

## **Representing the Property Owner**

### Getting the Case

One of the first considerations in representing property owners in condemnation cases is getting the case. The rules governing a lawyer's solicitation of employment are generally set forth in the Texas Disciplinary Rules of Professional Conduct. Additionally, the Texas Legislature has attempted to limit the solicitation efforts of several groups, including attorneys, by enacting Section 38.12 of the Texas Penal Code, entitled Barratry and Solicitation of Professional Employment.

“Barratry” is the offense of frequently exciting or stirring up quarrels and suits, either at law or otherwise. Under the penal code provision, a person commits an offense if, with intent to obtain an economic benefit, the person solicits employment for himself or another concerning legal representation arising out of a particular occurrence or event, or series of occurrences or events, or concerning an existing legal problem of the prospective client, when neither the person receiving the communication nor anyone acting on that person's behalf has requested the communication. Additionally, Rule 8.04(a)(9) of the Texas Disciplinary Rules of Professional Conduct prohibits a lawyer from engaging in conduct that constitutes barratry.

An attorney who is guilty of barratry may be suspended from practice, or the attorney's license may be revoked, by a district court of the county in which the attorney resides or in which the act complained of occurred. TEX. GOV'T CODE ANN. §82.062. This is true regardless of the fact that the act complained of may be an offense under the Penal Code and regardless of whether the attorney is being prosecuted for or has been convicted of the offense. While the Legislature most likely anticipated the situation where a personal injury attorney appears at the scene of an accident, hospital, or funeral home to sign up a client, the language of the statute is not so limited.

There is an exception to prosecution for certain types of barratry where “the person's conduct is authorized by the Texas Disciplinary Rules of Professional Conduct or any rule of court.” TEX. PENAL CODE §38.12(c).

### Taking the Case

When an attorney is contacted by a property owner to represent it in a condemnation case, the attorney must first determine whether he or she should take the case. Rule 1.01 of the Texas Disciplinary Rules of Professional Conduct addresses when a lawyer should accept or decline a representation:

A lawyer generally should not accept or continue employment in any area of the law in which the lawyer is not and will not be prepared to render competent legal services. “Competence” is defined in Terminology as possession of the legal knowledge, skill, and training reasonably necessary for the representation. . .

In determining whether a matter is beyond a lawyer's competence, relevant factors include the relative complexity and specialized nature of

the matter, the lawyer's general experience in the field in question, the preparation and study the lawyer will be able to give the matter, and whether it is feasible either to refer the matter to or associate a lawyer of established competence in the field in question. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequences.

In a condemnation case, the client's goals in the representation can be many and varied, and like any other case, a lawyer considering accepting a condemnation representation must first consider whether he or she is competent to accept the case.

The following are ten questions our firm suggests property owners ask before hiring a condemnation attorney, and they give some insight into the inquiry an attorney should make before taking on a condemnation case:

1. *What is the attorney's relevant experience?*

A condemnation case represents the property owner's one and only opportunity to be compensated for the taking of some or all of its property. For many property owners, it is the most important lawsuit they will ever be involved in. The most important decision the property owner will make is the attorney that will represent it. Before hiring an attorney in a condemnation case, the property owner must be certain the attorney has the relevant experience handling these specific kinds of cases. This may or may not be the first lawyer that contacted the property owner or the lawyer with the most information about the project. The only way to find out is to ask.

2. *How many condemnation cases has the attorney tried to a jury verdict on behalf of property owners?*

Many cases are resolved short of a jury trial. However, experienced practitioners will tell you that some cases simply have to be tried to achieve the compensation to which the property owner is entitled. The condemnation attorney's ability and experience in trying these cases puts the property owner in the best position to resolving the case without the effort and expense of a jury trial. A property owner must know how many times the attorney has been to the courthouse representing property owners.

3. *How many special commissioners' hearings has the attorney attended on behalf of property owners in the last two years?*

All condemnation cases go through an administrative hearing before three special commissioners appointed by the trial court to make a preliminary determination of compensation. The number of hearings an attorney has

attended on behalf of property owners is another indication of whether that attorney has the relevant experience.

4. *What percentage of the attorney's work is devoted to the representation of landowners in condemnation cases?*

Condemnation is a specialized area of the law. Because of the many loopholes and complexities involved, it is not an area that lends itself either to the dabbler or to the general practitioner. The condemnation attorney should be able to represent that he or she spends more than 50% of his or her time representing property owners in condemnation cases.

5. *Has the attorney been involved in any reported decisions involving condemnation cases?*

This is another indication of an attorney's relevant experience. Just as some cases must be tried, sometimes cases are appealed. The condemnation attorney should be willing to pursue the case to the lengths necessary to obtain the compensation to which the property owner is entitled. The best indication of whether any attorney is willing to do this is whether he has done it before.

6. *Has the attorney handled similar cases?*

Condemnation cases are like property: no two are the same. However, similar issues arise in similar cases, and it can be helpful if your attorney has handled the same type of case as yours. For example, powerline or pipeline cases present very different issues from highway or roadway condemnation cases. Additionally, whole takings cases are very different from partial takings cases, particularly where there are issues of damages to the remaining property after the taking. Takings from improved properties present very different circumstances and issues than takings of raw, vacant land. Finally, the particular highest and best use of the property is important to how it will be impacted by a taking. Issues that are important to an industrial property may not have as much impact to a retail property, and vice versa.

7. *How will the attorney's fee be calculated?*

Any attorney will expect to be compensated for the time and effort necessary to assist the property owner in obtaining the compensation to which it is entitled. It is important to understand that a property owner cannot recover its fees and expenses incurred in a condemnation case; all a property owner recovers in the typical condemnation case is its compensation for the taking. Some attorneys will charge by the hour, others will charge a contingency fee. While the appropriate fee arrangement will depend on the facts and circumstances of the case, property owners need to be aware that when an attorney charges by the

hour for the time expended on the case, the property owner runs the risk that the fees paid to the lawyer may exceed any increase in compensation obtained through the attorneys' efforts or, worse, the amount originally offered. In most cases, an experienced condemnation lawyer will represent the property owner for a percentage of the amount recovered over and above the original offer. Under this arrangement, the attorneys' fees will never exceed the increase in compensation.

8. *Does the attorney have any clients I can talk to as a reference?*

An experienced attorney in this area should be able to provide a number of references of clients who can give the property owner their own perspective of the attorney's ability and reputation in this practice area.

9. *Are there any appraisers I can talk to as a reference?*

Almost every condemnation case will require the property owner to hire an appraiser to estimate the compensation to which it is entitled. Like condemnation law, appraisal in condemnation cases is a specialized practice, and there are a limited number of appraisers with the required experience in both appraising property and testifying as to values. The result is that the appraisers who work on condemnation cases have more knowledge than most about who the most experienced attorneys in this area are.

10. *Who are other experienced attorneys in this practice area?*

Because there really are a limited number of attorneys with the relevant experience in condemnation law, they all know each other, at least by name and reputation. An experienced attorney should be willing to provide the names of other experienced attorneys in this area so that the property owner can make a fully-informed decision on the best fit for a representation of its interests.

The point of this inquiry is to determine whether the attorney has the relevant experience in condemnation matters to best assist the client's interests. It is also in the best interests of the attorney. The relevant experience brings with it the ability to recognize potential pitfalls, manage client expectations, and determine an appropriate allocation of risk between client and lawyer at the outset of the representation. For the hourly-billing lawyer, there are many twists and turns that a condemnation case can take that could result in either charging or writing-off fees substantially in excess of what was anticipated at the time of the initial engagement. Except in limited situations, these fees are not recoverable for the client in a condemnation case. For contingent fee cases, and the rare reverse-contingency case, the lawyer may find himself in a situation where his time in the case greatly exceeds any hope of recovery and his obligation to his client forces the expenditure of good time (money) after bad. With experience, guidance, and study, the practitioner may learn to avoid certain representations and to structure others so that these risks become manageable.

### Hourly or Contingent Fee?

Most of the discussions on fees in this paper assume that the property owner is represented on a contingent-fee basis. While contingent fees are sometimes viewed with suspicion, in condemnation cases charging the property owner an hourly fee merits greater concern. A property owner cannot recover its fees and expenses incurred; all a property owner recovers in the typical condemnation case is compensation for the taking. While a contingent fee has the potential to result in a fee in excess of the lawyer's time expended, charging by the hour for the lawyer's time expended has the more grave potential of exceeding the amount of the property owner's recovery. At a minimum, the lawyer seeking to charge an hourly rate for his time on the case owes it to his client to advise it of this possibility.

Under Section 1.04 of the Texas Rules of Professional Conduct, a lawyer may not charge a fee that is "unconscionable." "A fee is unconscionable if a competent lawyer could not form a reasonable belief that the fee is reasonable." Among the factors to be considered in assessing the reasonableness of the fee are "the skill requisite to perform the legal service properly" and "the amount involved and the results obtained." On a visceral level, it is not difficult to see how a fee that exceeds the property owner's recovery or potential recovery from a condemnation case might be perceived to be unconscionable.

### The Right to Take

In some instances, a property owner's primary goal may be to avoid the taking altogether. Any analysis of the right to condemn property must begin with the condemnation statute, codified in Chapter 21 of the Texas Property Code. The condemnation statute sets forth established guidelines for the conduct of condemnation proceedings for the protection of property owners' rights where acquisition of their private property is required to serve a public purpose. Section 21.011 provides that "the exercise of the eminent domain authority in all cases is governed by Sections 21.012 through 21.016" of the Texas Property Code. These sections establish "a two-part process consisting of an initial administrative proceeding and then, if necessary, a judicial proceeding."

### *The Administrative Phase*

*Unlike traditional lawsuits, condemnation cases do not begin as judicial cases. Instead, the proceedings initiated by a condemning authority's condemnation petition are administrative in nature. The proceedings are not governed by the Texas Rules of Civil Procedure; instead, the procedures to be followed are found in Chapter 21 of the Texas Property Code. The condemnation petition does not allege that the defendant has done anything wrong; there is nothing to answer for or deny in a condemnation case. The trial court's role is very limited during this phase of the case. He must appoint three disinterested freeholders as Special Commissioners, and, if an appeal of the award of these commissioners is not timely filed, he must enter judgment on the condemning authority's petition and the amount of the award of Special Commissioners. These are ministerial acts. The trial court cannot, for example, grant a continuance or compel witnesses to attend the proceedings. Additionally, there is no discovery during the administrative phase other than the mandatory exchange of information contained within Section 21.0111 of the Texas Property Code.*

*A condemnation case becomes a judicial case only upon the timely appeal of the award of Special Commissioners. It is at this point that the case proceeds as any other civil case on the court's docket and the property owner may raise any "right to take" issues.*

Article I, Section 17 of the Texas Constitution proscribes the taking of private property for a public use without adequate compensation. Challenges to the public necessity of a condemning authority's project, however, face a decisively uphill battle. In general, all property may be taken under the power of eminent domain, both real and personal. The property must be taken for a public use, and if private property is taken for a purely private purpose, Section 17 is violated, as is the Due Process Clause of the Fourteenth Amendment of the United States Constitution. A public use is one which concerns the whole community in which it exists, not a particular individual or a number of individuals. The question is largely one for the legislature. Texas courts have refused to interfere except to inquire whether the legislature could reasonably have considered the use a public one. Public use is not limited to business necessity and ordinary convenience but may extend to matters of public health, recreation and enjoyment. While it is a question law for the trial court to decide, where the legislature declares a particular use to be a public use, the presumption is in favor of this declaration and will be binding of the courts unless the use is clearly private.

In response to the *Kelo* decision out of the United State Supreme Court, the Texas Legislature enacted Section 2206 of the Texas Government Code, entitled *Limitation On Eminent Domain For Private Parties Or Economic Development Purposes*. The statute is most noteworthy for its exceptions and probably belongs in the file next to that other meaningless gesture towards landowners' rights, the 1995 *Private Real Property Rights Preservation Act*.

There are additional requirements with which a condemning authority must comply. Section 21.012(b) of the Texas Property code establishes the four requirements a condemning authority must plead in its petition for condemnation:

- (1) describe the property to be condemned;
- (2) state the purpose for which the entity intends to use the property;

- (3) state the name of the owner of the property if the owner is known; and
- (4) state that the entity and the property owner are unable to agree on the damages.

Of these requirements, the fourth resulted in the most litigation and the biggest headache for condemning authorities. Prior to filing a condemnation action, a condemnor was required to make a “bona fide effort to agree” on the amount of money to be paid to the landowner. This was not a difficult burden on the condemnor. It need not engage in protracted negotiations and need not further negotiate when to do so is futile, a situation that arises when a property owner insists on terms that are unacceptable to the condemnor. Under no circumstances does a condemnor have a duty to compromise in negotiations. The condemnor must merely refrain from making offers that are arbitrary or capricious. Furthermore, there is no general duty of good faith beyond this minimal requirement.

The good-faith negotiations requirement, intended to reduce the number of condemnation cases that had to be filed by ensuring that the condemning authority and property owner at least had some dialogue concerning compensation prior to the filing of a lawsuit, was always a low hurdle for condemning authorities. This hurdle was lowered even further by the Texas Supreme Court’s majority opinion in the *Hubenak* case. The *Hubenak* Court posited a new procedure whereby the condemnation case would be abated for a reasonable time until the “unable to agree” requirement is satisfied. If after a reasonable period of time the condemnor has not made an offer, then the condemnation proceeding should be dismissed.

The aftermath of the *Hubenak* opinion has been, for all practical purposes, an abandonment of the purpose behind the “unable to agree” requirement, “to forestall litigation and to prevent needless appeals to the courts when the matter may have been settled by negotiations between the parties.” This policy was intended to protect, and the impact of the Court’s holding will disproportionately impact, smaller cases where the amount in controversy is often not enough to warrant hiring an attorney or, often, even an appraiser. It is the property owners in these cases that the “unable to agree” requirement was intended to protect by forcing the condemning authority to put a reasonable number on the table before filing legal proceedings that will require the property owner to incur fees and expenses that it cannot recover. Without this requirement, it may be in the property owner’s best economic interest to donate its property rather than incur the fees and expenses associated with prosecuting a claim for compensation in a condemnation case, which fees and expenses may exceed the possible recovery.

Moreover, because the abatement procedure is not set forth in the condemnation statute, it is very unlikely that the property owners that could benefit from abatement, those with smaller cases who likely cannot afford to hire a lawyer, will even know of its existence. In more substantial cases, however, abatement is not likely to be invoked for two reasons: (1) perversely, the condemning authority has a greater incentive to make a reasonable pre-condemnation offer because, as the amount in controversy increases, the property owner has a greater incentive to contest the offer; and (2) the benefit to the property owner of litigation avoidance is offset by the increasing benefit of the amount in controversy. Thus, the dilution of the good-faith negotiations requirement in *Hubenak* is bad law and bad news for those property owners facing condemnation who can least afford it.

When the client property owner's primary goal is to defeat the taking, arises, it can present a number of professional responsibility issues for the condemnation lawyer. Most of these issues relate to the management of the client's expectations. The client needs to understand that the trial court's discretion to second guess a condemning authority's determination of public necessity and authorization to condemn is limited. While it is true that the condemning authority has less discretion in failing to follow the statutory procedures for a condemnation case, a dismissal under these circumstances will generally be followed by a subsequent condemnation lacking whatever procedural infirmity resulted in the initial dismissal. This does not accomplish the client's goal of avoiding the eventual acquisition of its property. Moreover, if the attorney charges the client for his time incurred, the fees and expenses in a full-blown challenge to the right to condemn can be substantial, potentially exceeding the amount of compensation that the property owner stands to recover if the challenge is unsuccessful. If the attorney has a contingent fee arrangement that fails to address how a challenge to the right to condemn will be handled, the attorney may be forced to pursue the challenge with the only hope of recovering his time in the case coming from the condemning authority in the unlikely event that the challenge is successful. This situation can lead to an unacceptable tension between the attorney's obligations to his client to accomplish its aims and his own self-interest in avoiding a potential sinkhole of time and opportunity cost.

The attorney representing a property owner must work hard to ensure his client has a reasonable expectation of what can be accomplished in terms of challenging the right to take. An unsuccessful challenge to the condemnation, with its attendant fees and expenses, can vitiate the overarching purpose behind the constitutional guarantee that property will not be taken for a public purpose without adequate compensation being paid. Money is fungible, and every dollar spent by the property owner, either in challenging the right to take or in attempting to obtain the compensation to which it is entitled, is a dollar that is deducted from its ultimate recovery and, accordingly, "adequate compensation."

### The Compensation Question

The compensation question is, at its essence, a problem of market value to be resolved through the analysis of appraisals. The condemnation attorney cannot appraise the property but is best situated to assist the property owner in determining whether to hire its own appraiser, who to hire, when to hire the appraiser, and the best approach to maximizing the property owner's compensation.

The condemning authority's offer of compensation is typically supported by an appraisal, and at some point the condemning authority will have to provide the property owner with a copy of it. Until the property owner has the appraisal, it is difficult to evaluate the offer of compensation for the taking. It is rarely worth the effort or expense to obtain an appraisal estimate of compensation in advance of receiving the appraisal on which the condemning authority relies.

### *The Cost of Hiring An Appraiser*

*Property owners are often stunned at the cost of an appraisal for condemnation. Where it may have paid \$500 for a bank appraisal in support of a residential loan, the cost of a condemnation appraisal can exceed \$10,000, depending on the issues involved. This may be in contrast to \$3,000 to \$5,000 that the condemning authority has paid for its appraisal. There is an economy of scale issue that benefits the condemning authority as a repeat player in the process. The condemning authority typically hires an appraiser to appraise several parcels along its project. Thus, the cost of the appraiser's market analysis and collection of market data can be spread across these parcels, lowering the cost per appraisal for the condemning authority.*

Once the appraisal comes in, the first step in its evaluation is to confirm that all legally compensable elements of market value have been considered. Depending on whether the condemnation involves a whole or partial taking, vacant or improved land, fee ownership or a leasehold interest, or claims for remainder damages, the issues involved in this evaluation can range from straight-forward to exceedingly complex.

The appraisal report in a condemnation case really contains two appraisals: an assessment of the market value of the whole property before the taking and of the property remaining after the taking. In most cases, the difference between these values will be the amount of compensation owed.

Every case will involve an assessment of the whole property before the taking, and this assessment is critically important. In many cases, the market value of the whole property will be determinative of the compensation question, either because the taking is a whole taking or because the taking does not negatively impact the market value of the remainder property after the taking. Even in cases involving remainder damage issues, the reliability of the assessment of the remainder after the taking will depend on the accuracy of the assessment of the property before the taking.

The first issue to be considered in assessing the whole property is identifying the relevant parcel, sometimes referred to as the separate economic unit. In some instances, this will be the taking; in others, the relevant parcel will be all or part of the whole property. The bounds of the relevant parcel are in large part determined by the use of the property. The portions of the whole property that share the same highest and best use, up to and including the whole property, constitute the relevant parcel. This determination is critically important to determining the market value of the whole property and, thus, the market value of the property being taken. While in most cases the whole property will be the relevant parcel, when the relevant parcel is something less than the whole property, using the whole property as the relevant parcel unfairly averages the market value of the part taken with property that does not share its use potential.

The next inquiry is whether the appraisal has adequately assessed the property's use potential. The market value of property is not limited to its existing use. Instead, in determining market value, the appraiser must consider the property's highest and best use, the reasonably probable and legal use of property, which is physically possible, appropriately supported, financially feasible, and that results in the highest value. The appraiser's conclusion of the relevant parcel's

highest and best use will control the appraiser's selection of market data. Thus, an error at this point of the appraisal will taint all market value conclusions going forward in the appraisal.

The final inquiry in evaluating the appraisal's estimate of market value before the taking is whether the methodology employed was appropriate and whether the market data on which the conclusions are based is comparable. Although these may ultimately be issues for an appraiser, the condemnation attorney can contribute meaningfully to this analysis. This contribution is particularly important in those cases where the amount in controversy does not warrant the expense of an appraisal, which the property owner cannot recover in a condemnation proceeding. The condemnation attorney's role is to maximize the property owner's compensation. Many times, this means advising the property owner to accept the offer rather than pursue an amount of compensation that is not justified by the expense.

The assessment of the remaining property after the taking is more complex. All of the issues presented by the appraisal estimate of the whole property's market value still apply. Additionally, there are legal constraints on which impacts from a taking may be considered that can greatly alter an analysis of the remainder's market value. As the Texas Supreme Court has remarked on many occasions, not every decrease in market value is compensable.

*Condemnation's Role in Responsible Government*

*When the compensation paid for the taking of private property does not include all of the compensable impacts of the taking, the just compensation obligation fails in its function as a check on government's taking of private property. The underlying principle of the takings clause is that public burdens should be borne by the public, and not by individual property owners. Therefore, it is critical that this calculus include the full magnitude of the burden to be imposed on the property owner as a result of the taking. Too often it does not. The proponents of public projects have an incentive to understate the property acquisition costs associated with a project to facilitate its approval. It is particularly easy to understate or omit damages to property that is not acquired but will suffer a negative impact from the project. When the true cost of the acquisition is revealed through the judicial process, usually years later, these same proponents blame the property owners, the attorneys representing them, or juries for the cost overruns. In fact, these overruns are the direct and natural result of their own conduct in failing to assess the compensation question fully in the planning stage.*

An example of this is seen in the impaired access cases. We know that a property's location can be determinative of its market value. A key component of a property's location is its access. Diminished access resulting from a taking of property, however, cannot be considered in determining market value unless the change in access is "material" and "substantial." "Material" means that it makes a difference. Fair enough: we can agree that government should not have to litigate access claims where the change in access does not make a difference. "Substantial" means, among other things, not insubstantial. Again, government should not have to litigate an access claim where the difference to the property is insubstantial. However, the terms material and substantial when used to determine the compensability of a change in access have been taken far from their plain meanings and have been applied to deny compensation in situations where the change in access clearly makes a big difference in how the property is accessed and in its market value. An appraiser may be able to quantify this impact, but only the condemnation attorney can advise the client whether the impact is compensable and, thus, whether it warrants the attendant expense associated with litigating the issue.

The lawyer for the property owner must constantly be aware that the condemnation case represents the property owner's one and only opportunity to recover for the impacts of the taking on the market value of the property. The property owner is certain not to recover for a particular element of damages if its attorney does not seek to recover it. A trial-and-error approach is insufficient and unfair to the property owner. The property owner has to rely on its attorney to determine what claims can be asserted to make sure it recovers all of the compensation to which it is entitled without incurring needless expenses litigating noncompensable issues.

The lengthy pursuit of damage claims that are ultimately rejected can certainly have a chilling effect on a lawyer's enthusiasm for condemnation cases in the future. And yet, if the property owner's lawyer fails to pursue the compensable remainder damages, he or she fails in the duty to recover the full amount of damages allowed under law for the taking. On a case-by-case basis, these inefficiencies can be punitive. Depending on whether the property owner has hired its attorney on an hourly or contingent basis, a sustained and unsuccessful pursuit of damages can result in attorneys' fees greatly in excess of the client's recovery or in a fee that fails to compensate the condemnation attorney for the time incurred on the case.

Unfortunately, these inefficiencies in condemnation cases are probably unavoidable as long as the attorney represents property owners and is fully committed to fulfilling his duty to his or her clients. Damage issues on the blurred line of compensability will arise, and, if necessary, this duty will require the attorney to litigate the issue as far as necessary, irrespective of the risks that he or she may not recover a fee or that the fee will not equate to the amount of time and effort expended on the case. These risks can be minimized, however, for the condemnation attorney handling condemnation cases on a contingent fee. Experience in this practice area, particularly with complex remainder-damage cases, over time should lead to an ability to recognize and separate compensable elements of damage from those elements that are noncompensable. Maintaining a substantial docket of cases, while not reducing the risk, allows a condemnation attorney to lessen the impact of having one of his cases end up in protracted litigation over compensability by spreading this risk over more cases.

#### Resolution of the Case

There are many opportunities for resolution of a condemnation case. As indicated above, the most important opportunity comes at the time of the condemning authority's offer. If a case does not warrant the effort and expense associated with litigation, the condemnation attorney must recognize this and advise the property owner accordingly. The condemnation attorney will want to avoid the situation where the property owner recovers less than the condemning authority's original offer after deduction of fees and expenses.

The award of Special Commissioners affords another opportunity for resolution. The point of the administrative phase is to bring the parties together to avoid litigation. At this stage, both sides typically have their positions as to the market value of the property and the impacts of the taking. The hearing allows each side to explain its position and expose the weaknesses of its opponent's position to a disinterested decision-maker. After hearing the evidence and receiving the award, the parties are in a much better position to evaluate their respective positions and consider settlement. Many cases are resolved following the administrative phase.

For those cases that proceed to a judicial case, there are a number of opportunities for the parties to gain a better understanding of the market facts and, thus, the merits of their positions. The cross examination in the commissioners' hearing is without the benefit of discovery. Full discovery allows for a more vigorous examination of the appraisal opinions that form the basis of the parties' positions. As the facts that support or cut against the property owner's position are established, the condemnation attorney should have a good picture of what the case is "worth" and, thus, what an acceptable settlement would be.

In most cases, this process culminates in mediation. While the mediation process is voluntary, and there are no rules or procedures governing the mediation presentation, it is important that the condemnation attorney fully prepare for this critical opportunity to resolve the property owner's claim short of a jury trial. Because of risk and expense factors, there is always some justification for settlement at less than the property owner's number in even the strongest case, just as the condemning authority always has some incentive to pay more than the amount of its appraisal. If both sides treat the mediation process seriously, most cases should settle.

The most common reason condemnation cases do not settle in mediation is miscalculation of the case by the condemnation attorney. There are a number of explanations for this. First, many attorneys do not take mediation seriously. Instead, they enter the mediation process with some settlement number in mind without giving much thought to the analysis that would support such a settlement. This analysis is important, particularly when dealing with governmental agencies that must have support for their financial decisions for audit purposes. Another explanation is the lack of jury trial and appellate experience among practitioners. To properly evaluate a case, the condemnation attorney needs to understand how the trial court, jury, and potentially the court of appeals will perceive the property owner's case, whether in terms of the admissibility or persuasiveness of its evidence or the compensability of its damage claim. An additional factor that contributes to the failure of many mediations is the underestimation of the litigation expenses to be incurred going forward. The condemnation attorney has to work hard to accurately assess this aspect of the case and manage the client's expectations accordingly.

Very few condemnation cases proceed to jury trial, and many condemnation attorneys tend to treat a jury trial as a second commissioners' hearing. This is a grave mistake, for many reasons. Unlike a commissioners' hearing, there are rules of procedure and of evidence that apply to the presentation of evidence in a jury trial. Thus, the condemnation attorney must give special care and attention to ensure that all of his or her evidence is admissible. The exclusion of evidence can be devastating to the property owner's case. At a minimum, such exclusion will alter the planned presentation of the case on which the case was prepared and evaluated. While evidence will sometimes be excluded in the trial of a condemnation case, it should never come as a surprise, and the condemnation attorney must plan for the exclusion of evidence that he recognizes may have admissibility issues.

Additionally, jurors are not used to the process the way many special commissioners are. They are more likely than commissioners to focus on the presentation of the evidence in assessing its credibility. Missteps by lawyers and witnesses that are reflective of a lack of preparation may be interpreted by jurors as a lack of credibility.

### *Why a Jury Trial?*

*There are alternatives to a jury trial for the resolution of condemnation cases, including binding arbitration and a bench trial in which the judge would decide both the facts and the law in the case. There are a number of reasons why a jury trial is a preferable means of dispute resolution. The most basic is the problem of bias. Both arbitrations and bench trials place a premium on the condemnation lawyer's relationship either with the arbitrator or the judge, as opposed to his or her substantive expertise. This is even more problematic in condemnation cases, where there are no liability issues and the compensation amount is subjective. The compensation awarded in a condemnation case should be decided based on the market facts and not by which side's lawyer has a better relationship with the factfinder. The jury selection process eliminates this concern.*

The most important difference between jurors and commissioners is in their selection. Commissioners are typically appointed from a list of various affiliates of the trial judge. In contrast, jurors are selected through a selection process in which the lawyers get to participate. Special commissioners often have some background in real estate that may shape their view of the market evidence. Jurors are selected for their lack of connection to the case, including their lack of real estate experience. This ensures that the trial is decided on the evidence that is presented at trial and not on "secret" evidence that a juror may have, either about the property itself or the market data presented, that has not been subject to the rules of admissibility or to cross-examination. Special commissioners are often chosen for their predisposition towards or against property owners' claims, depending on the choosing judge's philosophy. Jury selection gives the condemnation attorney the opportunity to discover any such predispositions.

Once a jury is selected, the trial proceeds with argument and evidence. Because the property owner has the burden of proof on market value, it is allowed to open and close the evidence and argument. The trial at this point is more similar to a personal injury case than to the condemnation case in the administrative phase. For the property owner attorney to achieve consistent results, it is not enough to fully present the market facts that support the property owner's position. The attorney must make the jury want the property owner to win. Once the jury wants you to win, it can find the reasons why you should win. If the jury does not want the property owner to win, there is no amount of evidence that will convince it otherwise.

To make the jury want you to win, you have to select a theme that is consistent with your position and that resonates with the jury. Although the particular theme appropriate for a condemnation case will vary with the facts, a theme will resonate with the jury if it is consistent with their beliefs and life experiences. The theme of the case can be viewed as columns across which the facts of the case are draped. The presentation of evidence, including cross-examination of the condemning authority's witnesses, should be consistent with and emphasize the case theme at every opportunity.

The benefit of this approach to trying cases is to remove some of the risk and uncertainty from the process. The presentation of evidence at trial never goes as planned. A witness can falter, evidence can fall flat, objections can be sustained. The theme is the one thing that you can count on. It is not subject to cross examination. It does not depend on the admissibility of evidence. Instead, it depends on the morals, beliefs and life experience of the jury. The goal of your theme is not to convince the jury that the property owner should win based on the evidence but that the

property owner should win based the jury's own beliefs of what is right and wrong. It is difficult to convince someone of something they do not believe. It is far easier to convince them of something they already believe.

A final note about the trial of condemnation cases. A disproportionate number of condemnation trials involving remainder damage claims are appealed. To the extent possible, the condemnation attorney must be vigilant in framing the case in terms of recognized compensable elements of recovery. A condemnation attorney may have a case that presents a good opportunity to develop the case law on an issue of compensable damages. The decision to go forward in such a case should be made by the client, and not the lawyer, with full disclosure of the expenses that will be incurred and the likelihood of success.

*A Compensation Trap*

*The property owner has the burden of proof on damages, and the issue of compensability of damages is generally a question of law for the court to decide. Together, these rules in condemnation cases can sometimes lead to a harsh result for the property owner who has prevailed in the trial court on a damage theory that is ultimately rejected on appeal. Under certain circumstances, the property owner can be deemed to have failed to present any evidence of compensable damages, and the trial court's judgment will be reversed and rendered for nominal damages to the property owner.*

Conclusion

When a client comes to a lawyer with a condemnation case, it could very well be the most significant legal issue that the client will ever have. From the moment a case comes in the door, the sole focus of the condemnation attorneys' efforts is to maximize the property owner's recovery for the taking, with a constant eye on the principle that money is fungible. This interest may be served by advising the property owner to accept the offer when the facts do not warrant incurring the expense of contesting the offer. It may also be served by taking the case through a full jury trial and appeal when the facts and amount in controversy warrant. Trying condemnation cases enhances the condemnation attorney's ability to recognize when offers should be accepted, when cases can be settled favorably for the property owner, and when the facts justify the risk and expense of pursuing full compensation in a jury trial.