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Trial Strategy and Techniques to Exclude Noncompensable Damages and Improper Valuation Methods in Eminent Domain Cases

A report submitted under ongoing NCHRP Project 20-6, "Right-of-Way and Legal Problems Arising Out of Highway Programs," for which the Highway Research Board is the agency conducting the research. The report was prepared by Joseph M. Montano, Chief Highway Counsel, State of Colorado, for John C. Vance, HRB Counsel for Legal Research, principal investigator, serving under the Special Projects Area of the Board

THE PROBLEM AND ITS SOLUTION

State highway departments and transportation agencies have a continuing need to keep abreast of operating practices and legal elements of special problems involving items of damage in condemnation cases that are both compensable and noncompensable as well as elements of valuation that are both proper and improper. The duty of counsel for the condemnor is to protect the taxpayer from having to pay for these noncompensable and improper items. The report includes ideas and suggestions of strategy and trial techniques--together with legal authorities in support thereof--for use by legal counsel in the discharge of his duty.

RESEARCH FINDINGS

Research findings are not to be confused with findings of the law. The monograph that follows constitutes the research findings from this study. *Because it is also the full text of the agency report, the statement above concerning loans of uncorrected draft copies of agency reports does not apply.*

I. INTRODUCTION

A condemnation case may present items of damage that are both compensable and noncompensable. Also, it may present elements of valuation that are both proper and improper. If the damages are noncompensable and the valuation processes are improper, they should not be the basis for an award of just compensation. Therefore, it becomes the duty of counsel for the condemnor to protect the taxpayers from having to pay for these noncompensable and improper items. What can counsel do during the course of litigation to discharge this duty? There are a number of things that can be done. Suggestions and ideas of strategy and trial techniques--together with legal authorities in support thereof--are included herein for use by counsel in the discharge of his duty. The cases cited are predominantly condemnation cases, although some are not. The ones that are not are used because they illustrate and support, in principle, the position taken.

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There are many courses of action available to preclude from the jury's consideration improper valuation items and noncompensable damages. These courses of action must also be taken to preserve the record for appeal, if that eventually becomes necessary.

It is not the purpose here to document in any detail what elements of damages are noncompensable and what valuation processes are improper. It is assumed that these are or will be known to counsel, and the only thing that remains is to determine what steps should be taken to keep these improper items from the jury's consideration.

These steps can be taken before trial and during trial. Before trial, pre-trial discovery, coupled with motions to suppress evidence, commonly referred to as *in limine* motions, can be used effectively. During every major part of the trial--such as in jury selection, opening statement, direct examination, cross-examination, rebuttal, instructions, and closing arguments--certain steps must also be taken.

Each step is discussed here in the order in which it would arise during the course of litigation.

II. PRE-TRIAL DISCOVERY

There is some disagreement among lawyers for condemning agencies as to whether pre-trial discovery is to the advantage of the condemnor. Those who believe that it is not advantageous will not seek to undertake it. Those who believe it is, will seek to undertake it. In any event, it seems clear that the tendency is for the courts to permit it. See *NCHRP Report 87*, "Rules of Discovery and Disclosure in Highway Condemnation Proceedings."

Pre-trial discovery in the forms of *admissions*, *interrogatories*, and particularly *depositions* of landowners and their expert witnesses will often reveal that an opinion of land value and damages is based on criteria that are not judicially accepted. Therefore, pre-trial discovery should be used to prepare for trial and avoid surprises. Pre-trial discovery will, to a large extent, guide the tactics and strategy that should be employed during trial. It can be an important tool for those who learn to use it effectively.

III. *IN LIMINE* HEARINGS

Where it is learned or expected that the other side will rely on improper elements or noncompensable items to increase the opinion of value and damages, efforts should be made in advance of trial to obtain a protective order excluding any references, suggestions, statements, testimony, arguments, or instructions concerning the matter that are deemed to be improper.

A motion to suppress evidence or a motion requesting an *in limine* hearing to determine whether the alleged improper elements are to be considered is deemed to be proper. But such a hearing is within the discretion of the court,[1] and not every trial judge grants one. However, there is strong support for the position that *in limine* hearings or motions to suppress should be granted where it is apparent that improper and damaging evidence will be heard by the jury.

The reason for this procedure and rule of law is best illustrated by the language in Lapasinskas v. Quick, 17 Mich. App. 733, 170 N.W.2d 318 (1969), a tort case decided by the Court of Appeals of Michigan. There the plaintiff sought to have the court exclude from the jury's consideration certain material (the father's negligence) that he deemed to be improper and that would be harmful to his cause if the jury were to hear it. He sought, *in limine*, to obtain a protective order from the court requiring exclusion of any reference, suggestion, statement, testimony, argument, or instruction concerning the matters deemed to be improper. The request was denied. In doing so, the trial court said that if objectionable evidence was attempted to be introduced at the trial, the objection should be made at that time. At the trial, counsel for defendant did in fact make reference to the father's negligence. The plaintiff objected, and his objection was sustained. The trial court also gave an instruction that the father's negligence had nothing to do with the case. The Appellate Court nonetheless reversed the case. The pertinent language of the court's opinion is as follows:

> Despite the just quoted cautionary instruction, we think this case must be reversed and a new trial ordered because "the studied injection into this child's case of the subject of parental fault, contributory or otherwise, constitutes reversible error." Elbert v. City of Saginaw (1961), 363 Mich. 463, 482, 109 N.W.2d 879, 888, per Black, J., concurring.
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> The defendants were represented by experienced counsel who knew better than to inject the issue of the father's negligence. Yet he deliberately and

skillfully injected this impermissible argument. Cf. Felice v. Weinman (1964), 372 Mich. 278, 280, 126 N.W.2d 107.

(2) The plaintiff did what he could to protect himself. Anticipating the very argument that was made, he had sought the court's protection by motion in the nature of a motion in limine. The plaintiff's action in seeking the court's protection before the objectionable evidence was introduced was "eminently proper." McCullough v. Ward Trucking Co. (1962), 368 Mich. 108, 114, 117 N.W.2d 167. In McCullough the plaintiff requested that the trial court rule that the defendant's counsel was not to make any reference in the presence of the jury to the fact that the plaintiff was eligible for workmen's compensation insurance benefits. The trial judge agreed with the plaintiff that the defendant should not introduce the subject but refused to rule it out in advance of the matter coming up at the time of trial. In an opinion in which 2 other justices joined, Mr. Justice Black criticized the failure of the trial judge to prevent the introduction before the jury of the inadmissible and prejudicial subject of workmen's compensation benefits (pp. 114, 115, 117 N.W.2d pp. 170-171):

"The practice followed by plaintiff, prior to swearing of the jury and at chambers, was eminently proper. See Ruedinger v. Klink (1956), 346 Mich. 357, 372, 78 N.W.2d 248. The trial judge's sound ruling of inadmissibility considered, the result should have been an order that defendants, desiring as they said to make a record of the claimed right 'to go into the workmen's compensation angle in this case,' should proceed to make an offer of the proposed proof at chambers under Court Rule No. 37, §15 (1945). Instead, the trial judge said that if counsel could not agree 'to abide by the announced advance ruling of the court,' that 'the matter should be raised at the trial by questions propounded and objection made and ruling obtained therein.' Thus the injecting question was asked, the objection was made, and the advance ruling of inadmissibility was repeated, all in the presence of the jury.

"If it is proper--and it is--for defense counsel to seek at chambers an advance ruling of suppression when a plaintiff's counsel proposes without disclosed right to inject the subject of the defendant's insurance coverage, so is it proper for a plaintiff to seek such ruling of suppression when his opponent proposes without disclosed right to inject the subject of payment of compensation, or availability of compensation, when the action is brought under the auspices of the 1952 amendment (C.L.S. 1956, §4.3.15 Stat. Ann. 1960 Rev. §17.189). This practice of calculated and unwarranted introduction before the jury of like matters of prejudice should be stopped quite as promptly whether a plaintiff or a defendant is the culprit."

We have no way of knowing whether the defendant's injection of this issue influenced the jury or whether the trial judge's cautionary instruction in fact removed any effect adverse to plaintiff's claim. See Clark v. Grand Trunk W. R. Co. (1962), 367 Mich. 396, 402, 116 N.W.2d 914; cf. Felice v. Weinman, supra. We cannot say that the verdict in this case might not have been different had this prejudicial issue not been adverted to by the defendants. Under the circumstances of this case, where the plaintiff sought to protect himself and the defendants, nevertheless, insisted on injecting this impermissible issue, we think it proper to visit upon the defendants the burden of a new trial during which the issue of the father's negligence shall not be referred to by innuendo or otherwise.

Lapasinskas, 170 N.W.2d 319 (fn. 1), quotes as follows from a law review article that discusses succinctly the reasons for an *in limine* hearing:

"A motion, heard in advance of jury selection, which asks the court to instruct the defendant, its counsel and witnesses not to mention certain facts unless and until permission of the court is first obtained outside the presence and hearing of the jury....

"If prejudicial matters are brought before the jury, no amount of objection or instruction can remove the harmful effect, and the plaintiff is powerless unless he wants to forego his chance of a trial and ask for a mistrial. Once the question is asked, the harm is done. Under the harmless error rule many of

these matters would probably not be reversible error even though they have a subtle but devastating effect upon the plaintiff's case.

> "Perhaps the greatest single advantage to a motion in limine is not having to object in the jury's presence to evidence which is 'logically relevant.' Jurors cannot be expected to understand why they should not be allowed to consider all evidence which is related to the case, and will usually resent the fact that an objection kept them from hearing it." (Emphasis by author.) Davis, *Motions in Limine*, 15 Clev.-Mar. L. Rev. 255, 256 (1966).

Another excellent case on this point is City of Quincy v. V. E. Best Plumbing Co., 17 Ill.2d 570, 162 N.E.2d 373 (1959), which held it was error for the trial court to refuse to hear evidence in advance of trial concerning whether a tract of land was a part of the residue.

Some courts submit all or most matters to the jury with the statement that the objections go to the weight and not to the admissibility of the evidence. However, the best rule, and probably the majority rule, is that the objections properly go to the admissibility and that the judge must determine the issue even though it may involve mixed questions of law and fact. The law seems to be well established that all issues except the amount of compensation are to be determined by the court. Therefore, it should follow that the court must determine if a factor is proper or compensable. In support of this statement, reference is made to: Riverside County Flood and Water Conservation District v. Holman, 69 Cal. Rptr. 1 (Cal. App., 1969) (an impairment of access case); Troiano v. Colorado Department of Highways, 170 Colo. 484, 463 P.2d 448 (1969) (circuity of route and diversion of traffic case); People v. Fair, 40 Cal. Rptr. 644 (Cal. App., 1964) (dealing with what constitutes a single parcel for severance damages); DuPuy v. City of Waco, 396 S.W.2d 103 (Tex., 1965) (obstruction of access by construction of viaduct); Ray v. State Highway Commission, 196 Kan. 13, 410 P.2d 279 (1966) (interference with access); Commonwealth of Kentucky Department of Highways v. Carlisle 442 S.W.2d 294 (Ky. App., 1969) (interference with access); Sacramento & San Joaquin Damage District v. Reed, 215 Cal. App. 2d 60, 29 Cal. Rptr. 847 (1963) (dealing with improper elements of valuation).

On the other hand, some courts have held that it is a factual matter for the jury to determine. For a few of these cases, all dealing with access questions, see: Chandler v. Hjelle, 126 N.W.2d 141 (N.D., 1964); State ex rel. Herman v. Schoffer, 105 Ariz. 478, 467 P.2d 66 (1970); State v. Kohler, 268 Minn. 77, 128 N.W.2d 90 (1964).

Sacramento & San Joaquin Damage District v. Reed, 215 Cal. App. 2d 60, 29 Cal. Rptr. 847 (1963), perhaps illustrates one of the best reasons why motions to exclude testimony should be granted. This case also discusses at length the question of noncompensable items. For these reasons, lengthy quotes are made here from the opinion of the case.

This case involved the condemnation of property for the construction of a levee. This levee was one of many to be constructed as a part of a flood-control plan that had taken, and would take many more, years to complete.

The court there (at the outset of the trial) was confronted with a motion to exclude evidence of damages from fears of increased flooding that might occur in the future by future construction of levees. The trial court denied the motion, and on appeal the portion of the case fixing severance damages was reversed.

The opposition to the motion was that a prospective buyer would be concerned about the levee, that he would not pay as much for the property because of the possibility of future flooding from the construction of the levee and levees to be constructed on lands of others. This position apparently was based on the case of Hufford v. Pacific Gas & Electric Co., 49 Cal.2d 545, 319 P.2d 1033 (1957).

On review, the appellate court said:

> While the motion to exclude was not a conventional procedure, it was well conceived under the circumstances. Counsel for the condemnor might have waited until the valuation witness has testified and after eliciting on cross-examination that his appraisal had included impermissible factors, moved to strike it. Such a motion, even when soundly grounded, generates practical difficulties for witness, counsel and court. (See Rose v. State, 19 Cal.2d at 742, 745-746, 123 P.2d at 522, 523-524; Buena Park School District v. Metrim Corp., 176 Cal. App. 2d 255, 262, 1 Cal. Rptr. 250; People v. Loop, 127 Cal. App. 2d 786, 792-801,

274 P.2d 885; City of Redding v. Diestelhorst, 15 Cal. App. 2d 184, 192, 59 P.2d 177; City of Stockton v. Ellingwood, 96 Cal. App. 708, 722-723, 275 P. 228; California Condemnation Practice (Cont. Ed. of the Bar), p. 297). An order granting the motion in midtrial frequently has harsh effects, and trial judges are understandably reluctant to make it. No matter how well justified in law, the order may find the valuation witness without a prepared substitute opinion. Possibility of the order may involve witnesses in formulating substitute value opinions as a secondary line of defense, only to find they are not needed. The order imposes on jurors the intellectual surgery entailed by any direction to ignore what has been heard. The motion to exclude adopted in this case is vastly more rational. It reduces the surprise factor. It is calculated to iron out a disputed issue before the jury trial gets under way and before the actual expression of value opinions. Expanded pretrial discovery techniques furnish occasion for its use (see Oceanside Union School Dist. v. Superior Court, 58 A.C. 182, 23 Cal. Rptr. 375, 373 P.2d 439). The motion in this case was precisely directed at a well-defined issue. It was an entirely proper mode of objection. Once the trial court ruled on it, no further objections or motions were necessary to preserve the point for appeal purposes.

Considered as direct evidence of severance damage, the potentiality of increased water burden attributable to future east-side levees was inadmissible on at least two counts: First, it ran counter to the California doctrine which excludes from severance damage consequential losses from construction or operation of public improvements on lands belonging to others. (People v. Symons, 54 Cal.2d 855, 861, 9 Cal. Rptr. 363, 357 P.2d 451; County Sanitation District v. Averill, 8 Cal. App. 2d 556, 561, 47 P.2d 786; see 4 Nichols, Eminent Domain, pp. 514-517; 170 A.L.R. 721-728.) Second, the conjectural character of the east-side levee proposal brought the flooding within the ban against speculative and contingent losses. (Arnerich v. Almaden Vineyards Corp., 52 Cal. App. 2d 265, 272, 126 P.2d 121; 17 Cal. Jur. 2d 673-674.) The ruling of the trial court permitted indirect use, in the formulation of value testimony, of factors not directly permitted. The theory, in apparent reliance on Hufford v. Pacific Gas Co., supra, was that a valuation witness may state as a "reason" for his opinion any detrimental factor which the witness might choose to attribute to a prospective purchaser, so long as the detriment in some way arises from the project in suit.

The Hufford case warrants no such approach. The approach ignores the fact that the "prospective purchaser" is an abstraction, a ventriloquist's dummy who speaks only with the voice of the flesh-and-blood valuation witness. In feeding words to the fictional buyer, the witness--be he appraiser or landowner--is confined only by his own imagination and by such narrower limits as the law may impose on him. A condemnation trial is a sober inquiry into values, designed to strike a just balance between the economic interests of the public and those of the landowner. (See Kratovil and Harrison, Eminent Domain--Policy and Concept, 42 Cal. L. Rev. 596, 626.) There is a limit to imaginative claims even when described in terms of a prospective buyer's mental reactions. To say that only the witness' valuation opinion has probative value, that his "reasons" have none, ignores reality. His reasons may influence the verdict more than his figures. To say that all objections to his reasons go to weight, not admissibility, is to minimize judicial responsibility for limiting the permissible arena in condemnation trials. The responsibility for defining the extent of compensable rights is that of the courts. (People v. Symons, supra, 54 Cal.2d at 861, 9 Cal. Rptr. at 367, 357 P.2d at 455; People v. Ricciardi, 23 Cal.2d at 396, 144 P.2d at 802.)

People v. O'Connor, 31 Cal. App. 2d 157, 159, 87 P.2d 702, 703, states as sound a criterion as any. In sustaining valuation testimony assailed as conjectural and speculative, the court described the elements of damage in the following terms: "These elements of damages mentioned by the witnesses are not claimed by respondents as special damages, but are merely the reasons given by the experts for their opinions that the market value of the portion of the tract not taken would be diminished by reason of the taking of the 1/10-acre strip in front. They are not conjectural but actual admitted facts...."

In this case, through a semantic device, the jury received indirectly what

> it could not get directly: speculative evidence of diminished values attributed to a proposed project on other lands, a project which had been in the talking stage for several decades, which was still subject to debate, and for which there was no federal appropriation. The device consisted of postulating a figurative buyer whose "fears" were substituted for a realistic statement of actual losses and impairments. The valuation opinions were based not on "actual admitted facts" as in People v. O'Connor, supra, but on a conjectural buyer's conjectural fears of conjectural flooding created by conjectural levees. If and when any of defendants' lands are placed within a flood trough, defendants may then assert their right to compensation, whatever it may be. (People v. Adamson, 118 Cal. App. 2d 714, 722, 258 P.2d 1020; see Clement v. Reclamation Board, 35 Cal.2d 628, 220 P.2d 897; Beckley v. Reclamation Board, 205 A.C.A. 815, 23 Cal. Rptr. 428.) A present award of severance damage based in part on this element would provide them compensation in advance of any possible entitlement.
>
> Affecting as it did that half of defendants' remaining lands east of the levee in suit, the speculative element played a major role in the valuation opinions. Admission into evidence of opinions so conceived was error.
>
> Viewed in the light of the record, the error was prejudicial. Mr. Rhodes, the defendants' expert witness, had conceded partial reliance on the east-side levee proposals in fixing his estimate of decreased value. He fixed the Reed severance damages at $8,400. The jury's severance damage award to Reed was $12,000, which was $3,600 more than the figure set by his own expert. Reager's severance damage was fixed by the jury at $24,111, which was the precise amount given by Mr. Rhodes. Both landowners had testified to substantially greater amounts. In fixing the awards at or higher than the figures given by defendants' own expert, the jury were allowing damages for a least all the detriment described by the expert, including the speculative flooding attributed to east-side levees.
>
> Defense counsel points to several instructions in which the jury were instructed against allowance of damage for increased flooding due to east-side projects in the planning or discussion stage. The court, however, had permitted evidence of such damage by indirection. The jury awards, equal to or exceeding the amounts fixed by an expert witness who had admittedly considered this impermissible factor, demonstrate that the jury paid scant attention to the limiting instructions. The provisions of article VI, section 4 1/2 of the state Constitution cannot save this judgment.

An *in limine* hearing sometimes can amount to a full-fledged trial on one or more issues. Evidence must be presented at this hearing so that the court is advised of the factual aspects of the issues and thus enabled to rule on the motion. Another reason for presenting testimony is that a good record must be made if it later becomes necessary to appeal.

The procedure that should be followed is for counsel to file a "motion" with the court. The motion should request that:

1. Certain evidence or theories be suppressed.

2. An order enter precluding from consideration elements of damages that are noncompensable.

This motion should briefly describe the evidentiary matters, theories, and noncompensable elements expected to be discussed during the trial.

At the hearing on the motion, a record must be made in order for the court to have a basis on which to rule. Perhaps counsel can stipulate concerning the evidentiary matters, theories, and elements of proposed damages. If he cannot, testimony must be presented to disclose the nature of the evidence intended to be used and the basis for damages.

A good illustration is where it is anticipated that damages will be assessed on the basis of circuity of route caused by a highway project. In this instance, evidence of the access patterns before and after construction must be presented. At the conclusion of this testimony, legal arguments must be presented to establish that, as a matter of law, the alleged damages are noncompensable. The court can then rule on the motion. The order should be that the damages based on this

element are noncompensable and that there must not be any reference to the elements or damages during the course of the trial on the amount of compensation.

Another example is where, after the appraisal reports of the proposed witness have been examined or after his deposition has been taken it is discovered that his opinion of value is based on an improper basis or theory. Such a basis or theory could be taking raw ground and hypothetically carving it into a subdivision and then multiplying the number of hypothetical lots times a proposed sales price for each lot. At the *in limine* hearing, the witness should be called to testify. The basis of his opinion should then be before the court. At the conclusion of the evidence, legal argument should be presented to show that the basis is not judicially acceptable. The court should then rule that the method is improper and it should enter an order suppressing any evidence of value on this theory. (Note: A few courts have held that this method of valuation is proper, but the majority of courts hold that it is not.)

IV. JURY SELECTION

The first opportunity during the course of the trial to inject before the jury references to improper elements of valuation and noncompensable damages is during jury selection. By virtue of pre-trial discovery or by the physical aspects of the case, as well as by the reputation of opposing counsel, one should know or have a good idea if improper statements might be made during *voir dire* of the jury panel.

If counsel knows or has reason to believe that these statements might be made, the court should be requested, in advance, to preclude opposing counsel from making the statements in front of the jury panel.

It is a basic and elementary rule of law that *voir dire* examination should not be used to inject prejudicial matters improperly into the minds of the jury.[2/]

V. OPENING STATEMENT

After the jury is selected, the next major step in the trial is for counsel to make opening statements. At this point, counsel is given the opportunity to tell the jury what his theory of the case is and what the testimony will reveal. During this time counsel may, either in good or bad faith, make statements relating to evidence of noncompensable damages or improper elements of value. How should this be handled?

As with jury selection, if it is known or anticipated that these statements will be made, the court should be requested, in advance, to preclude any reference to any alleged evidence of these improper items or elements. However, courts are often reluctant to rule in advance and, therefore, other steps must be taken at the time that the statements are made.

If the statements are made in good faith and if it appears that the evidence would be proper, there is no error. If during the testimony the evidence is in fact erroneous, but is at that time excluded, there are no grounds for a mistrial. However, if counsel knew, or should have known, that the evidence would be improper, it is grounds for a mistrial.[3/] It follows, therefore, that where there is precedent that certain damages are noncompensable, any reference to them or the factual items causing them cannot be said to have been made in good faith. A motion for mistrial should be made when such statements are deemed to be prejudicial. On the other hand, if the statements are not deemed to be harmful, an objection to the statements should be made, with a request that the jury be instructed to disregard them.

If no objection is made to references of improper evidence, it is not deemed to be a waiver of the right to object at a later time when the testimony is sought to be introduced.[4/]

Often references are made to factual matters that cannot be proved. If a reference is prejudicial, it is also grounds for a mistrial.[5/]

As a defense to improper statements, it has been argued that the general or stock instruction that provides that statements of counsel are not evidence cures the harm that may have been done. This general instruction may not be sufficient to cure the prejudice that is created.[6/] A motion for a mistrial is still proper, or perhaps a specific, but written, instruction should be tendered at the conclusion of the evidence, the purpose of which would be to tell the jury that they are to disregard the specific statements that were made. As a matter of trial tactics, a decision will have to be made to determine if such an instruction should be tendered. If the instruction is given, the appellate court may rule that the harm was corrected by the instruction, thereby precluding any argument, on appeal, on the merits of the objection or motion for a mistrial.

VI. DIRECT EXAMINATION

The next major step during the trial is direct examination. It is during this time that most of the issues relating to noncompensable damages and improper appraisal elements will arise and have to be resolved.

Counsel must be prepared to take every possible step available to keep out the improper evidence and to protect his record for appellate purposes. Several trial procedures are available to him.

A. BASIS FOR OPINION SHOULD BE STATED BEFORE OPINION IS GIVEN

The general rule is that a witness cannot state his opinion first and then give the basis for it.[7/] The reverse is the proper way to do it; i.e., give the basis for it and then state the opinion. Counsel should always object if the opinion is sought to be given before the basis for it is stated. In this way, if the basis is improper, a timely objection should keep the opinion from the jury's consideration. Also, counsel should never agree to a procedure that would allow the opinion to be stated first and then a basis to be given for it. The reason for this is that the opinion may be based on improper factors. If this is so, not only will it be too late to object, but the jury will have heard the opinion, and it will be almost impossible to eradicate it from their minds. A good example of what can happen is illustrated by Warren v. Waterville Urban Renewal Authority, 235 A.2d 295 (Me., 1967). In that case, counsel for the landowners agreed to an improper procedure and lost his basis for appeal.

There the basis for the appeal was that the trial court erred in denying the landowner's motion to strike the value opinion of the condemnor's sole expert witness. The reason for the motion was that the basic hearsay facts on which the witness based his opinion were not in the evidence and, therefore, the opinion was not supported.

The witness testified that (1) his opinion of value was based on facts that he obtained from the records in the assessor's office; (2) he got leads as to comparable properties from brokers in the community; (3) he made personal inspections of the comparables; (4) he obtained the sales price, the date of sale, the dimensions of the land, and the special circumstances of the sale, if any, from either the buyer or the seller, the broker or banker who participated in the deal; and (5) he secured the gross rental charge from the owner or tenant. In addition, the witness used five comparable sales. Then he testified that he used the three approaches to value (i.e., the comparable sales approach, the reproduction cost less depreciation approach, and the capitalization of income approach by the use of gross rent multiplier).

The attorney for the landowner raised no objection to the introduction of the evidence on direct examination. He cross-examined fully thereon and got the witness to admit that if his information was in error, his opinion would be in error.

The court in this case said:

> It is true that the opinion of an expert as to the value should be stricken and not be considered as evidence, where it is demonstrated during his testimony that his opinion rests wholly or chiefly upon reasons or matters which are illegally incompetent or on principles which are unsound (citing numerous cases). If it appears that the witness has not reasonable basis whatever for his opinion, then his testimony should be stricken. The testimony of a professional appraiser properly to be accepted must be based upon sound principles.

The court also said that the expert opinion was aided by factual data, that the witness obtained from hearsay sources. He did not have personal knowledge of these details. His qualifications, however, were not in issue and he was permitted to testify to such facts without any objection, either on the grounds that such evidence was hearsay or for any other reason.

Counsel for the condemnor took the position that a witness could state his opinion first and then could explain the basis for it. The court in chambers indicated that it would be liberal and would permit the witnesses to do this. The court then asked counsel for both sides if they had any objections to this procedure. No objection was made. On this basis, the appellate court said there was a manifested acquiescence in the procedure.

The court held that the factual information such as the sales prices and the rental charges, although hearsay, was in the case by consent of both parties. Specifically, the court said:

> It has frequently been held by our Court that when evidence is admitted without objection and no motion is made to strike it from the record, it becomes what has been designated as "consent evidence."

The court said that the landowner's evidence was before the jury on the basis of the procedure outlined by the trial court, and that the landowner could not now change his position and adopt a different tactic and seek to remove the adversary's expert opinion of value in the case under consideration by the jury. To do so would be not only unfair to the trial court, but manifestly unjust to the opposing litigant. The landowner had agreed to a subtle course of trial procedure and should not be relieved therefrom to the prejudice of the other party, except for compelling reasons. The court said: "A party cannot claim a grievance from trial conduct which he actively seconded or placidly tolerated."

The court, relating to matters of hearsay, made the following statement:

> The opinion of an expert is not necessarily rendered inadmissible or incompetent because it may be based on knowledge of facts gained from hearsay sources. Any expert worthy of the name must, of necessity, assimilate higher learning derived from the experience of others. As an expert witness he draws on various sources of information whose credibility or trustworthiness he must determine in the light of his expertness. We would completely frustrate the use of expert witnesses if they were obliged to substantiate each single factor upon which their ultimate opinion must depend upon firsthand personal knowledge or personal experience. If some of the expert's factual information is derived from sources fairly trustworthy, though hearsay, then he has in a sense, the ability to coordinate and evaluate that information with all other facts in his possession secured through personal observation, the trial court may in the exercise of a sound discretion, permit the expert's ultimate opinion to be considered by the jury.

This case also stands for the proposition that an expert witness may not give an opinion based in part on the opinions of others. The court said:

> To present to the jury someone else's opinion as the basis of the witness's own opinion by adoption would constitute an improper use of hearsay evidence. The witness's opinion must be his own; he cannot act as a mere conduit for the opinions of others.

B. LANDOWNER AS A WITNESS

Some trial courts, under the theory that a landowner can qualify to give an opinion of just compensation merely because he is the owner, permit such landowner to base his opinion on factors that for other witness would be incompetent. The law is clear that an owner, because he is an owner, need not show any qualification to give an opinion of land value and damages to the remainder. But this does not mean he can rely on criteria that are improper. There are few cases on this point, but one that expresses the law clearly is People of the State of California v. Nahabedian, 340 P.2d 1053 (1959), where the Court of Appeals of California ruled that a landowner in stating his opinion is bound by the same rules of admissibility of evidence as is any other witness. Specifically, the court said:

> The general rule which permits a witness to state the reasons upon which his opinion is premised may not be used as a vehicle to bring before the jury incompetent evidence.

It follows that one should be on guard against admission of improper elements of value and noncompensable damages through the landowner.

C. OBJECTIONS--GENERAL

An objection to an opinion based on improper testimony must be made. If it is not made, the appellate court will not review the matter on appeal.[8/]

The purpose of an objection is to prevent an answer to the question that has been put to the witness. The question that arises during trial is whether only one objection should be made to the same class of testimony or whether an objection ought to be made each time the testimony is sought to be introduced. Obviously, it would be better not to jump up and down each time that the same

type of testimony is being introduced, particularly if the court is overruling the objections. Continual objections may antagonize the jury and incur the wrath of the court. But the record must be protected, and objections must, therefore, be made.

Where the same class of improper testimony is later sought to be admitted (i.e., after an objection to that type of testimony has been made and overruled) it has been held that there is no need to object again.[9] However, this does not appear to be a clear-cut rule of law. Other courts have ruled differently; i.e., that if objections are not made and later on the testimony is sought to be introduced again, the objection has been waived.[10]

The best practice to follow is to make a continuing objection to the testimony and clarify for the record what the objection is and to what specific class of testimony it is directed. Further, it should be stated that it is not the intent of counsel to waive any objection to this same type of testimony if it is later on introduced, but that there is no need to object each time. The court should be asked to approve the continuing objection. If it does not, then an objection must be made each time to protect the record. Even if the court approves the objection, it should be renewed with each new witness. If it is not, the objection may be deemed to have been waived.[11]

D. OBJECTIONS--SPECIFIC GROUNDS MUST BE GIVEN

An objection must be specific. It is waived as to all other grounds not mentioned.[12] It must state the grounds on which it is made and what is specifically objected to. The moving party must show that the question is improper.[13]

The court will not be required, as some judges put it, "to separate the wheat from the chaff upon its own initiative nor would be disposed to do so."[14] For example, a general objection to a total opinion of value of $30,000 that included $5,000 for the cost of a new improvement was not deemed to be sufficient. The objection should have been specifically made to the $5,000.[15]

Failure to make a specific objection to testimony alleged to be improper may also preclude the granting of a motion to strike at a later time. For example, in Boring v. Metropolitan Edison Co., 435 Pa. 513, 257 A.2d 565 (1969), the Supreme Court of Pennsylvania held that a motion to strike will not be reviewable where the testimony was received without objection. There the landowner's witnesses valued a lease separately from the fee, which is deemed to be improper, but no objection was made to that testimony. Later, a motion to strike the testimony was made, but the grounds were different than those asserted as error on appeal. Needless to say, the court did review on that point.

In State v. Wilson, 4 Ariz. App. 420, 420 P.2d 992 (1966), a case dealing with noncompensable items of circuity of route and diversion of traffic, the Court of Appeals of Arizona held that a motion to strike the testimony based on noncompensability was properly denied when the testimony was received without an objection.

City of Springfield v. Beals Industries, Inc., 155 N.E.2d 501 (Ohio App., 1958), is another example of the objection not being specific or objecting on the wrong grounds. There this question was asked: "You do not know that Martin bought 73 acres at about $321 an acre?" The objection was made on the grounds that the land was not comparable. The court held the objection was not proper, because it was not made on the grounds of the statement of the price.

See also State Roads Commission of Maryland v. Creswell, 235 Md. 220, 201 A.2d 328 (1964). There the opinion of value of mineral-bearing land was based entirely on the anticipated income from the sale of gravel, an improper measure of damages. But counsel objected only to the price for which it could be sold and requested that only the figure be stricken. Later a motion to strike the testimony was denied because the original objection was not sufficient. It should have been made to the entire testimony on the basis that it was an improper measure of value.

In State of Missouri ex rel. State Highway Commission v. Volz Concrete Material Co., 330 S.W.2d 870 (Mo., 1960), the Supreme Court of Missouri held that it was not error to refuse to strike the entire testimony of a witness where that portion of his opinion based on the improper use of the reduction in business volumes was stricken.

Also, in State Highway Commission v. Callahan, 410 P.2d 818 (Ore., 1966), the testimony of the witness was properly excluded where there was an indication that the sale he was using to establish value was probably enhanced, in value, because of the influence of the public project for which the land was being acquired. The witness could not testify that the parties to the transaction were unaware of the impending construction and condemnation. Specifically, the court said:

In effect he was therefore unable to say the sale was unaffected by artificial market conditions induced by the state. Admissibility of evidence of sales of other land is largely within the discretion of the trial court. It is incumbent on the party offering the proof of other sales to show the facts which establish similarity.

E. OBJECTIONS--PROPER TIME TO RAISE

The objection must be timely made; i.e., before the question is answered. If the objection comes after the answer, it is too late.[16] A good statement of the law is found in Highland Development Co. v. Hall, 216 So.2d 724 (Ala., 1968), a noncondemnation case, where the court said that "an objector cannot speculate on the answer to a question by waiting until it is answered, then objecting, and subsequently claiming error when overruled."

Sometimes a question is answered so quickly that it is impossible to object before the answer is given. In this instance, trial courts seldom rule that the objection came too late. At this point, not only should an objection be made, but a request to exclude the answer must also be made. If it is not, the testimony remains even though the objection is sustained.[17]

When the objection is sustained and the question is later repeated in a slightly different form, a second objection must be made. If it is not, the objection to the first question is deemed to be waived. See Highland Development Co. v. Hall, *supra*.

The objection must be made to an improper measure of value and damages as soon as it is apparent that it is improper.[18] Where testimony is partially proper and partially improper, objection to all the testimony is not good. It must be directed to the improper testimony.[19]

Failure to object to testimony that on direct examination appears to be proper, but is revealed on cross-examination to be improper, will not be deemed to be a waiver of the objection for failure to make it on direct examination.[20]

F. OBJECTIONS--NONRESPONSIVE ANSWERS

Sometimes in an effort to get certain improper evidence before the jury, an answer to a question will be unresponsive. The answer may mention elements of damages that are noncompensable. Not only must an objection be made, but it must be accompanied by a motion to strike the answer. If it is not, it may preclude review on appeal.[21]

When a nonresponsive answer is given, it is only the examining party who, solely on the basis of unresponsiveness, is entitled to have the testimony stricken.[22] But, if the evidence is improper, the other party is entitled to have the testimony stricken also.[23]

G. OBJECTIONS--TO MATTERS DENIED IN *IN LIMINE* HEARINGS

Where a motion to suppress evidence or a motion *in limine* is denied or denied in part, objection to that portion denied must be made when the testimony that was initially sought to be suppressed is introduced. If the objection is not made, it is waived, even though a motion to suppress the evidence previously was made and denied.[24]

H. PRELIMINARY CROSS-EXAMINATION OR *VOIR DIRE* EXAMINATION

When it is known or expected that the opinion of a witness is based on elements that are improper or noncompensable, leave of court should be obtained to *voir dire* or preliminarily cross-examine the witness before the opinion is given. If leave is granted, this means that direct examination will be interrupted for cross-examination on a given point or points.

By proper cross-examination it may be shown that the opinion is based on improper items or includes noncompensable damages. If it is so shown, a motion should be made to preclude the witness from giving the opinion or testifying to the incompetent evidence.

Preliminary cross-examination is within the sound discretion of the court.[25] Many judges refuse to permit it on the basis that extensive cross-examination will be permitted.[26] This basis is entirely illogical, because if the testimony is incompetent no amount of cross-examination is going to make it competent.

The procedure of preliminary cross-examination is explained in Davis v. Penn Railroad Co., 215 Pa. 581, 64 A. 774 (1906). Reference to it may also be found in 58 Am. Jur. *Witnesses* §845.

In Davis the witness for the landowner was about to give his opinion of value of the land taken. The condemnor, at that point, asked leave to examine the witness. The trial court denied the request. On appeal the case was reversed. The Supreme Court, in essence, held that an opportunity should have been afforded to enable the condemnor to show whether the opinion was incompetent. The appellate court reasoned that once the testimony goes to the jury, it is almost impossible to eradicate it entirely from their minds by an instruction or by direction of the court. The court also said that the harm done is beyond recall and any other rule is unfair to the opposite party because it permits incompetent testimony to go to, and influence, the jury against him. The pertinent language from the case is as follows:

> It was error for the learned judge to refuse to permit the defendant's counsel to cross-examine the plaintiff's witnesses as to their competency before they testified in chief to the value of his land and the damages he had sustained. The competency of the witnesses was a question for the court, and if, after an examination by plaintiff's counsel, their testimony did not disclose their competency in the opinion of defendant's counsel, the latter should have been afforded an opportunity to cross-examine them. This would have disclosed more fully the knowledge of the witnesses of the matters about which they were called to testify, and would have better enabled the court to have determined the sufficiency of that knowledge as a preliminary question. The learned judge of the court below, from his opinion filed in the case, seems to think that it was in the discretion of the court whether the defendant's counsel should have been permitted to examine the plaintiff's witnesses as to their competency before or after they had given their testimony in chief on the matters about which they were called to testify. This misled the court into an error. As the competency of the witnesses was a primary question for the court, it should have been made to appear and have been passed upon by the court before the witnesses were permitted to express any opinion. (Citing cases) It is not sufficient that if, after the witnesses have testified in chief as to the damages in the case, it should appear in cross-examination that they did not have the prerequisite knowledge to make them competent, their testimony could then be struck out. After such testimony has gone to the jury, it is next to impossible to eradicate it entirely from their minds by any instructions or directions by the court. The harm done the opposite party by the admission of such testimony is beyond recall with the jury then trying the case. It is therefore important to determine in the first instance, the competency of the witnesses, and to enable the court to do so it ought to in all cases, upon request, allow the witnesses to be cross-examined for that purpose. Any other rule is unfair to the opposite party, as it permits incompetent testimony to go to, and influence the jury against him. In all cases where a witness is called to give an opinion as evidence for the consideration of a jury, a prior cross-examination should be permitted on matters affecting his competency.

Some judges refuse to permit cross-examination on *voir dire* on the grounds that if an objection is not made to the qualifications, in general, of the witnesses, the right to preliminary cross-examination is waived. These judges confuse the fact that a witness may qualify as a real estate expert, in general, but still may be incompetent to give an opinion in a particular instance if that opinion is based in part or totally on criteria that are not judicially accepted.

When a witness is tendered as an expert, the right should be reserved to challenge the competency of his opinion. This right can be reserved, even though the witness may qualify as an expert in real estate matters. Then, at the proper time, preliminary cross-examination should be undertaken, followed by appropriate objections and motions.

I. MOTION TO STRIKE

A motion to strike is a request for an order to strike the testimony after it has been given and to withdraw it from the jury's consideration.

The proper time to move to strike the testimony is when it becomes apparent that the testimony is improper.[27]

If it does not appear until cross-examination that the testimony is improper, the motion is still good and should be granted.[28] If the testimony on direct examination is improper, counsel cannot wait until after cross-examination to make the motion. If he does, it is too late.[29] The motion should be made before the witness leaves the stand.[30] If counsel waits until after the testimony is presented and the party rests, it is too late.[31]

If the testimony is improper, it is not enough to object if counsel wants the jury to disregard it. A motion to strike must be made.[32]

Also, if at first a motion to strike is denied on the grounds that there is no basis for it, but later on there is a basis for it, if it is not made at the second time, it is waived, and any error will not be reviewed on the ground that the court refused to strike the testimony.[33]

If a motion to strike is not ruled on, it is deemed to be denied by operation of law.[34] Therefore, it is important to request a ruling on the motion if the court does not rule on it immediately and takes it under advisement. A motion to strike must be made to opinions based on improper elements, or to elements that will be used as a basis for the opinion. The fact that the case may be tried to the court without a jury is still no reason not to strike. In Central Illinois Light Co. v. Nierstheimer, 26 Ill.2d 136, 185 N.E.2d 841 (1962), the landowner's witnesses testified that in arriving at the damages to the remainder, they considered elements of danger from power lines and fears that people would have because of the towers and power lines. The appellate court held that these were improper elements of damages; that even though the case was being tried to the court without a jury, such evidence was improper; and that opinions expressed by the witnesses were incompetent and that the trial judge should not have considered those opinions.

In Lipinsky v. Lynn Redevelopment Authority, 355 Mass. 550, 246 N.E.2d 429 (1969), the court was not satisfied with an opinion based solely on cost less depreciation, and struck the testimony. The court reasoned that where it is demonstrated that the testimony of an expert rests *wholly* on reasons that are legally incompetent, there is no right to have the opinion considered. In Maher v. Commonwealth, 291 Mass. 343, 197 N.E. 78 (1935), it was developed on cross-examination that the owner's valuation was based in part on sentimental value to him. The appellate court ruled that the trial court erred when it refused to grant a motion to strike.

For other excellent cases dealing with improper elements of damages or values and holding that motions to strike were properly granted, or should have been granted, see: City of Chicago v. Giedraitis, 14 Ill.2d 45, 150 N.E.2d 577 (1958) (excluded the owner's investment costs as a basis to establish value by the use of the cost less depreciation approach); State Highway Commission v. Dumas, 395 P.2d 424 (Ore., 1964) (also excluded owner's costs of new improvements to establish market value); Commonwealth of Kentucky Department of Highways v. Davis, 400 S.W.2d 515 (Ky., 1966) (held that coal-bearing lands could not be valued by multiplying the number of tons estimated to be in place times the price per ton at which the coal could be sold); Arkansas State Highway Commission v. Wilmans, 370 S.W.2d 802 (Ark., 1963) (profit from liquor and beer business was ruled to be improper basis to determine value); Arkansas State Highway Commission v. Carpenter, 371 S.W.2d 539 (Ark., 1963) (the cost of a motel used while the house on land taken was being moved to remainder was deemed to be improper); Commonwealth of Kentucky Department of Highways v. Rose, 392 S.W.2d 443 (Ky., 1965) (discusses procedure where opinion contains both proper and improper factors); Nelson v. Iowa State Highway Commission, 115 N.W.2d 695 (Iowa, 1962) (dealt with circuity of route caused by the construction of a median strip); People v. Alexander, 2 Cal. App. 2d 84, 27 Cal. Rptr. 720 (1963) (discusses law applicable to an opinion based upon improper or speculative factors).

When improper elements are used, a motion to strike should be made. If it is not, the error is waived.[35]

But, if a motion to strike, like objections, is too broad and not specific, it will not be error to refuse to grant it.[36] The specific improper elements must be pointed out and must be precisely referred to. A mere motion to strike the testimony, or to strike merely because the opinion is based on improper elements, without pinpointing them, is not enough. A motion to strike must be stated with particularity as to the grounds, and must be specific as to the portion of the testimony sought to be stricken.

Testimony usually will contain partly proper and partly improper items. In this situation, what should be done? Again, the motion must be specific as to the improper testimony sought to be stricken. If it is not, error cannot be predicated on a refusal to strike.[37] Central Illinois Public Service Co. v. Montgomery, 225 N.E.2d 412 (Ill. App., 1967), ruled, however, that an opinion based in part on proper and in part on improper elements of damage is not competent.

Where testimony is proper in part and improper in part, it is obvious that the improper testimony should be stricken on proper motion. But, what about the final opinion of value and damages in dollars and cents? What is the status of that testimony? If the witness can eliminate the improper item from his calculations and revise his estimate accordingly, he should still be permitted to give an opinion of value and state an amount for damages.[38] But, if he cannot segregate the proper from the improper items, his entire opinion should be stricken.

The following is a collection of excellent cases on this point.

In Commonwealth of Kentucky Department of Highways v. Rosenblatt, 416 S.W.2d 754 (Ky., 1967), the Kentucky Court of Appeals ruled that where the witnesses had used improper elements, a mere admonition to the jury not to consider them was not sufficient. The Commonwealth on appeal pointed out that, over its objection, the landowner's witnesses were permitted to testify to such items as circuity of travel, the value of the property to the owner, restriction of access, rerouting the public highways, and loss of trees not on the owner's property. The Commonwealth argued that these elements of damage were legally noncompensable.

At the conclusion of the testimony of each of the landowner's witnesses, counsel for the Commonwealth moved to strike the testimony of that witness, or that the witness be required to revise his figures by eliminating the improper factors that he had used, and to give an opinion based on admissible factors alone.

The motion was overruled except that at the conclusion of the testimony of one of them, the Court admonished the jury not to consider the loss of accessibility or inconvenience or loss of shade trees not on the landowner's property.

When all of the evidence had been presented, counsel for the Commonwealth again moved to strike the testimony of all the witnesses. The motion was overruled, and the court admonished the jury to disregard the evidence concerning these factors. Notwithstanding, the appellate court said:

> It will be observed that the admonition did not have the effect of striking the testimony of the witnesses as to values. The witnesses were not required to revise their figures.

The court concluded that all of the witnesses used legally noncompensable factors in determining the value, and held that it was error not to sustain the motion to strike testimony or to require the witnesses to revise their estimates after eliminating the improper factors.

In State Highway Commission v. Central Paving Co., 399 P.2d 1019 (Ore., 1965), error was assigned to the trial court's refusal to grant condemnor's motion to strike certain testimony of the defendant's value witnesses. The motion to strike was made on the grounds that the testimony of the value of the condemned property was based on factors not properly includable in arriving at the valuation of property. Here, on cross-examination the witness testified that his estimate of the difference in value resulted from an increase in the hauling distance between defendant's property and the main highway and from the interposition of the frontage road in front of the property. The landowner argued that under the statute the state could acquire any interest in land, including easements of air, view, light, and access. However, the court held that the right of a defendant to a more direct contact with the highway is not an interest in land.

The appellate court said that the trial judge should not have given an instruction that, in effect, permitted the jury to consider the circuity of route. Instead, it should have given the requested instruction that would have advised the jury not to consider circuity of route. The court ruled that it was error to permit testimony of landowner's loss based, in part, on circuity of route. The appropriate language of the opinion is:

> ... Circuity of route was inextricably bound up in the witness Taggert's estimate of the value of the defendant's land after the taking. Counsel for plaintiff in moving to strike the testimony, clearly identified the element of circuity of travel as the objectionable factor in Taggert's estimate. The trial court overruled the objection on the ground that a witness' testimony was not objectionable, merely because "he can't exactly break it down in dollars and cents." A value witness need not attribute a value to each of the elements properly employed in reaching his ultimate estimate of value. However, if the estimate is based in part upon an element improperly employed, the estimate is not competent evidence and the state is entitled to inquire as to the value attributed to the improperly employed element for the purpose of reducing the estimate by that amount, or, if it cannot be segregated, to insist that the witness' estimate be stricken.

The Oregon Court also said that a value based on the estimate of cost to replace the area of land taken by filling in adjacent land was improper. Also, the consideration of the increased possibility of vandalism was improper.

In Commonwealth Department of Highways v. Shaw, 390 S.W.2d 161 (Ky., 1965), the witness used the cost to relocate shrubbery and loss of plants in transplanting as a factor to arrive at value. The condemnor objected on the grounds that this was improper and moved to strike the entire testimony. The motion was not deemed to be proper because it was not directed to the improper testimony only.

The following is the important language in the case:

> In a number of recent cases we have been confronted by the situation where the valuation witness, after giving proper and competent testimony on direct examination, is led to admit on cross-examination that he has included in his estimate of value some improper factor. At the conclusion of his cross-examination, a motion is made to strike his entire testimony, as was done in this instance. When the witness's valuation is based solely or primarily on an improper factor, his estimate becomes invalid and is subject to a motion to strike. But when the improper factor can be eliminated from his calculations and the estimate revised accordingly, the appropriate remedy is an admonition to the jury not to consider the improper factor and a requirement of the witness that he revise his figures and give an opinion on the correct basis. In such an event, we are agreed that even though a motion to strike all of the witness's testimony is inappropriate and properly overruled, the trial court of its own volition could appropriately admonish the jury and require the witness to eliminate the improper factor from his calculations and revise his estimate accordingly. However, it is counsel's responsibility to request the relief to which he is entitled, and in the absence of an appropriate motion the trial court's failure to act on its own volition is not an error. The court is of the opinion that a blanket motion to strike the entire testimony of the witness is not sufficient to make it encumbent on the trial court, upon correctly overruling the motion, to initiate some other and more appropriate action. As a matter of fact, it may be that counsel would prefer that the witness not be given a gratuitous opportunity to correct his testimony.

In Illinois Power & Light Corp. v. Talbott, 321 Ill. 538, 152 N.E. 486 (1926), a condemnation case by a power company for an easement to install a power line, the opinion of the court was stated:

> After the witnesses had testified and been cross-examined as to the basis of their opinions, the appellant moved to exclude their testimony in regard to the depreciation of the land not taken outside of the three rod strip for the reason that such opinions were based upon elements of alleged damage which were too remote and not sufficiently and reasonably certain to be the basis for opinions touching the value or depreciation of the land, and the basis of the opinions was of such a character that the alleged elements of damage included in the opinion could not be separated so as to tell how much of the damage included was predicated upon improper elements. The court denied the motion. This was error. Opinions of witnesses based upon supposed elements of damage which were not recognized by law as proper to be considered in condemnation proceedings should have been excluded. Only such opinions as are based on evidence of lawful elements of damage can be of benefit to a jury in the assessment of the amount of damage. (Citing numerous cases.)

In Commonwealth of Kentucky Department of Highways v. Gardner, 413 S.W.2d 80 (Ky., 1967), it appeared from the testimony on cross-examination that witnesses had predicated their estimates of damage primarily on the improper factor of circuity of route. The court said that if a witness bases his estimate of damages primarily on an improper factor, his estimate is invalid, and his testimony is subject to a motion to strike and that in this case the trial court should have stricken the testimony.

The appellate court went on to say that even though the trial court admonished the jury not to consider the improper factors and excluded so much of the testimony as related to improper factors, the trial court's action was of no efficacy. The reason for this was that if the witnesses were not able to exclude, disregard, or eliminate from their consideration the improper factors and make an estimate of damages free from the influence of those factors, the jury could not be expected to make a separation either.

In City of Chicago v. Giedraitis, 14 Ill.2d 45, 150 N.E.2d 577 (1958), the city condemned a building that was used for a tavern and for an apartment that was occupied by the landowner.

The landowner attempted to give testimony concerning the amounts he had expended on the property. The trial court excluded this testimony. The appellate court said that although replacement or reproduction costs may, under certain circumstances, be material, the proffered proof was not designed for that purpose, but only sought to show the landowner's investment and therefore was clearly inadmissible. The court said the test is not what the improvements originally cost or the sum that the owner has expended therein, but rather it is the amount for which the entire property would voluntarily sell. Furthermore, even if the court were to consider this as an attempt to prove replacement costs, the testimony would be equally objectionable because no evidence of reasonable depreciation was offered.

The landowner also contended that the opinion of one of its witnesses was erroneously stricken. In response to this argument, the court said:

> ... We have many times held that although any qualified individual may state his opinion as to the property value, there must be some preliminary showing of the factors upon which this opinion is based, and where improper elements have been considered, the testimony is incompetent and upon motion must be stricken. City of Chicago v. Central National Bank, 5 Ill.2d 164, 125 N.E.2d 94; Illinois Power & Light Corp. v. Peterson, 322 Ill. 342, 153 N.E. 577, 49 A.L.R. 692; Forest Preserve District v. Hahn, 341 Ill. 599, 173 N.E. 763; City of Chicago v. Chicago City Railway Co., 302 Ill. 57, 134 N.E. 44; Department of Public Works v. Lambert, 411 Ill. 183, 103 N.E.2d 356. Here, Kamenjarin (the witness) stated that in arriving at his valuation opinion, he considered the land and buildings separately and based his computations upon a possible future rental income. It is, of course, evident that the fair cash market value of the improved real estate is not necessarily the total of the separate land and building appraisals, but that the whole property must be considered as a single unit. The City of Chicago v. Callender, 396 Ill. 371, 71 N.E.2d 643; Chicago Land Clearance Commission v. Darrow, 12 Ill.2d 365, 146 N.E.2d 1; Kinter v. United States, 156 Fed.2d 5, 172 A.L.R. 232, 244. Furthermore, even though evidence of actual rental receipts may be admissible in a condemnation proceeding to determine the property value (citing numerous cases), we know of no instance in which speculative or future anticipated rentals were held to be competent valuation factors. In fact, the matter has been previously considered by this court in Chicago Land Clearance Commission v. Darrow, 12 Ill.2d 365, 146 N.E.2d 1, and City of Chicago v. Central National Bank, 5 Ill.2d 164, 125 N.E.2d 94, 100, and in both instances we held that such theoretical profits are too uncertain and depend too much upon other contingencies to safely be accepted as any evidence of the market value. As was stated in the latter case, "where the premises are owner-occupied that element is not material, and such evidence of gross receipts would be misleading to the jury." Since the Giedraitis property was owner-occupied and no actual rental had been made or was even anticipated, it is clear that the trial court did not err in striking testimony based upon such improper elements.

Another good case to illustrate the point is Weinzelbaum Inc. v. Abbell, 49 Ill. App. 2d 442, 200 N.E.2d 43 (1964). This case involved an action by a painting and decorating contractor against an occupier of an apartment for balance due under a contract and for values of extras. The case of the plaintiff was based entirely on the testimony of an individual. It was not apparent from the direct testimony that his knowledge about the things that he was testifying to was based on hearsay. It was not until cross-examination that it was revealed that his testimony was based on hearsay. Then, after further questioning, the defendant moved that the testimony of this witness be stricken. The trial court denied this motion.

The appellate court held that it was error to deny the motion to strike the testimony. The court said when the testimony was first admitted on direct examination, the infirmities present therein were not apparent, because the witness on direct examination stated that he personally had spoken to the defendants with regard to having the extra work done. It was on cross-examination that the defendants elicited the fact that the alleged authorization was given orally to someone else, and that it was incompetent and inadmissible. The court said:

> The fact of inadmissibility may not come to light until after or during cross-examination, or at a later stage of the case. In such circumstance, a motion to strike will lie.
>
> ....

> The question as originally propounded on direct examination was in its tenor not improper, nor, seemingly, was the answer to it. A motion to strike is timely when the character of the objectionable testimony is apparent, or as soon as it becomes apparent. Neither was it necessary nor possible to voice objections at an earlier stage in the proceeding.

The plaintiff argued that the trial court as a trier of fact is assumed to have disregarded all incompetent or objectionable testimony; that there was other competent evidence on which the trial court could have based its judgment; and that the findings of the trial court should not be disturbed.

The plaintiff also contended that the defendant failed to make objections to the admission of the witness's testimony on direct examination, and that the failure to make timely objection to the admission of incompetent evidence when elicited is deemed to waive and cure the error, if any. Notwithstanding these arguments, the plaintiff did not prevail.

City of Chicago v. Chicago City Railway Co., 302 Ill. 57, 134 N.E. 44 (1922), reaches the same conclusion. It stands for the proposition that an opinion is incompetent if a valuation witness cannot separate improper from proper elements. This case involved a special assessment for street improvements.

United States v. Certain Parcels of Land, 149 F.2d 81 (C.C.A. 5, 1945), involved an appeal by the Federal Government in a condemnation for the construction of a roadway. The Federal Court held that the burden of proof was on the landowner, and then said:

> Its ill assorted and misfit collection of evidence valuing separately land, buildings, trees and plants, did not satisfy this burden. Instead of producing evidence as to the value of the land, to be condemned, as a whole and in its then condition, on which a jury might rest its verdict, appellee produced witnesses who estimated: the value of a house in vacuo; the value not of the land as a whole and as it then was, but as separate lots into which it was supposititiously divided; the value of the bulbs not as their presence added to the value of the land as land but as though they were being separately condemned; and then sought by the verdict to congolomerate this mass of unrelated and inharmonious testimony into a consistent whole.

The Court of Appeals considered that the case went far out of bounds and that the verdict was in excess of any substantial relevant evidence. On this basis, the case was reversed even though proper objection was not timely made to notice and to correct the error. Here, counsel for the United States did not do anything to prevent the resulting confusion.

Perhaps one of the best cases to discuss improper measures of just compensation is Commonwealth of Kentucky Department of Highways v. Tyree, 365 S.W.2d 472 (Ky., 1963). There the Court of Appeals of Kentucky states that at some point in the testimony what may be relevant (i.e., the value of the land) may turn out to be based on irrelevant measures of value, or elements that are legally noncompensable. If this is brought out on direct examination, the testimony can be stricken immediately without waiting for cross-examination.

But, if it is brought out on cross-examination that these factors are irrelevant or noncompensable, such as sales to a condemning agency, sales of noncomparable properties, loss of profits, or diversion of traveling, the testimony ought to be stricken. The court points out that the witness may have attributed certain values to the irrelevant factor that could be eliminated from his estimate by a requested admonition, in which event the remaining estimate would be acceptable evidence.

The case points out that when the improper testimony is brought out on cross-examination, nothing is served by merely making an objection, because the estimate of value still stands before the jury, and they will have no satisfactory basis on which to discount it by reason of the improper factor. The court also says that if the witness has used an improper factor and a motion to strike his entire testimony is made and sustained, his estimate is excluded completely from the jury's consideration.

The court points out that because the use of irrelevant measures of value or legally noncompensable elements is a matter of relevancy of evidence, it is necessary to make an objection or a motion to strike in order to preserve grounds for appeal. If no such objection or motion is made, the appellate court cannot reverse on the ground that the verdict was based on irrelevant evidence.

The court states that the basic reason why objections are to be made to incompetent or irrelevant evidence is that the jury is not qualified to determine questions of competency or relevancy, and, in the absence of objection, the jury is entitled to give full value to the evidence.

When one is laying a foundation to strike testimony or an opinion of value, it is imperative to show that (1) the witness has relied on improper factors, and (2) these factors were essential to his opinion of value. Where his opinion of value is based in part on proper and in part on improper factors, he must be asked if he can segregate the improper factors and revise his calculation and come up with another figure. If he cannot, his entire opinion should be stricken; or, if this fact is revealed on preliminary examination, he should be precluded from giving an opinion.

Opinions based on unwarranted, false, or mistaken assumptions of facts should not be permitted to stand, and motions to strike should also be granted.[39]

VII. CROSS-EXAMINATION

Cross-examination has many purposes, one of which is to show that the witness has relied on improper elements of value or noncompensable damages, so that appropriate action can be taken to eliminate these matters from the jury's consideration. For examples of cases where this was done, see State Highway Commission v. Central Paving Co., 399 P.2d 1019 (Ore., 1965), where circuity of route was considered; Illinois Power & Light Corp. v. Barnett, 388 Ill. 499, 170 N.E. 717 (1930), where improper elements were used for damages; Arkansas State Highway Commission v. Sargent, 410 S.W.2d 381 (Ark., 1967), where cross-examination revealed that there was no reasonable basis for the opinion; Commonwealth of Kentucky Department of Highways v. Gardner, 413 S.W.2d 80 (Ky., 1967), a circuity of route case; State v. Wilson, 4 Ariz. App. 420, 420 P.2d 992 (1966), where traffic patterns were interfered with.

The fact that the inadmissibility of evidence may not come to light until after or during cross-examination does not preclude a motion to strike the testimony, nor does it mean that a waiver has resulted, because no objection was made to the testimony on direct examination. The rule is best illustrated by Weinzelbaum Inc. v. Abbell, 49 Ill. App. 2d 442, 200 N.E.2d 43 (1964), a noncondemnation case, where the Court of Appeals of Illinois said:

> The fact of inadmissibility may not come to light until after or during cross-examination, or at a later stage of the case. In such circumstances, a motion to strike will lie.

For condemnation cases on this point, see: Illinois Power & Light Corp. v. Talbott, 321 Ill. 538, 152 N.E. 486 (1926); State Highway Commission v. Dumas, 395 P.2d 424 (Ore., 1964); Sacramento & San Joaquin Damage District v. Reed, 215 Cal. App. 2d 60, 29 Cal. Rptr. 847 (1963); State of Indiana v. Sovich, 252 N.E.2d 582 (Ind., 1969), where land value was premised on enhancement created by project.

When it becomes apparent that improper items have been used, a motion to strike should be made. Whether the motion to strike should be made at the *instant* that cross-examination reveals that the witness used improper items or at the conclusion of cross-examination is not clear. In State of Texas v. Blanchard, 387 S.W.2d 143 (Tex. Civ. App., 1965), the Court of Civil Appeals held that motion was not timely because it was not made until after *voir dire* examination was concluded.

There the witness on direct examination stated his opinion first and then proceeded to give the basis for it. He volunteered the sales price of a transaction without any background concerning the sale. At this point, opposing counsel did not object, but asked for the background information. The witness, however, without giving the background, again gave the price, whereupon opposing counsel asked and was given leave to *voir dire* concerning the sale.

The *voir dire* was conducted in front of the jury, and the examination revealed that the sale was improved (condemned land was unimproved) and was not sold, but traded. Therefore, counsel moved to strike the testimony. The motion was denied and on appeal, the court, while recognizing that the evidence was improper, ruled that the motion was not timely because an objection had not been made when the evidence was first given. Apparently the court was referring to the testimony as first given on direct examination.

Specifically, the Texas court said:

> It occurs to us that counsel for appellant did not timely object to the evidence, and he developed before the jury practically all the evidence of which

> he now complains. Appellant is not now in a position to complain because the jury heard this evidence when it was produced before the jury in answers to questions propounded to Orr (witness) by appellant's own counsel.

Counsel for appellant cross-examined other witnesses and brought out the same testimony as with Orr without objecting or moving to strike the testimony. For this reason the court ruled that if it were mistaken as to its conclusion that a timely objection was not made with the witness, Orr, counsel by later on introducing the same testimony waived the objection.

As to the other witness, counsel for appellant did move to strike but not until appellee had rested and appellant had put on certain of his own witnesses. This motion, the court said, came too late.

The Blanchard case says that if the improper testimony is given on direct examination, a failure to immediately object precludes a motion to strike. Also, if the improper testimony is revealed on cross-examination, but in the presence of the jury, the cross-examiner has waived his right to have the testimony stricken.

If *voir dire* examination is to be undertaken to establish that the witness has relied on improper elements, it may have to be done outside the presence of the jury. Indeed, in Barnes v. North Carolina Highway Commission, 250 N.C. 378, 109 S.E.2d 219 (1959), the Supreme Court of North Carolina said that it is better practice for the judge to hear the evidence in absence of the jury to determine admissibility of sales.

Where incompetent evidence is brought out on cross-examination, the law seems to be generally that the party asking the question not only invites, but requires, an answer and he waives a right to object to a responsive answer. The reasoning is that a party cross-examining his adversary's witness cannot hold his adversary responsible for incompetent evidence developed in the course of the cross-examination.[40] However, the rule seems to apply only to matters that were not used by the witness as a basis for his opinion. But, for a contrary result, see Arkansas State Highway Commission v. Russell, 398 S.W.2d 201 (Ark., 1966), where it was revealed, on cross-examination, that the witness used an offer to value the land. The court denied a motion to strike. It reasoned that because this information was obtained on cross-examination, the examiner was acting at his own peril in putting questions that might invoke an answer damaging to his own case. If the reasoning of this case were to be adopted as the law, it would, indeed, be difficult to expose an improper basis of an opinion.

VIII. REBUTTAL EVIDENCE

Trial courts do not always sustain objections or grant motions to strike improper valuation testimony or elements of noncompensable damages. If the case is lost, the record is preserved for appeal. But one should not give up merely because the court may have ruled improperly. Efforts should be made to rebut this improper evidence, with the hope that the case will still be won or that the award will not be substantially high enough to warrant an appeal.

The questions that arise include whether by rebutting this evidence, particularly if it is rebutted with improper evidence, one has waived the error, or is estopped or barred from insisting that error was committed. The answer is that no waiver has taken place, nor is one estopped or barred from having the matter reviewed on appeal.[41]

IX. INSTRUCTIONS--WRITTEN

If objections and motions to suppress or strike evidence have not been sustained, there is still one other avenue by which the jury can be told that they are to disregard the evidence that is considered improper. This is by written instructions. If the evidence has been admitted over objection, a decision will have to be made whether to tender an instruction to disregard and not to consider certain improper elements of valuation or noncompensable damages. If the instruction is given, the jury may follow it, and the ultimate end will have been accomplished. On the other hand, if the jury does not follow it--and there is not always a way to know what they did follow--the damage still remains. The verdict may reflect amounts based on improper items, but now there is a legal basis on which an appellate court can say that the harm was cured by the instruction. Whether to tender an instruction under these circumstances presents a difficult decision. The decision might be to forego the instruction and appeal on the basis that the objection was overruled or the motion to strike was denied.

If no objection or motion to strike is made during the course of the testimony, the only course available is to request the trial court to instruct the jury to disregard the testimony and, on re-

fusal, to assign error.[42] However, it is not recommended that objections and motions to strike be bypassed in favor of taking care of the matter by instructions. This procedure is, indeed, risky.

Where a case has presented items of damage that are both compensable and noncompensable, if proper objection and request for jury instructions are made, the trial court has a duty to give the instruction and to segregate the compensable from the noncompensable. For example, in State v. Wilson, 4 Ariz. App. 420, 420 P.2d 992 (1966), the Court of Appeals of Arizona, over objection, permitted one of the owners to testify that the gross volume of a guest ranch business had dropped one-third after access rights were taken. This court reasoned that the evidence could not be used for the purposes of showing the noncompensable injury of loss of profits, but that it could be admitted for the purposes of showing or running to the establishment of the value of the property. The court, discharging its duty to segregate, gave the following instruction:

> You are instructed that you are not to consider any claimed loss or impairment of business of the defendants in assessing damages to the remainder of the property, inasmuch as the law permits damages to be awarded for injury to the property but not injury to business conducted thereon.

No error was deemed to have been committed by the trial court because it made the distinction between profits from the business and income from the property and gave an instruction thereon. In Arkansas State Highway Commission v. Potts, 401 S.W.2d 3 (Ark., 1966), testimony of damages based on circuity of route was cured by an instruction that these damages were not to be considered. In Department of Public Works & Buildings v. Maddox, 2 Ill.2d 489, 173 N.E.2d 448 (1961), the Supreme Court of Illinois held that an instruction to disregard any damages resulting from a change in access patterns by the construction of a median strip was proper. For a case holding that it was error to refuse a similar instruction, see In re Appropriation of Easements for Highway and Slope Purposes, 137 N.E.2d 595 (Ohio App., 1955).

However, an instruction purporting to segregate may not be sufficient to cure the error or harm. In Commonwealth of Kentucky Department of Highways v. Gardner, 413 S.W.2d 80 (Ky., 1967), the Court of Appeals of Kentucky ruled that even though the trial court had admonished the jury not to consider the improper factors, primarily circuity of route, such admonition was of no efficacy because the witnesses were not able to exclude, disregard, or eliminate from their consideration the improper factors and make an estimate of damages free from the influences of these factors. The court reasoned that if the witnesses could not, neither could the jury be expected to. The same was also true in Commonwealth of Kentucky Department of Highways v. Rosenblatt, 416 S.W.2d 754 (Ky., 1967), where the witnesses were not required to revise their figures.

Also, an instruction will not cure the harm where the award is near the amount of the opinion based on improper factors.[43] Even though an instruction is given, the right to appeal is not always lost when the verdict is high.

It is not clear whether an instruction that tells the jury what specific items of damage it may or may not consider is proper. In DuPuy v. City of Waco, 396 S.W.2d 103 (Tex., 1965), the Supreme Court of Texas held that an instruction is not proper if it tells the jury that certain items or elements of damage may or may not be considered. The court said that what may or may not be considered should be best determined by the trial court in the admission and exclusion of testimony, rather than by instruction. However, the cases dealing with improper elements and noncompensable damages clearly indicate that instructions can properly advise the jury not to consider certain improper elements. But an instruction that singles out proper evidence for comment is improper.[44]

One of the stock instructions generally advises the jury that they may consider any matter that a knowledgeable purchaser would consider. This instruction could be erroneous if, during the course of the testimony, legally unacceptable criteria are admitted, which criteria are often used by buyers. Examples are circuity of route, diversion of traffic, inconvenience, or valuing raw ground by hypothetically subdividing it into lots and estimating what the property is worth if sold by sites. Under these circumstances, it is obvious that the general instruction standing alone could be misleading.[45] Other instructions advising the jury not to consider these items should be tendered.

Another instance when an instruction will not cure the damage is when it is given at the end of a protracted case. In Carolina Power & Light Co. v. Creasman, 262 N.C. 390, 137 S.E.2d 497 (1964), the Supreme Court of North Carolina ruled that an instruction given was not sufficient to cure the harm done. This instruction, although proper on its face, was given at the end of a protracted case. In this case, the condemnation was for the construction of a new steam plant. Much evidence was received concerning anticipated inconveniences and damages from insects, fogs, ashes blown from ash disposal areas, fumes blown by wind, appearance of plant, water pollution, and nox-

ious odors and the presence of smoke and growth of algae and other matters in and around the edge of the lake. The instruction given advised the jury not to consider these items.

X. CLOSING ARGUMENT

During the closing arguement, the landowner's attorney sometimes will make statements that are damaging to the condemnor's cause. How should these statements be handled? Objections; motions to strike the statement with an immediate oral instruction to the jury to disregard them; motions for a mistrial; or written instructions telling the jury to disregard the specific statement of counsel are procedures that can be employed.

In addition to statements of improper valuation processes and noncompensable items, certain other statements are often made by the landowner's counsel that are prejudicial.

It was not the purpose of this paper to discuss these statements, but research revealed that they are often made; therefore, it was decided to mention them here. These statements often seem to take the following lines: (1) the property was taken without the landowner's consent and he had no choice in determining whether his property should be taken, (2) his whole investment accumulated over many years is being taken, (3) the power and forces of the government are designed and arrayed against him and he is waging an unequal battle; or the statements may be calculated to create sympathy for the landowner and bias and prejudice against the condemnor, by referring to illness or misfortune of the landowner.

Counsel is generally permitted wide latitude while making a closing argument, but he must confine himself to the evidence in the case and the issues to be resolved. Nor can he make any argument or statement calculated to arouse the sympathy, passion, bias, or prejudice of the jury, so as to bring about a favorable verdict for his client. Smith v. Riedinger, 95 N.W.2d 65 (N.D., 1959); State Highway Commission v. Callahan, 410 P.2d 818 (Ore., 1966); Jonte v. Key System, 89 Cal. App. 2d 654, 201 P.2d 562 (1949); Todd v. Lit Brothers, 381 Pa. 109, 112 A.2d 810 (1955); Commonwealth of Kentucky Department of Highways v. Davis, 400 S.W.2d 515 (Ky., 1966); State of Missouri ex rel. State Highway Commission v. Turk, 366 S.W.2d 420 (Mo., 1963); State v. Jauernig, 395 S.W.2d 923 (Tex. Civ. App., 1965).

Statements that the owner had no choice in determining whether his property should be taken, and statements that he was unwilling to sell, thereby imparting that the condemnation was forced on the owner, are deemed to be prejudicial. In support of this position, attention is directed to the following cases: Department of Highways v. Darch, 374 S.W.2d 490 (Ky., 1964); City of Chicago v. Cunnea, 329 Ill. 288, 160 N.E. 559 (1928); Commonwealth Department of Highways v. Musick, 400 S.W.2d 513 (Ky., 1966); Commonwealth Department of Highways v. Sanders, 396 S.W.2d 781 (Ky., 1965); State v. Waggoner, 319 S.W.2d 930 (Kan. App., 1959); Commonwealth of Kentucky Department of Highways v. Davis, 400 S.W.2d 515 (Ky., 1966); Board of County Commissioners v. Noble, 117 Colo. 77, 184 P.2d 142 (1947); Commonwealth Department of Highways v. Goehring, 408 S.W.2d 636 (Ky., 1966); and an A.L.R. annotation dealing with "Propriety and Effect, in Eminent Domain Proceedings, of Argument or Evidence as to Landowner's Unwillingness to Sell Property," cited as 17 A.L.R.3d 1449.

Language in an instruction to the effect that the property was taken without the owner's consent was also held to be error. State v. Goodson, 281 S.W.2d 858 (Mo., 1955).

Statements to the jury that the owner is waging an unequal battle, because he is pitted against the entire resources of the government and is fighting a battle against a large and strong organization, are improper. Where such statements have been made, new trials were granted to serve the ends of justice.

Cases specifically holding that it is improper to make reference to the largeness of government or corporations are: State Highway Commission v. Callahan, 410 P.2d 818 (Okla., 1966); State of Missouri ex rel. State Highway Commission v. Turk, 366 S.W.2d 420 (Mo., 1963); State v. Jauernig, 395 S.W.2d 923 (Tex. Civ. App., 1965); Commonwealth of Kentucky Department of Highways v. Davis, 400 S.W.2d 515 (Ky., 1966).

Other statements that are an appeal to the passionate prejudice of the jury are also improper. Examples are: portraying the landowner as poor people, Commonwealth of Kentucky Department of Highways v. Davis, 400 S.W.2d 515 (Ky., 1966); asking the jury to put themselves in the landowner's position, In re Appropriations of Easements for Highway Purposes, 8 Ohio App. 2d 252, 221 N.E.2d 476 (1966); and making reference to past history of poverty, sickness, hardship, and death in the family, Schober v. City of Milwaukee, 18 Wisc.2d 591, 119 N.W.2d 316 (1963).

When the statements are made on closing argument, an objection must be made, immediately, to

preserve the record on appeal.[46] But, counsel for the condemnor must do more. He must ask for an order from the court instructing the jury to disregard the statements.

Some statements may be deemed to be so damaging that a motion for a mistrial should be made. Courts have held that some statements are so harmful that they could not have been cured by any objections or instructions of the court. In these instances, even though no objection is made, the appellate courts have reviewed. In support of this position, see: City of Quincy v. V. E. Best Plumbing Co., 17 Ill.2d 570, 162 N.E.2d 373 (1959); City of Chicago v. Pridmore, 12 Ill.2d 447, 147 N.E.2d 54 (1957); Schober v. City of Milwaukee, 18 Wisc.2d 591, 119 N.W.2d 316 (1963); State v. Jauernig, 395 S.W.2d 923 (Tex. Civ. App., 1965); and Wilemon v. State, 385 S.W.2d (Tex. Civ. App., 1965).

As to statements relating to noncompensable damages and improper valuation methods, if the trial court has ruled that they are not to be considered, counsel should not make reference to them. If counsel does, the same courses of action as herein outlined can be taken.

Sometimes counsel, under the guise of advising the jury what they cannot consider, invites them to include amounts for improper items. A good example is illustrated in City of Quincy v. V. E. Best Plumbing Co., 17 Ill.2d 570, 162 N.E.2d 373 (1959), wherein the landowner's attorney made statements to the effect that the owner could not be compensated for certain items that he named and that he said were not compensable, but he also said that the landowner was to receive compensation that would render him neither richer nor poorer. The Supreme Court of Illinois, holding that this was error, stated:

> In his argument, counsel for the owner stated that his client could not recover in this cause for certain expenses and loss which it would sustain as a consequence of moving from the property taken, but he then dealt at length upon the duty and right of the jury, in their consideration of the damage to be allowed the owner, to see that the owner is no poorer after the taking of its property than it was before. Thus, while technically negating the right to recover for certain expenses and loss, counsel invited the jury to so provide in its verdict for damages that the owner would suffer no expense or loss. The emphasis upon this position could serve only to deprive the City of a fair trial and to deteriorate the judicial process.

It is obvious that throughout all phases of a trial, through closing argument, counsel should be alert and must immediately take whatever courses of action are available to him to preclude or exclude from consideration improper items.

APPLICATIONS

The foregoing research should prove helpful to highway administrators, their legal counsels, and right-of-way engineers. Highway officials are urged to review their right-of-way acquisition programs to determine how this research can effectively be incorporated in a meaningful way. Attorneys should find this paper especially useful in their work as an easy and concise reference document in eminent domain litigation cases.

FOOTNOTES

1/ Ark. State Highway Comm'n v. Davis, 455 S.W.2d 97 (Ark., 1970)

2/ Mead v. Scott, 130 N.W.2d 641 (Iowa, 1964) (not a condemnation case).

3/ In re Appropriation of Easement for Highway Purposes v. Bennett, 193 N.E.2d 702 (Ohio, 1962).

4/ State v. Fenix, 311 S.W.2d 61 (Mo., 1958).

5/ United States v. 86.52 Acres of Land, 250 F. Supp. 619 (D.C. Mo., 1966); United States v. Certain Interests in Property in Cumberland County, 185 F. Supp. 555 (D.C. N.C., 1960).

6/ Lybarger v. State of Neb. Dep't of Roads, 177 Neb. 35, 128 N.W.2d 132 (1964).

7/ Warren v. Waterville Urban Renewal Authority, 235 A.2d 295 (Me., 1967); Hedges v. Conder, 166 N.W.2d 844 (Iowa, 1969); City of Chicago v. Giedraitis, 14 Ill.2d 45, 150 N.E.2d 577 (1958); Ill. Power & Light Corp. v. Barnett, 388 Ill. 499, 170 N.E. 717 (1930).

8/ Urban Renewal Agency of the City of Harrison v. Hefley, 371 S.W.2d 141 (Ark., 1963).

9/ State v. Walker, 334 S.W.2d 611 (Tex., 1963); State of Ind. v. Monninger, 182 N.E.2d 426 (Ind., 1962); Webber v. Yaden, 373 P.2d 1007 (Ore., 1962) (not a condemnation case); Sacramento & San Joaquin Damage Dist. v. Reed, 215 Cal. App. 2d 60, 29 Cal. Rptr. 847 (1963).

10/ Hryciuk v. Robinson, 326 P.2d 424 (Ore., 1958) (not a condemnation case); Webber v. Yaden, 373 P. 2d 1007 (Ore., 1962); Dunes Club Inc. v. Cherokee Ins. Co., 259 N.C. 294, 130 S.E.2d 625 (1963) (not a condemnation case).

11/ State of Missouri ex rel. State Highway Comm'n v. Volz Concrete Material Co., 330 S.W.2d 870 (Mo., 1960).

12/ Wallender v. Michas, 475 P.2d 72 (Ore., 1970) (not a condemnation case); Plaza Express Co. v. Middle States Motor Freight Inc., 40 Ill. App. 2d 117, 189 N.E.2d 382 (1963) (not a condemnation case); E. A. Meyer Constr. Co. v. Drobnick, 199 N.E.2d 447 (Ill., 1964) (not a condemnation case); Boring v. Metropolitan Edison Co., 435 Pa. 513, 257 A.2d 565 (1969).

13/ Commonwealth of Ky. Dep't of Highways v. Rose, 392 S.W.2d 443 (Ky., 1965), Buena Park School Dist. of Orange County v. Metrim Corp., 176 Cal. App. 2d 255, 1 Cal. Rptr. 250 (1959).

14/ Smith v. Abel, 316 P.2d 793 (Ore., 1957) (not a condemnation case).

15/ State Highway Comm'n v. Dumas, 395 P.2d 424 (Ore., 1964).

16/ Snow v. Cannelton Sewer Pipe Co., 210 N.E.2d 118 (Ind., 1965) (not a condemnation case); Lumber Fabricators, Inc. v. Applachian Oak Flooring & Hardware Corp., 141 So. 2d 210 (Ala., 1962) (not a condemnation case).

17/ Lumber Fabricators, Inc. v. Appalachian Oak Flooring & Hardware Corp., 141 So. 2d 210 (Ala., 1962).

18/ Boring v. Metropolitan Edison Co., 435 Pa. 513, 257 A.2d 565 (1969).

19/ Urban Renewal Agency of the City of Harrison v. Hefley, 371 S.W.2d 141 (Ark., 1963); Smith v. Abel, 316 P.2d 793 (Ore., 1957) (not a condemnation case).

20/ Ill. Power & Light Corp. v. Barnett, 338 Ill. 499, 170 N.E. 717 (1930); Weinzelbaum Inc. v. Abbell, 49 Ill. App. 2d 442, 200 N.E.2d 43 (1964) (not a condemnation case); Dunes Club Inc. v. Cherokee Ins. Co., 259 N.C. 294, 130 S.E.2d 625 (1963) (not a condemnation case); State Road Comm'n of W. Va. v. Ferguson, 137 S.E.2d 206 (W.Va., 1964).

21/ Jaqueth v. Town of Guilford School Dist., 189 A.2d 558 (Vt., 1963) (not a condemnation case); State of Texas v. Blanchard, 387 S.W.2d 143 (Tex. Civ. App., 1965).

22/ Northern Indiana Pub. Serv. Co. v. Otis, 145 Ind. App. 159, 250 N.E.2d 378 (1969) (not a condemnation case).

23/ Hester v. Goldsbury, 64 Ill. App. 2d 66, 212 N.E.2d 316 (1965) (not a condemnation case).

24/ City of Wichita Falls v. Jones, 456 S.W.2d 148 (Tex. Civ. App., 1970); Jackson v. State, 108 Ga. App. 529, 133 S.E.2d 436 (1963) (not a condemnation case).

25/ State Highway Comm'n v. Hamilton, 5 N.C. App. 360, 168 S.E.2d 419 (1969).

26/ North Carolina State Highway & Pub. Works Comm'n v. Privett, 246 N.C. 501, 99 S.E.2d 61 (1957).

27/ Transit Trucking Co. v. Gaitsch, 10 Ill. App. 2d 64, 134 N.E.2d 32 (1956) (not a condemnation case); Weinzelbaum Inc. v. Abbell, 49 Ill. App. 2d 442, 200 N.E.2d 43 (1964) (not a condemnation case); Cooper v. Housing Authority, 105 R.I. 126, 249 A.2d 904 (1969).

28/ State v. Wilson, 4 Ariz. App. 420, 420 P.2d 992 (1966); Weinzelbaum Inc. v. Abbell, 49 Ill. App. 2d 442, 200 N.E.2d 43 (1964) (not a condemnation case); People v. Alexander, 212 Cal. App. 2d 84, 27 Cal. Rptr. 720 (1963).

29/ Beam v. Kent, 3 N.J. 210, 69 A.2d 569 (1949).

30/ Bd. of Park Comm'rs of City of Wichita v. Fitch, 184 Kan. 508, 337 P.2d 1034 (1950).

31/ State of Texas v. Blanchard, 387 S.W.2d 143 (Tex. Civ. App., 1965); Ark. State Highway Comm'n v. Stallings, 248 Ark. 1207, 455 S.W.2d 874 (1970).

32/ Lumber Fabricators, Inc. v. Appalachian Oak Flooring & Hardware Corp., 41 Ala. App. 570, 141 So. 2d 210 (1962) (not a condemnation case).

33/ Abbadessa v. Tegu, 123 Vt. 183, 187 A.2d 56 (1962) (not a condemnation case).

34/ McElwain v. Schuckert, 13 Ariz. App. 468, 477 P.2d 754 (1970) (not a condemnation case).

35/ Forest Preserve Dist. of Cook County v. Krol, 12 Ill.2d 139, 145 N.E.2d 599 (1957); Northern Indiana Pub. Serv. Co. v. Otis, 145 Ind. App. 159, 250 N.E.2d 378 (1969) (not a condemnation case); State of Texas v. Blanchard, 387 S.W.2d 143 (Tex. Civ. App., 1965); Urban Renewal Agency of the City of Harrison v. Hefley, 237 Ark. 39, 371 S.W.2d 141 (1963).

36/ American Savings Life Ins. Co. v. State, 13 Ariz. App. 336, 476 P.2d 680 (1970); Southern Indiana Gas & Elec. Co. v. Gerhardt, 241 Ind. 389, 172 N.E.2d 204 (1961); Pub. Serv. Co. of Indiana Inc. v. Levenstein Bros. Realty Co., 246 Ind. 520, 207 N.E.2d 202 (1965); Northern Indiana Pub. Serv. Co. v. Otis, 145 Ind. App. 159, 250, 250 N.E.2d 378 (1969) (not a condemnation case); Territory of Hawaii v. Adelmeyer, 363 P.2d 979 (Ha., 1961); State Highway Comm'n v. Dumas, 395 P.2d 424 (Ore., 1964); Ark. State Highway Comm'n v. Wilmans, 236 Ark. 945, 370 S.W.2d 802 (1963); Urban Renewal Agency of the City of Harrison v. Hefley, 237 Ark. 39, 371 S.W.2d 141 (1963); Ark. State Highway Comm'n v. Bowers, 248 Ark. 388, 451 S.W.2d 728 (1970); People v. Loop, 274 P.2d 885 (Cal. App., 1954); Ark. State Highway Comm'n v. Woody, 248 Ark. 657, 453 S.W.2d 45 (1970); State Highway Dep't v. Whitehurst, 112 Ga. App. 877, 146 S.E.2d 919 (1966).

37/ Territory of Hawaii v. Adelmeyer, 363 P.2d 979 (Ha., 1961); Ark. State Highway Comm'n v. Bowman, 237 Ark. 51, 371 S.W.2d 138 (1963); Ark. State Highway Comm'n v. Carpenter, 237 Ark. 73, 371 S.W.2d 539 (1963); Urban Renewal Agency of the City of Harrison v. Hefley, 237 Ark. 39, 371 S.W.2d 141 (1963); Commonwealth Dep't of Highways v. York, 390 S.W.2d 190 (Ky. App., 1965); Commonwealth Dept't of Highways v. Shaw, 390 S.W.2d 161 (Ky. App., 1965); Ark. State Highway Comm'n v. Bowers, 248 Ark. 388, 451 S.W.2d 728 (1970); Boring v. Metropolitan Edison Co., 435 Pa. 513, 257 A.2d 565 (1969); State Roads Comm'n of Md. v. Creswell, 235 Md. 220, 201 A.2d 328 (1964); People v. Loop, 274 P.2d 885 (Cal. App., 1954); Commonwealth of Ky. Dep't of Highways v. Rosenblatt, 416 S.W.2d 754 (Ky. App., 1967); Pub. Serv. Co. of Indiana Inc. v. Levenstein Bros. Realty Co., 246 Ind. 520, 207 N.E.2d 202 (1965); Cooper v. State of Alabama, 274 Ala. 683, 151 So. 2d 399 (1963); County of Santa Clara v. Ogata, 240 Cal. App. 2d 262, 49 Cal. Rptr. 397 (1966).

38/ Commonwealth Dep't of Highways v. Shaw, 390 S.W.2d 161 (Ky. App., 1965).

39/ United States v. 102.93 Acres of Land, 154 F. Supp. 258 (D.C. N.Y., 1957); United States v. 86.52 Acres of Land, 250 F. Supp. 619 (D.C. Mo., 1966); United States v. Certain Interests in Property in Cumberland County, 185 F. Supp. 555 (D.C. N.C., 1960); Southern Indiana Gas & Elec. Co. v. Gerhardt, 241 Ind. 389, 172 N.E.2d 204 (1961); Likins-Foster Monterey Corp. v. United States, 308 F.2d 595 (C.C.A. 9, 1962).

40/ Board of Park Comm'rs of City of Wichita v. Fitch, 184 Kan. 508, 337 P.2d 1034 (1950); State of Missouri ex rel. State Highway Comm'n v. Volz Concrete Material Co., 330 S.W.2d 870 (1960); Ark. State Highway Comm'n v. Fowler, 240 Ark. 595, 401 S.W.2d 1 (1966); 98 C.J.S. *Witnesses* §375.

41/ Kane v. City of Chicago, 392 Ill. 172, 64 N.E.2d 506 (1945); Jones v. Bailey, 246 N.C. 599, 99 S.E.2d 768 (1957) (not a condemnation case).

42/ Boring v. Metropolitan Edison Co., 435 Pa. 513, 257 A.2d 565 (1969).

43/ Baker v. Commonwealth of Penn. Dep't of Highways, 401 Pa. 512, 165 A.2d 243 (1960).

44/ State v. Wilson, 4 Ariz. App. 420, 420 P.2d 992 (1966).

45/ State v. Wilson, 4 Ariz. App. 420, 420 P.2d 992 (1966).

46/ Bd. of County Comm'rs v. Barron, 487 P.2d 579 (Colo. App., 1971).