also known as the Yellow Book), published 2000 by the Appraisal Institute.