National Cooperative Highway Research Program

RESEARCH RESULTS DIGEST

DIGEST 47 - JUNE 1973

These Digests are issued in the interest of providing an early awareness of the research results emanating from projects in the NCHRP. By making these results known as they are developed and prior to publication of the project report in the regular NCHRP series, it is hoped that the potential users of the research findings will be encouraged toward their early implementation in operating practices. Persons wanting to pursue the project subject matter in greater depth may obtain, on a loan basis, an uncorrected draft copy of the agency's report by request to the NCHRP Program Director, Highway Research Board, 2101 Constitution Ave., N.W., Washington, D.C. 20418

Trial Strategy and Techniques Using the Comparable Sales Approach to Valuation

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 L. I. Lindas 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 right-of-way acquisition and control, as well as highway law in general. The duty of counsel for the condemnor is to protect the taxpayer from having to pay more than is just for a taking. This report deals specifically with the comparable sales approach to valuation. It 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.*

Introductory Matters: Psychology of A Trial

Before dealing with the specifics of the market data, or comparable sales approach to value, it is important that the trial attorney have a basic understanding of what might be termed the psychology of the condemnation trial.

Whereas in most instances a good set of provable facts should assure a favorable verdict, one should constantly keep in mind that human factors frequently exert the greatest influence on the outcome of a legal contest.

Human beings decide lawsuits, be they the witnesses, lawyers, judge, or jury. People themselves are the major force to be dealt with, either as the problem or the answer to the problem.

Because of this, it becomes exceedingly important to recognize that a judge or juror's personality, beliefs, and prejudices, as well as his physical and social characteristics, can color his thinking when called upon to reach a solution to any question given him for consideration.

Additionally, to a greater or lesser extent, there are many other factors that can affect the thinking of those who have been selected to solve a problem. Such mundane circumstances as the season of the year, the thinking of the times, the lateness of the evening, the length of the trial, or existing weather conditions can enter into the deliberations, or lack thereof, of a juror who is anxious to be at home or at work.

In the writer's own experience he has had to compete with a judge who was anxious to attend the opening of a baseball game in a nearby community, and who was pushing toward the conclusion of the trial as only a judge can. Likewise, he has observed farmers, selected as jurors, squirming in their chairs awaiting the trial's end, so they could get to the task of voting on a verdict, and then to their fall harvest. In either case, one knew deliberations would be short, and perhaps unfavorable if his activities were unduly delaying the trial's end.

Other considerations to be kept in mind, that can have a forceful influence upon the decision of a court or jury, can be traced to the value witness and his demeanor when on the witness stand, as well as trial counsel's conduct during the trial.

One's deportment, voice, dress, attidude and mannerisms have been, and will continue to be, an impetus affecting the listener and the consideration he will give to what he has seen and heard. It is of such importance that the winning or losing of a legal contest can often be attributable to the witness or lwayer, who, on the one hand, has captivated and charmed those listening, or on the other hand, has alienated and lost them.

More than twenty years of trying condemnation cases, or reviewing the outcome thereof, has taught the writer that if the average jury really comprehends the problem that has been placed before them for solution, they will arrive at the right answer more often than not. You may not like the answer at the time, but sober reflection generally convinces that it was the correct one.

Selection of the Jury

In the selection of a jury, a lawyer's voir dire examination must not be neglected. This is one's first opportunity to become acquainted with those who will have the chore of deciding the issues that will later be presented to them for solution.

Seldom will one find two people alike, and seldom will one find two juries similar. There are as many personalities in this world as there are people. What in one instance will satisfy and convince one will not impress or influence the other. One writer on human relations says every person can be catalogued into one of four mental groups:

1 - Those whose minds are closed to what you have to say.

2 - Those who have an open mind.

3 - Those who have confidence in you.

4 - Those who believe in you.

Because it is seldom that those who occupy a jury box know you, or you them, your voir dire examination is directed to finding those who really have an open mind. This is not a simple task, as no one will ever admit publicly that he is prejudiced or biased. In provincial areas, you can almost sense a juror's sentiment in favor of his neighbor. In large urban areas, which are more cosmopolitan, this may not be so noticeable.

If it appears during the course of the trial that the mind of the jury is closed to the case you are presenting, you are in a difficult situation. You can only hope that the jurors' innate sense of fairness will keep the verdict from being completely catastrophic.

If you feel you have a jury whose collective mind is open, you still have the important task of presenting and supporting your case with satisfactory evidence.

If, during the course of the trial, the jury has warmed up to you the point where you sense their confidence in what you are endeavoring to accomplish, your chance of swaying them to your theory of the case is considerably enhanced. If, however, you find that they believe in you, you will be fortunate indeed.

In the individual case, the voir dire examination consists of the further efforts of counsel on one side or the other to further eliminate from the panel anyone who has the faintest idea or knowledge of appraising, real estate values, or related matters. Both sides are wary of the possibility of the juror making his own appraisal, which might or might not be in favor of the condemning agency or the landowner.

Usually it is found that the occupants of the jury box are completely unacquainted with the subject with which they have to deal. It is therefore vitally important that the picture painted for them by counsel be understandable and helpful, and this in turn, requires that all testimony be clear and concise.

Jury views are generally had of the property involved in a condemnation action, either before or after the opening statements of counsel. For the most part, juries do not spend more than 30 minutes to an hour doing this. Trial counsel is cautioned that he should not wrongfully assume that from their observation their perception will be the same. Further, he should not assume that they will remember everything they observed. Even trained observers would be hard pressed to retain an image of a taking, and its affect on the remaining property if a partial taking, in the short period of time the average jury spends on a view.

Now back to the courtroom, where the jury will hear value testimony that it is known will be conflicting to say the least. This testimony will be from appraisers on both sides, all of whom will probably have a good background and reputation in the field of real estate appraising. Add to this expert testimony counsel's argument. It is expected that the advocate's summation will normally tend to muddy the water somewhat, and it is a wonder that a jury is able to do as well as it does in most cases.

If it is assumed that the average condemnation trial takes two days to present, a jury is expected, in this short space of time, with no special training or background, to absorb and comprehand the testimony placed before them. They are expected to understand and resolve the differences of opinions as to value during a contest that has lasted 10 to 15 actual trial hours. They are to grasp and understand the Court's instructions and, better still, understandably retain 30 to 45 minutes of these detailed and involved group rules that are given them to aid in making a determination of the problem before them.

The least that trial counsel can do is to develop and present the technical and opinion testimony in as simple and understandable a manner as possible. The advocate must do what he can to clear away the fog of conflicting facts and testimony if he is to prevail. He must further present his case so as to erase from the mind of the jury, and particularly the judge, the inclination to believe that his expert witnesses are biased in favor of his client.

The Valuation Witness

Counsel can help in accomplishing this if he impresses on his witness the necessity of presenting his opinion in language that is sincere, easy to follow, sensible to the average individual, and unmistakeable in its import. In other words, make it simple.

There is indeed beauty in simplicity. The simple explanation is easily grasped. The unadorned recital of facts and opinion will make sense to the untrained. Therefore, every case of this type must be reduced to the lowest common denominator so that the truth may be found.

Many judges suspect that the expert value witness is a somewhat biased individual. As one judge put it, the trouble with most expert testimony is that it is bought and paid for.

Witness the following Court pronouncement in a recent Oregon case:(1)

> It is recognized that the appraisal of property involves a considerable amount of guesswork. And at the litigation stage the uncertainties are compounded because the appraisals frequently reflect the bias of the witness.

And again, the following reference:

> . . . Since the witnesses derive their fees from the one or other party to the controversy, the trial often amounts to a mere battle of lies. To some extent the exaggerations and prevarications of the witnesses are discounted by the tribunal as a result of the cross examination. But few juries and judges are equipped to form independent judgment on matters of such technical nature, and the award is often a meaningless compromise between

> the values testified to on both sides. There is a crying need in the United States for the use of skilled commissions and specially trained judges in the trial of important valuation cases.

Ponder this comment from another case:[2]

> More latitude is permitted in the cross examination of expert witnesses than in the case with ordinary witnesses, because expert testimony is viewed with some suspicion. The natural bias which the expert may have in favor of the party who employed and is paying him is the chief cause for the discredit that has been cast upon expert testimony as a whole.

Such comments are not isolated pronouncements by the courts and it is probably the reason one Federal jurist found it pertinent to observe:[3]

> There are cases where common sense is more reliable than any amount of expert witnesses, and this is one of those cases.

Hugo Munsterberg, the noted German psychologist,[4] has written that it is characteristic of the human race to be intensely interested in the success of some one party to a contest. There is something in human makeup that invariably leads us to take sides when we get into court. He feels this causes a witness to become competitive, rather than disinterested, unemotional and factual. The witness wants his side to win.

Munsterberg maintains that this feeling of competitiveness in the witness is brought about because of the confidence that has been placed in him by those who have employed him, and that he feels a sense of power in being able to direct the verdict in one way or another.

Munsterberg goes on to state that this desire to win seldom fails to color the testimony of the witness and to create fallacies and references dictated by the witness's feelings, rather than by his intellect or his dispassionate powers of observation. The witness simply wants to be loyal to those who have employed him.

If we be but a little honest within ourselves, we know that this condition does exist, and in varying degrees makes itself known to those listening by the manner in which the witness conducts himself on the stand. If the attorney cross-examining the value witness can make this even partially obvious to the jury, the effectiveness of the witness will have been diminished to the extent that his obvious desire to aid his employer will have a perverse effect upon those listening.

Trial Preparation

One additional point should be made before going into the specifics of comparative sales. No amount of strategy or tactics can take the place of trial preparation. The normal condemnation trial usually revolves around a determination of what constitutes just compensation. Seldom does one find himself faced with the question of necessity, public use, or other jurisdictional matters. If they are raised, they are legal in nature and are determined by the Court before the actual condemnation trial gets off the ground.

Because value seems to be the real question that one must meet in cases of this type, counsel must have a complete understanding of the appraisal process. In fact, his knowledge in this field should almost match that of the value witness he is examining on either direct or cross examination.

Once it is known that a condemnation case is going to reach the trial stage, counsel becomes an important member of a team. Generally this team is composed of the attorney, engineer, appraisers, and perhaps others such as a geologist, contractor, photographer, model maker, or the like.

From this point on counsel does not act alone. Because the presentation of the case will be a team effort, there must be close coordination between the team members and a complete understanding of the role each is to play. The testimony to be given by the witness members of the team is of necessity linked with the testimony to be given by the others. This in turn necessitates pretrial conferences, joint visits to the property being condemned, and a view of the comparative sales properties being used by the value witnesses, as well as those properties believed to be relied upon by your opponent's value witnesses. At the risk of being repetitive, it is urged that counsel never forget that there is no substitute for trial preparation. It always pays dividends.

Fair Market Value

Although other criteria are recognized, value is generally the recognized measure of just compensation when land is taken by exercise of the law of eminent domain.(5) Stated differently, where there is a total taking of land for a public use, the just compensation to be paid therefor is measured by the fair cash market value of the land as enhanced by the value of the improvements thereon that are considered a part of the realty. When only part of a tract of land is taken, damages to that portion not taken, if any, are recoverable by the owner, in addition to the fair cash market value of the part appropriated.(6)

Market value, in turn, is variously defined as the amount of money that land would bring in a free and open market if it were offered for sale by one who desired but was not obliged to sell, and was bought by one willing but not obliged to buy. It is the actual value of the land, with all its adaptations to general and special uses, that is to be considered. Nothing is to be allowed for prospective or speculative value, or possible value based on future expenditure and improvements.(7)

The fair cash market value is not the price the property would bring if sold at forced sale under the auctioneer's hammer, nor is it regulated by the use to which the owner may place it. Instead, it is the value obtainable, in cash, on a free and open market in the usual and ordinary course of business.

In determining the fair cash market value of the land being condemned there should be taken into account all considerations that might fairly be brought forward and reasonably be given substantial weight in negotiations between the owner and a prospective purchaser.(8)

The Comparable Sales Approach to Value

With the foregoing in mind, one may now take a look at the comparative, or market value, approach to value. Its basic principle is that no prudent buyer of a property will pay more for that property than the amount for which he can purchase an equally desirable substitute property.

Counsel will soon discover that this precept is more readily understood and accepted by the untrained juror than some of the more sophisticated approaches to value.

The approach is not foolproof, however. Its weakness can be found in the fact that two properties are seldom, if ever, exactly alike. Although one may find degrees of comparability between similar properties, it is rarely, if ever, that one finds full comparability or exactness.

The writer has found it to be the usual tactic of most condemnation trial attorneys to ask his value witness if he considered the sales of "comparable properties" in arriving at his opinion of value of the property under consideration. This always invites a vigorous cross examination of the witness, in which opposing counsel proceeds to point out the many areas of non-comparability that are always present between two properties.

It is suggested that the better question is to ask your witness if he considered sales of properties having similarity in various respects that aided him in arriving at his independent opinion of value, and in so doing, have him point out the areas that are alike and the differences. For some reason the word "similar" seems softer and more acceptable than the word "comparable". Experience has convinced the writer that juries will find properties similar, where they would not find them comparable.

Evidence of the voluntary sales of similar property in the vicinity of the property being taken is generally admissible as independent evidence of the value of this property.(9) If there is a reasonable basis for comparison between the property sold and that being condemned, evidence of the other sale is not incompetent.(10)

Dissimilarities between the properties affect the weight and value of the expert's opinion rather than its competency. The test to be applied is whether there is a reasonable comparability between the properties. The term "comparable" or "similar" does not mean "identical".(11)

It should be obvious that parcels of real estate are seldom, if ever, absolutely alike in all respects. As one Court(12) has stated:

> One basic and obvious difference is that they can have neither exactly the same location, nor exactly the same juxtaposition to other properties. Whether evidence of the value of other property should be admitted depends upon whether they are sufficiently similar in character, location, and other factors which

would influence value, that they meet the test of reasonable comparability so they can reasonably be regarded as having probative value as to the worth of the property in question.

and again

A further important observation to be made relating to the evidence of such 'comparables' is that whatever differences may exist with respect to the properties, and the effect they may have upon value, is something which can be explained to and considered by the jury. Undoubtedly the more alike the properties are the more persuasive the evidence concerning the value of the comparable property would be; and conversely, the degree of difference would proportionately diminish its persuasiveness. It would therefore seem that when there is a substantial basis in the evidence for the trial court to believe that the test of "reasonable comparability" is met and has admitted the evidence, the extent of such differences should be considered as going more to affect the weight of the evidence than its competency.

In looking for areas of similarity in property, one must consider many elements that will have a bearing on a Court's discretion in admitting or not admitting evidence of the sale.

Sales to A Condemning Agency: Admissibility

An increasing number of states are holding that evidence of sales made to a condemning agency should not be automatically excluded as a matter of law.(13) The weight of authority, however, is contrary to such holdings.(14) There are several reasons advanced in support of the rule that such sales should be excluded. One reason advanced is that such sales are almost always in the nature of a compromise.(15)

There is much truth to the foregoing reason, because a condemnor may pay more to avoid the expense and uncertainty of a condemnation proceeding, and the seller may accept less than he feels represents fair market value for the same reason.

Other reasons advanced in support of the exclusionary rule point to the elements of compulsion, coercion, or compromise that are inherent in the sales of property to a codemnor, making evidence of the sales unreliable.(16)

Nevertheless, it appears there is a growing tendency to allow the trial judge, in a given instance, to determine if the sale to the condemning agency meets the substantive law test of market value; that is, a buyer and seller both fully informed, willing to deal, and not under compulsion.

One of the earlier cases in which this matter was under consideration occurred in New Jersey.(17) The logical and persuasive comments of the Court read as follows:

Almost all sales, however, are necessarily influenced on one side or the other by considerations outside of the fair market value of the property. Either the seller is influenced by the circumstances of his affairs, which make it desirable for him to sell even at some sacrifice, or else he thinks he is getting more for his property than its real worth; and, on the other hand, the purchaser has some special need or use for the property which makes it more valuable to him than to others not having such need, or else he thinks he is buying at less than the property is really worth. If the sale, as here, takes place between parties, one of whom has the power to condemn, it may likewise be that the seller or the buyer, and possibly both, are influenced by other considerations as well as by what they think is the fair market value of the property. The seller may think that if he does not sell amicably he will be put to the expense of being properly represented at the condemnation proceedings; but, on the other hand, he doubtless weighs against this the fact that a jury is very apt to give a liberal market value for properties taken under condemnation for the very reason that the owner is being compelled to sell against his will.

The purchaser, on the other hand, knowing that what the law requires him to pay is at least fair value, and knowing that a jury is inclined to construe this as meaning a value particularly "fair" to the man who sells against his will, may also be somewhat influenced. But, in the absence of extraordinary circumstances, we are unable to see, as a general rule, why private sales to parties having the right to condemn do not come quite as near representing in their results true market value as do such sales made between parties, neither of whom have this power.

> It is easy enough to imagine special circumstances, falling in each class where the result in the price obtained is, because of such special circumstances, so nearly abnormal as to destroy the similarity which must exist in order that the evidence shall be admissible. In other cases where the special circumstances are not of sufficient importance to produce this result, they may nevertheless affect the weight of the evidence, and be used for that purpose before a jury. This is so whether the purchaser is or is not a party having the power to condemn.

Elements of Comparability

Such matters as the distance from the land in controversy, its use, if improved or unimproved, if subdivided, its terrain, its size, the date of sale, if the sale is to a private party or a condemning agency, if the sale is forced or voluntary, and the terms thereof, should all be considered,(18) particularly in cross examining the opponent's value witness, as well as in preparing one's own witness to give testimony. The inexperienced lawyer would do well in a trial to have before him a check list of the foregoing items to aid him in exploring the differences in the cross examination of the other party's value witness.

With respect to all of the foregoing one still finds wide discretion being given to the trial judge to determine, in a given instance, whether the so-called comparable or similar sale would be helpful to the judge or jury and therefore should be permitted in evidence. In all instances it is found that the proper test is the similarity in character and locality of the land, together with the fact that the sale is not so far removed in point of time from the appropriation as to make a comparison inaccurate or impossible.(19) Additionally, the sale must not have been compulsory and should have been made in a free and open market, be gunuine, with the sale price actually paid or substantially secured.(20)

Although much latitude is given a trial judge respecting the admission of sales, as a general rule most judges frown on attempts to compare unimproved property with improved property,(21) subdivided lots with unsubdivided land or acreage,(22) or substantially smaller properties with larger acreages being condemned.(23) Respecting size alone, however, the Court in a recent California case(24) held as follows:

> Plaintiff next contends that the Court erred in receiving in evidence, over plaintiff's objections in most instances, testimony in respect to numerous small sales of one acre or less as comparable sales. In substance, plaintiff's objections were to the effect that the properties sold were not comparable in size to defendant's properties here involved, having in mind that the latter embraced 260 acres. Although the subject properties of the comparable sales were not subdivided, plaintiff's position is that some of them were so small that as a result plaintiff was forced to pay subdivision prices for raw land.

The Court, after pointing out that it seemed to be the plaintiff's position that if properties are not comparable in size, the sales of the same are not, as a matter of law, sufficiently similar so that the price realized for the other land may fairly be considered as shedding light on the value of the land in question, went on to say:

> An identical contention was rejected by the Court(25) . . . . where the property in other sales, all of recent date, ranged in size from one per cent to six and one half per cent of the size of the property condemned and where there was no sale of property the size of that condemned. The Court said: "The judge at the time when the question came up for discussion in the trial said in effect that size alone was not a determining factor. The smaller sales could have shown the adaptability of the defendant's property for subdivision, a trend of market value, a trend of the development in the area and various other things which would be of advantage to a prospective buyer."

Particular Trial Tactics

Inasmuch as a case is likely to rise or fall on the sales used by the witnesses as the foundation of their opinion of value, it is suggested that the trial attorney make certain that his expert value witness has come to court supplied with large colored photographs of every sale to be used by him as being comparable in some degree to the property being sought.

Of even more importance, the writer has found it to be of inestimable value if such a wit-

ness also comes supplied with a Polaroid Land camera, with which he can take photos of the sales being used by the opponent's value witness. Unless distance prevents it, such pictures can often be procured before the trial's end and be advantageously used to counter testimony previously given.

Additionally, one's appraisers are usually aware of the properties that will probably be relied upon by the value witness for the opposing side. As previously suggested, it would not be amiss for your witness to provide you with photos of such properties in advance of trial, together with the pertinent sales data. With this information, and in company with your appraiser, visit and examine the properties first hand. Your appraiser can assist in preparing your cross examination by pointing out the areas of non-comparability should value witnesses for your opponent depend on such sales as a basis of their value opinion. Do not, of course, neglect to view and examine the properties being relied upon as the basis of the value opinion of your own witnesses.

Another trial tactic that has been found effective, both on direct and cross examination of the value witnesses, is the use of an aerial photograph, particularly when comparing properties located in highly developed areas.

Several things may be accomplished by the use of the aerial in preparation for and during the course of the trial. In trial preparation, the attorney and value witnesses should study the unmarked aerial in detail so that he and his witness can, without hesitation, approach the exhibit and quickly identify the property being acquired, as well as the properties being relied upon as a basis for the value opinion.

It is particularly effective if, on cross examination of the opponent's value witnesses, he is asked to use the aerial exhibit to identify the properties, relied upon by him in support of his value opinion, and he has difficulty in locating them. In some cases an opposing appraiser has been unable to find the properties that he relied upon. The impression left with a jury is that he did not make a thorough examination of the properties used in preparing his opinion of value.

Most states no doubt have some counterpart of a Board of Real Estate Tax Equalization. Landowners, to a greater or lesser extent, appear before such boards to plead for a tax reduction. In so doing most states require them to file a petition in which they must assert, often under oath, what they believe to be the fair market value of their property.

It has been the writer's experience that, more often than just occasionally, it will be discovered that the landowner has complained that his tax assessment is too high and that the market value of his property is substantially less than the amount he is now alleging and desires to obtain from the condemning agency.

That such evidence is admissible was affirmed by the Oregon Supreme Court.[26] The Court, after noting that the defendant had made a request of the County Assesor to reappraise his property, said:

> The request for reappraisal was made on the ground that the property was valued at more than its true cash value. This document, together with evidence of the appraised value of the property at the time the request for reappraisal was made, is admissible as an admission of a party-litigant if it is inconsistent with the party's claim in the suit.

Whereas the foregoing has a marked effect on a jury when elicited from a landowner on cross examination,[27] it also can be used to good effect when cross examining the value witness, particularly when such examination discloses that he never checked to ascertain if his client did or did not make such a request for an adjustment. Although this may appear to be a small point to make, nevertheless, if one can show the witness' investigation to be lacking in enough small areas, one can make much of the fact in an argument before the Court or jury.

Another tactic that has been found to be extremely effective by the writer is to ask an opposing expert witness to go to a blackboard and draw a floor plan of the houses or properties being used by him to support his value opinion. This will indicate whether or not he has ever been in the building involved. If not, you can later argue to a jury that one who has never been in a building or knows what it looks like inside, is simply misleading the jury when he testifies it is comparable to the property being acquired. A word of caution: make sure your own appraiser is not caught in the same trap.

Legal Effect of Evidence of Comparable Sales

The trial attorney's presentation of his case on direct, and his method of so doing, will depend to a great extent on how his Appellate Courts have ruled on the admission of hearsay evidence of the sale prices of similar properties when testified to by the expert valuation witness.

The question of whether the court or jury can consider testimony of comparable sales as probative evidence of the value of the property being acquired, as well as evidence bearing on a witness's qualifications to testify as a value expert, are handled somewhat differently in the various states.

Stated differently, should the evidence of the prices for which other similar properties were sold be received as substantive evidence of the value of the property being condemned or, on the other hand, should it only be received as the foundation of the expert's opinion of value?

There has been a split of authority in the United States on the question of whether the evidence of the sale of comparable property is admissible, even when proved by primary evidence.(28) Those Courts following what is known as the Pennsylvania rule (in the minority) hold that it is not. Those following what is known as the Massachusetts rule hold that it is.(29)

In those jurisdictions where sale price of comparable property is found relevant, some courts admit hearsay evidence by an expert of such prices for the purpose of showing the basis of, and to explain, the expert's opinion of the value of the property in question.(30)

As one Court(31) has stated:

> An integral part of an expert's work is to obtain all possible information, data, detail and material which will aid him in arriving at an opinion. Much of the source material will be in and of itself inadmissible evidence but this fact does not preclude him from using it in arriving at an opinion. All of the factors he has gained are weighed and given the sanction of his experience in his expressing an opinion. It is proper for the expert when called as a witness to detail the facts upon which his conclusion is based and this is true even though his opinion is based entirely on knowledge gained from inadmissible sources.

In those jurisdictions accepting hearsay evidence of comparable sales to explain the expert's value conclusions, some courts permit such testimony only if elicited on cross-examination, while others permit its use on either direct or cross-examination.(32)

One Court(33) has held that the testimony of an expert as to comparable sales could be received as substantive evidence of the value of the property being condemned. It stated its reasons for so doing as follows:

> All expert opinion is based on "hearsay" to a great extent and much of what is presented by such witnesses is "secondary" evidence. We feel we can achieve speedy litigation and still preserve the truth by the rule adopted here. It must be shown that the witness is an expert and that the sales are comparable and recent. With these safeguards plus the fact that the witness has his professional reputation riding on his testimony we feel that the repugnancy of this line of testimony is reduced, if not eliminated altogether. The development of a value pattern by one experienced in the business and knowledgable as to the area involved will best bring uniformity to the market value determination in the most efficient manner.

An interesting sidelight is that the Oregon Supreme Court in a recent pronouncement(34) approved the use of sales of comparable properties as substantive evidence of value on March 17, 1965, but reversed their opinion on this point on October 13, 1965, with a dissenting opinion on the rehearing being submitted by the judge who wrote the original opinion, stating, in part, as follows:

> The formal and mechanical employment of the hearsay rule to exclude convenient, relevant and trustworthy evidence is subject to well-deserved criticism. . . . Now this court further sanctifies formality by holding that evidence which it is perfectly proper for the jury to hear in deciding what weight to give the expert's opinion cannot be considered by the jury as evidence of value. Few juries will ever understand the difference, and in my opinion there is no practical reason why they should.

and again:

> In the trial of routine condemnation cases neither party is seriously concerned about comparable sales as hearsay; the adversaries direct their attack against each other's experts as to the comparability of their respective sales. In the case at bar, opposing experts used some of the same sales, but drew different inferences from them. The trial judge adequately safeguards this kind of evidence by screening the experts. When there is a bona-fide question about the trustworthiness of the evidence, such evidence is easy enough to impeach.(35)

Compare the foregoing with a holding of the Supreme Court of Iowa(36) wherein approval is given to the use of another kind of hearsay evidence (viz, the use of revenue stamps on deeds of comparable properties) as substantive evidence of the value of the property being condemned. In justification of the holding, the Court stated:

> . . . The revenue stamps are as reliably indicative of the consideration as a recited amount would be. The stamps were attached to the deed pursuant to federal statute, the violation of which is a crime. With this reason for affixing the stamps we think the revenue stamps attached to the deed may be said to indicate with reasonable certainty the consideration paid. . . .(37)

Despite isolated rulings to the contrary, it appears that the majority of those courts in which the question has been raised have refused to countenance the use of such hearsay evidence as substantive evidence of value.(38)

Selection of Witnesses

Trial counsel can make good use of the competent and authorative witnesses on real estate values. When employing an appraiser get the best, if possible. It never pays to compromise with quality. The appraiser who qualifies well, whose courtroom manner is sincere, who has the ability to clothe himself with an aura of fairness, and whose forensic qualifications leave no doubt as to his ability to sell his opinion of value to a judge or jury, can make trial preparation a pleasure rather than the burden it becomes on occasion.

One can also make good use of the local real estate broker. Although the latter may not be able to explain the niceties of the appraisal process, his opinion of value will be admitted if one can show that he has bought and sold property in the area, knows the value of property, and has an opinion of the value of the property being condemned.

One of the most effective value witnesses used by the writer was of the latter type. He lived in the county seat of a small rural county. He had been in the real estate business for fifty years. He couldn't write an appraisal, and there was doubt in the minds of many if he even understood the appraisal process. But the knew property values. He had bought and sold property for fifty years, and was always ready and willing to testify as to property values in his county.

A prominent attorney, several years ago, endeavored to embarrass this witness by making him admit on cross examination that he had never written, nor could write, a formal appraisal. He then inquired as to why the witness was so positive that his opinion of value was sound.

The appraiser's quick reply was that he had bought and sold property in the county for 50 years, and if he didn't know the value of property he would have starved to death a long time ago.

Techniques used in presenting evidence involving the comparative or market data approach to value must vary, depending on the locale of the condemnation trial. In metropolitan areas the professional witness, as distinguished from the homey local real estate agent, may be more effective.

In provincial areas, the "out-of-towner", or the professional from the "big city", is not generally received with favor by the local jurors. The local appraisers, if not already hired by the local landowner, can be of more assistance.

Role of the Judge

Another factor facing the trial attorney which can play an important part in the outcome of any condemnation trial is the attitude of the judge. His comments, his manner of ruling on objections, the inflection of his voice when instructing the jury, and his over-all control of the trial can almost tell the trial attorney in advance if the verdict will be favorable to one side or the

other. Alienation of the judge will make all your techniques and trial tactics of no avail. As said in a recent Federal Court of Appeals decision:(39)

> Condemnation at best is an unhappy event aggravated by the inexactitude of expert opinion evidence forced into the subjective, and often unrealistic, belief of the parties as to value and damage. Expert opinion often varies greatly and subjective opinion nearly always.

Summary

All of the foregoing are thoughts, comments, and ideas of the writer, gained through the years, that have worked for him most of the time. But the new trial attorney should not be afraid to follow his hunches and experiment with new tactics that come to mind. Much is learned by exercising one's imagination and logic, and in the end one will find that he is a better lawyer for so doing.

1/State v. Nunes, 233 Ore. 547, 379 P.2d 579.
2/State Highway Comm'n v. Superbilt Mfg. Co., 204 Ore. 393,406, 428 P.2d 707 (1955).
3/Achilles v. New England Tree Expert Co., 369 F.2d 72 (USCC 2d Cir. Vt. 1966).
4/On the witness stand, Hugo Munsterberg.
5/Board of Higher Education v. First Methodist Church, 6 Ore. App. 492, 488 P.2d 835 (1971).
6/State Highway Comm'n v. Superbilt Mfg. Co., *supra*.
7/State Highway Comm'n v. Holt, 209 Ore. 697,699, 308 P.2d 181; City of Phoenix v. Consolidated Water Co., 101 Ariz. 43, 415 P.2d 866; State Highway Comm'n v. Tubbs, 147 Mont. 296, 411 P.2d 739; City of Albuquerque v. Chapman, 76 N.M. 162, 413 P.2d 204; State v. Rowley, 74 Wash.2d 328, 444 P.2d 695; 2 Lewis, Eminent Domain, § 707 (3d ed.)
8/State Highway Comm'n v. Superbilt Mfg. Co., *supra*.
9/City of Portland v. Therrow, 230 Ore. 275, 369 P.2d 762 (Oregon 1962). Note also the comment of the Court, wherein it gratuitously adds:

> It would also then, for the purpose of testing the value or weight to be given to the opinion of an expert witness on value of real property, be proper to inquire as to his knowledge of voluntary sales of comparable property in the vicinity of the property about which he has expressed an opinion.

10/State Engr. Comm'n v. Peek, 1 Utah 2d 263, 265 P.2d 630.
11/Evanston v. Piotrowicz, 20 Ill. 2d 512, 170 N.E. 2d 569 (1960)

> This court, moreover, has recognized that similar does not mean identical, but means having a resemblance, and the property may be similar for purposes of fruitful comparison, though each possesses various points of difference. Whenever there is a reasonable basis for comparison between the property sold and that being condemned, evidence of the sale is not incompetent, and the dissimilarities between the properties, which are declared to the jury, affect the weight and value of the testimony, rather than its competency.

State Road Comm'n v. Wood, 22 Utah 2d 317, 452 P.2d 872 (1969).
12/State Road Comm'n v. Wood, *supra*.
Note: in ruling upon the admissibility of evidence of similar or comparable sales, we find considerable discretion remains with the trial judge. As stated by the Courts in the Wood and Piotrowicz cases, *supra*, we find like comment. The following is from the Wood case:

> Because of the responsibility of the judge as the authority in charge of the trial, he is allowed considerable latitude in his judgment upon the matter; and his ruling should not be disturbed unless it appears he was clearly in error, and that this redounded to the prejudice of the complaining party.

13/Charleston & W. Carolina Ry. v. Spartenburg Bonded Warehouse, 151 S.C. 542, 149 S.E. 236; County of Los Angeles v. Faus, 48 Cal. 2d 672, 312 P.2d 680; Eames v. S. New Hampshire Hydro Electric Corp., 85 N.H. 379, 159A. 128; Hannan v. United States, 76 U.S. App. D.C. 118, 131 F.2d 441; State of Arizona v. McDonald, 88 Ariz. 1, 352 P.2d 343.
14/118 A.L.R. 893, 174 A.L.R. 395.
15/Honolulu Dev. Agency v. Pun Gun, Haw., 426 P.2d 324.
16/Honolulu Dev. Agency v. Pun Gun, *supra*;
Langdon v. City of New York, 133 N.Y. 628, 31 N.E. 98.
17/Curley v. Mayor and Aldermen of Jersey City, 83 N.J.L. 760, 85 A. 197.
18/85 A.L.R. 2d 130, et seq.; McCormick on Evidence (1954), § 166, at 348:

> In case of ordinary personal property, where market value is sought, of course the most obvious resort is to evidence of what other similar pro-

> perty, whether wheat, shoes, horses, or what not, currently sold for on the market at that place . . . .
>
> Any tract of land is considered unique, and consequently it is in cases of land valuation, and especially in condemnation cases, that the question of admissibility of evidence of prices paid on other sales is most frequently discussed. A few states have been unwilling to admit such evidence save in exceptional circumstances. This seems to put too heavy a strain on opinion evidence and the general knowledge of the jurors, and the view of the majority of courts which admits such evidence, within safeguarding limits, seems preferable. These safeguards are the following: The sales of the other tracts must have been sufficiently near in time, and the other land must be located sufficiently near the land to be valued, and must be sufficiently alike in respect to character, situation, usability, and improvements, to make it clear that the two tracts are comparable in value and that the price realized for the other land may fairly be considered as shedding light on the value of the land in question. Manifestly, the trial judge in applying so vague a standard must be granted wide discretion.

19/Knollman v. United States, 214 F.2d 106 (6th Cir. 1954). In this case the land in question involved 450 acres situated in Crosby Township, Hamilton County, 8 miles northwest of the corporation line of Cincinnati. The comparable sales being offered into evidence were located within the City of Cincinnati. The Court in dealing with the question of the admissibility of such comparable sales, held:

> The greater Cincinnati area is the economic unit of Hamilton County within which operates the law of supply and demand so important to the question of market value. The law does not cease operating at the boundary of a township.

The Court then found that the refusal to receive such evidence was error.

See also Mississippi State Highway Commn. v. Hall, 174 So. 2d 488 (1965), where the factual situation made it evident the receipt of sales from a different locality would also be error.

20/People v. Wasserman, 240 Cal. App. 2d 716, 50 Cal. Rptr. 95 (1966).

21/Texas v. Coon, 366 S.W. 2d 920 (1960).

22/Forest Reserve Dist. v. Chilvers, 344 Ill. 573, 176 N.E. 720 (1931); Arkansas State Highway Commn. v. Welter, 444 S.W. 2d 65 (1969). In the Welter case there was a taking of 12 lots, being part of a recorded plat of a 40-acre plat. While the plat had been recorded for some 10 years, no streets or utilities existed in the subdivision. The landowner's witnesses used as comparable, sales made in a nearby subdivision that had all utilities in place, with paved streets, curbs and gutters. The Supreme Court ruled the lower Court should have struck the value testimony of the owner's appraisers because of a total absence of any reasonable or factual basis in the record for the comparison of lots in the paper subdivision with the sale prices of fully developed lots.

23/Trustees of Schools of Township 36 v. LaSalle Nat'l Bank, 173 N.E. 2d 465 (1961); Morgan v. State, 343 S.W. 2d 738 (1961).

24/People v. Silveira, 236 Cal. App. 2d 604.

25/Covina Union High School Dist. of L.A. County v. Jobe, 174 Cal. App. 2d 340 (1959).

26/State Highway Comm'n v. Jones, 237 Ore. 372, 391 P.2d 625 (1964).

27/In those instances where counsel for the landowner fails to call upon his client to give testimony on direct examination, counsel for the condemning agency may call him as an adverse witness. After laying a proper foundation by showing the landowner has always felt his property to be of the value he has alleged in his pleading, counsel for the agency may then proceed to impeach him by producing his written request for a lower property assessment. The writer has personally used this procedure with great success. One should not be less than honest when requesting justice before a Court or jury. When it is found that one is not being fully trustworthy, the resulting verdict will surely reflect this.

28/5 Nichols, Eminent Domain, § 21.3 (rev. 3d ed. 1962).

29/Highway Comm'n v. Fisch-Orr (1965), 241 Ore. 412, 399 P.2d 1011, 406 P.2d 539, 12 A.L.R. 3d 1064.

30/Highway Comm'n v. Fisch-Orr (1965) *supra;* State Highway Comm'n v. Arnold, 218 Ore. 43, 341 P.2d 1089, 343 P.2d 1113 (1959).

31/State Highway Comm'n v. Conrad, 263 N.C. 394, 139 S.E. 2d 553 (1965) quoting with approval from People v. Ganghi Corp., 194 Cal. App. 2d 427, 15 Cal. Rep. 25; State Highway Comm'n v. Arnold, *supra:* 5 Nichols, Eminent Domain, 3d ed., § 21.3(2), at 437:

> Dealing with direct testimony, it has been held that in the determination of fair market value of property taken in a condemnation case, evidence of price for which similar property has been sold in the vicinity may be admissible upon two separate theories and for two distinct purposes. First, such evidence may be admissible as substantive proof of the value of the condemned property, or secondly, it may be admissible, not as direct evidence of the value of the property under consideration, but in support of, and as background for, the

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.

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opinion testified to by an expert as to the value of the property take.

32/Highway Comm'n v. Fisch-Orr, *supra.*

33/State Highway Comm'n v. Greenfield, 145 Mont. 164, 399 P.2d 989; *See also* New Jersey Highway Authority v. Rue, 41 N.J. Super. 385, 125 A.2d 305 (1956), where the admission of sales of comparable property was admitted as substantive evidence of the value of the property condemned is based upon a statute.

34/Highway Comm'n v. Fisch-Orr, *supra.*

35/Note: The writer, who has been involved in the trials of numerous condemnation actions, can agree that most juries will never really make a distinction between sales used as a basis for an expert's opinion and the same sales being used as substantive evidence of value. He can also agree that the main attack is normally against one's adversaries' expert witness as to the comparability of the sales being used. He cannot agree it is really a simple matter to impeach the opinion of an able expert witness as to his opinion of value. The inexactness of the appraisal science is such that the real professional can use the same sales as your own appraiser and arrive at a conclusion, the reasons for which have enough validity to make it most difficult to impeach.

36/Redfield v. Iowa State Highwacy Comm'n, 251 Iowa 332, 99 N.W. 2d 413 (1959).

37/Note: While it may be noted it is a crime to violate the federal statute requiring the placement of revenue stamps upon deeds, one might also query: What law would be violated if a knowledgeable purchaser, believing his property may soon be needed for a public improvement, placed additional stamps upon the document? It would appear the cross-examiner's job is cut out for him in going behind the consideration indicated by the stamps affixed to find the true consideration.

Note also the comment of the Court in United States v. Katz, 213 F.2d 799 (1st Cir.), *cert. denied,* 348 U.S. 857, 75 S.Ct. 82, 99 L. Ed. 675 (1954):

> Nor does information as to prices gleaned from the recitations of considerations in deeds in the Registry, or revenue stamps affixed thereto, give any real help in arriving at value. More often than not the true consideration paid is not stated in a deed, there appearing only a formal statement of consideration. Only the value of the revenue stamps affixed to the deed is determined by the consideration paid exclusive of the value of liens or encumbrances at the time of the sale, ... so that accurate knowledge of the price paid cannot be calculated from revenue stamps without accurate knowledge of the land at the time of the sale which might or might not appear in the records of the Registry.

38/Stewart v. Commonwealth, 337 S.W. 2d 880 (Ky. 1960); People v. Nahabedian, 171 Cal. App. 2d 302, 340 P.2d 1053 (1959); United States v. Katz, *supra;* United States v. 5139.5 Acres of Land, 200 F.2d 659 (4th Cir. 1952); 5 Nichols, Eminent Domain, § 21.3[1], at 431-432 (rev. 3d ed. 1962), wherein the textwriter states:

> The price paid for similar land, when admitted as independent evidence of value, must be proved with as much formality as any other material fact, and witnesses are not permitted to testify in regard to sales unless they were parties thereto, or were the brokers who effected the sale, or in some other manner, knew the price paid of their own knowledge, and not as a common rumor, or from hearsay only.

39/U. S. v. Corbin, 423 F.2d 821 (C.C.A. Kans. 1970).