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Preparation and Presentation of a Condemnation Appeal: The Condemnee's Viewpoint

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This article is devoted to the topic of appellate review of condemnation awards. In some jurisdictions, an affected property owner may appeal a commissioners' award to the appropriate court and thereby obtain a jury trial de novo. Thereafter, the jury, and not the commissioners, is considered the trier of the facts. This article does not cover jury trials, as such, but rather appeals in the traditional sense, that is, appellate review of the determination of the trier of the facts — whether that trier be a judge, jury, or board of commissioners. Since the appellate procedures vary from jurisdiction to jurisdiction, this article proceeds by way of an analysis of an appeal under the Federal Rules of Civil Procedure. The practical aspects and problem areas touched upon should, however, be similar to those arising in condemnation appeals in the state courts. In any event, where an appeal is contemplated, counsel should immediately consult local governing statutes and court rules in order to preserve his rights on appeal.

As in most other controversies, the ultimate burden of determining whether to appeal a determination below rests with counsel. This is especially true in the condemnation field because of the prop-

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2 See infra note 15.
erty owner's lack of knowledge of the law involved and the intricacies of judicial review. In deciding whether the case is worth appealing, the condemnee's counsel must consider the customary considerations relative to every appeal, such as whether the substantive law is favorable, the equities presented by the facts, the number and seriousness of the errors found in the record, and the pattern of the appellate court in prior cases of a similar nature. He must next consider the costs, in time and money, involved. Condemnation records are usually lengthy and appellate printing costs may therefore be excessive. 3

The scope of review in condemnation cases is another critical element to consider. Where the condemnee is appealing, he is faced with the fact of life that appellate courts are more prone to accept rather than reject the end product of the trier of the fact. This tendency is accentuated in condemnation cases for several reasons. First and foremost, the central issue, that of value, is usually a complicated factual issue at root. Again, the appellate court is not disposed to substituting its view for that of the trier of the fact, who after all did see and hear the witnesses (and may have actually viewed the property itself). 4

Nevertheless, there are times when an appeal is unavoidable, as, for example, where the award is grossly inadequate or where substantial errors have been committed below. At other times the claimant will be drawn into an appeal as respondent when the condemnor decides to take the case up for review. Where this is a distinct possibility, it may be well to bide one's time temporarily, to ascertain whether the other side will carry the burden of being the appellant. If the condemnor takes an appeal, the claimant can then either fill the role of respondent or cross-appeal. 5

3 An attorney cites a condemnation record that ran to 14,000 pages and included over 500 exhibits. See S. Searles, Pre-Trial and Procedural Aspects of Condemnation, The PRACTICAL PROBLEMS OF CONDEMNATION 11, 16 (1965). Under modern practice rules, it may be possible to cut these costs substantially by reproducing the record without a formal printing, or by reproducing only pertinent passages of the transcript.

4 "Frequently and usually, the court below inspects and views the property before, during or after the trial and is then able to somewhat check the expert's ideas and opinions against the physical facts. . . . [Accordingly], the appellate courts are reluctant to reverse or remand, even though it might have arrived at a different result, based upon the trial record." H. DOLAN, Federal Condemnation Practice, CONDEMNATION APPRAISAL PRACTICE 99, 117 (Am. Inst. Real Estate Appraisers 1961). See also United States v. Twin City Power Co., 253 F.2d 197 (6th Cir.), cert. denied, 356 U.S. 918 (1958).

5 See Sackman, Condemnation Appeals, 5TH S.W.L.F. INST. ON EMINENT DOMAIN 127, 150 (1969), wherein the author cites the use of this tactic by condemnor's counsel.
Making an Adequate Record

This section concerns preparation of an adequate trial record, against the possibility that an appeal may ultimately be necessary to secure just compensation. In brief, every condemnation case should be tried for both the benefit of the trier of the facts (judge, jury, or commission) and for the appellate court. Quite frequently, the trier of the facts will have expertise in the eminent domain field, or the trial will last long enough for him to become familiar with the facts and the issues. An appellate court, in marked contrast, hears innumerable appeals each month and cannot examine the case at its leisure. Moreover, there are no expert or other witnesses about to clarify ambiguities. Accordingly, it behooves trial counsel to provide a sound and clear record for ultimate review.

By way of illustration, an appraisal expert's qualifications and familiarity with the area should be brought out at the trial. The witnesses' testimony should indicate not only their conclusions but the formula or the chain of reasoning that produced the end result. If multiple approaches to value are used, it should be clear which one was relied upon primarily, and which ones were only used for a double check. The appraisal witness should be thoroughly conversant with every facet of his comparable sales and with defects in the comparables offered by the other side. Generous use should be made of photographs, diagrams, and other forms of demonstrative evidence. As part of the record, these items will provide a substitute for a view by the appellate judges, and will help orient them with respect to the property. When references are made to portions of the property by the witness, the locations involved should be fixed by means of an "X" or other notation on the exhibits, in order to enable the appellate court to follow the testimony in the record. On

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7 See generally P. ROHAN & M. REKIN, CONDEMNATION PROCEDURES & TECHNIQUES, ch. 8 (1968).

8 One experienced practitioner suggests that helpful exhibits from the record be reprinted in the brief and that the attorney consider drafting his own diagrams for inclusion in the brief. In this manner, the judges on appeal can follow the diagrams during the attorney's oral argument. See Sackman, Condemnation Appeals, 8TH S.W.L.F. INST. ON EMINENT DOMAIN 127, 157 (1968).

9 This is standard practice in the trial of negligence cases.
the negative side, the appraisal expert's testimony should demonstrate that he considered and subtracted benefits conferred on the property by taking (if any), and also made allowances for items of loss which are deemed noncompensable.

In some instances there may be no record, or a very inadequate one, if the condemnee's counsel does not take the initiative in seeing that one is made. Thus, for example, where a trial is had before commissioners, a request should be made for a stenographic or other form of record, perhaps with the cost thereof being shared by both sides (if not absorbed by the tribunal itself). Again, where one or more particular aspects of the case (such as whether a change of zone is imminent or the extent of severance damages) are likely to be crucial, it is sound practice to request that the judge, jury, or commissioners make specific findings on each of the points in question.\footnote{10} In a similar vein, memoranda of law and requests to charge directed to these issues should also be prepared.\footnote{11}

The condemnee's appeal will be an empty gesture if his counsel has failed to make and preserve timely objections. In some jurisdictions it is necessary to proceed by way of a formal bill of exceptions.\footnote{12} In most, however, timely objections to incorrect rulings will suffice. Where testimony has been excluded, however, it may be advisable to tender it or to have it taken down for the record so that it will be available to the reviewing court. Even where a great deal of informal proof is admitted, it may be well to note one's objection to hearsay, just to call attention to the question of the weight of the evidence being introduced.

As in the trial of any action, appellate courts require the com-

\footnote{10}{The request for specific findings on key elements or issues in the case would be made in addition to, and not in lieu of, requests to charge. The importance of such requests for specific findings cannot be overestimated. Although the trier of the facts (judge, jury, or commissioners) must make an adequate record and findings to facilitate appellate review, the trier of the fact need not answer every question raised on the trial. Accordingly, in many cases the condemnee has been held to have waived his right to have certain questions answered where he made no advance request for specific findings on those items. See, e.g., United States v. 3,065.94 Acres of Land, More or Less, 187 F. Supp. 728 (S.D. Cal. 1960).}

\footnote{11}{Illustrative requests to charge are set forth in Appendix C-3 of P. Rohan & M. Reskin, supra note 7.}

\footnote{12}{See Bell, Preserving Error for Appeal of the Eminent Domain Case, 1959 S.W.L.F. INST. ON EMINENT DOMAIN 151, 154-55; Johndroe, Procedural Pitfalls in a Condemnation Case, 1959 S.W.L.F. INST. ON EMINENT DOMAIN 101, 119-30. Under the Federal Rules, objections to the report of the commissioners must be served on all affected parties within ten days of receipt of notice of the report. Fed. R. Civ. P. 53(e)(2).}
plaining party to take other available steps to help avert a faulty trial. Thus, both objections and cross-examination should be used to point up an expert's lack of qualifications, any errors in comparable sales, and like defects. Again, it is commonly held that objections to the judge's charge to a jury or commissioners should be made in advance and accompanied by the condemnee's own proper requests to charge. Similarly, objections filed to the commissioners' findings and award should point up specific objections, as opposed to general complaints about the adequacy of the award. These objections should also be exhaustive, since they are usually incapable of being enlarged upon on appeal, on remand, or on any other subsequent phase of the litigation.

Local Rules Relating to Condemnation Appeals

The prosecution of a condemnation appeal brings into play the local procedural rules governing appeals, as, for example, whether a motion for new trial must be made before an appeal can be taken. A much more serious cause of concern, however, are local statutory and court-made rules which may be peculiar to condemnation appeals and not generally known to the bulk of practicing attorneys. Thus, for example, some jurisdictions require condemnation appeals to be processed within a brief, specified period of time, while others may require the posting of a bond or other security as a concomitant of the appeal. In other jurisdictions, the right to appeal may be lost if the condemnee withdraws the amount the condemnor paid into court after the commissioners' initial award. Accordingly, even the experienced appellate lawyer should make diligent inquiries as to the local rules governing condemnation appeals as a class.

Appealable Orders and Judgments

Under both federal and state practice it is generally accepted that an appeal can only be taken from a final order or judgment.

13 For judicial admonitions to this effect, see United States v. 18.46 Acres of Land, More or Less, 312 F.2d 287 (2d Cir. 1963); District of Columbia v. Lot 813 in Square 568, 232 F. Supp. 714 (D.D.C. 1964), aff'd, 346 F.2d 833 (D.C. Cir. 1965).
15 See, e.g., N.Y.C. Administrative Code §§ B 15-25 and B 15-26, requiring that condemnation appeals involving the city must be prosecuted within six months of the filing of a notice of appeal and that this time limit may only be extended by leave of court. It should also be noted that on the trial level, Section 71A of the Federal Rules of Civil Procedure stipulates that local state rules as to trial of a condemnation case by a jury, commission or both, will control in federal court, if the condemnation takes place under a state's eminent domain power.
This general principle is applicable to condemnation cases as well. Accordingly, a party may not be able to appeal until the question of value has been settled and all other aspects of the case finally determined. The delay may be of critical import to the condemnee, especially in cases in which the condemnee alleges that the taking is unlawful, or in which other aspects of the case may delay the entry of final judgment. In a few instances, lower federal courts have certified the urgency of the condemnee's needs in order to expedite appellate review before a final order or judgment was entered. In situations in which the condemnee alleges an illegal taking, rapid review has sometimes been obtained through use of extraordinary remedies, such as an action for mandamus or injunction proceedings. Another trap for the unwary is found in the condemnee's failure to appeal on time. A careful check of local procedural rules should be made to ascertain just when the case becomes ripe for an appeal. Thus, for example, in a jurisdiction wherein all parcels in a proceeding are tried together, must the first property owner wait until all parcels have been assigned a value before he can appeal, or does the availability of partial decrees advance his time to appeal? Must additional papers be filed or served to start the time to appeal running or does

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16 See, e.g., Eden Memorial Park Ass'n v. United States, 300 F.2d 432 (9th Cir. 1962); United States v. 91.69 Acres of Land, More or Less, 334 F.2d 229 (4th Cir. 1946).

17 In large cities it is not uncommon to have a condemnation backlog which delays trial of a proceeding for up to a year. Another six months or more may be consumed in perfecting an appeal. In United States v. Certain Lands in the Borough of Manhattan, 332 F.2d 697 (2d Cir. 1964), the court of appeals entertained an appeal from a denial of a tenant's motion to restrain the government from taking possession.

18 See, e.g., United States v. 3,085.94 Acres of Land, More or Less, 187 F. Supp. 728 (S.D. Cal. 1960). Where partial final decrees are employed, it has been held that under Rule 54(b) of the Federal Rules, an appeal must be taken from that decree and not from the decree settling the last parcel in the proceeding. See Scholl v. District of Columbia, 331 F.2d 1018 (D.C. Cir. 1964).

19 See infra note 89 and accompanying text. For illustrative pleading in this type of case, see Appendix C of P. Rohan & M. Reskin, supra note 7.


the period commence when the court publishes its finding and awards?22

Absent a recognizable legal error, the scope of appellate review in condemnation cases is extremely narrow, irrespective of whether the case was tried to a judge, jury, or commission. Thus, for example, a federal district court must accept the findings of commissioners appointed by the court, unless the findings are “clearly erroneous.”23 The United States court of appeals, in turn, will merely examine the record to determine whether the district court erred in accepting or rejecting the commission’s findings, again applying the clearly erroneous standard.24 Where the crux of the appeal relates to the quantum of the award (as being excessive or inadequate), the appellate courts will not disturb the finding below unless the amount awarded is so far out of line as to “shock the conscience of the court.”25 Whatever their wording, most state appellate courts apply similar yardsticks in passing upon condemnation appeals.26 Several factors combine to limit the scope of appellate review in condemnation cases. As previously noted, at root the question of value is a highly complex factual issue. Again, the trier of the facts has the benefit of seeing and hearing the witnesses and possibly visiting the site of the condemnation. Lastly, the award under review invariably falls within the “range of testimony,” that is, somewhere between

22 It is not always easy to determine what is a “final order” or judgment, even in federal practice. Thus, for example, a formal order which journalized action of the federal district court as reflected by a memorandum decision overruling condemnor’s objections to commission’s report and confirming it in all respects, including findings as to just compensation, but containing no direction to the clerk of the court to enter judgment (and also lacking sufficient findings upon which clerk could compute money judgment) was held not to constitute a “final judgment,” in United States v. Evans, 365 F.2d 95 (10th Cir. 1966). See also United States v. 3,065.94 Acres of Land, More or Less, 187 F. Supp. 728 (S.D. Cal. 1960). But see supra note 18.

23 See, e.g., Cunningham v. United States, 270 F.2d 545 (4th Cir. 1959); United States v. Chase, 200 F.2d 405 (2d Cir. 1959); United States v. Jones Beach Parkway Authority, 255 F.2d 329 (2d Cir.), aff’d, 358 U.S. 832 (1958); United States v. Twin City Power Co., 253 F.2d 197 (5th Cir.), cert. denied, 356 U. S. 918 (1958); United States v. Waymire, 202 F.2d 550 (10th Cir. 1955).

24 See, e.g., United States v. Benning, 330 F.2d 527 (9th Cir. 1964); United States v. 2,872.88 Acres of Land, More or Less, 310 F.2d 775 (5th Cir. 1962); United States v. 26.81 Acres of Land, More or Less, 244 F. Supp. 831 (W.D. Ark. 1965).


26 See, e.g., In re Huie, 2 N.Y.2d 168, 190 N.E.2d 140, 157 N.Y.S.2d 957 (1956); Mississippi State Highway Comm’n v. Williamson, 181 Miss. 399, 179 So. 736 (1938); Talbot v. Norfolk, 158 Va. 387, 163 S.E. 100 (1932).
the amounts put forth by the parties' appraisal experts. In the usual case, the appellate court would have to usurp the function of the trier of the facts in order to set aside the finding arrived at below. This is perhaps the single most important consideration to keep in mind in deciding whether to appeal and in framing the issues on appeal. It is axiomatic that the condemnee is appealing because he is convinced the award is inadequate. Appellant's counsel, however, should avoid making inadequacy his main contention and concentrate on the errors below which will provide the leverage to obtain a reversal or modification of the award.

On the state level, it should be borne in mind that intermediate appellate courts sometimes have the power to review both the law and the facts, while the highest courts in each state are ordinarily limited to reviewing questions of law. However, the significance of this distinction is diminished by the fact that even intermediate appellate courts apply the rule that the findings below will not be disturbed unless clearly erroneous.

POWER OF COURT WHERE FINDINGS ARE SET ASIDE IN WHOLE OR IN PART

A key element in preparing every condemnation appeal is the power of the tribunal in question, once it reaches the conclusion that the findings must be set aside in whole or in part. In federal practice, the district court, when reviewing the findings of commissioners, may act as it would with respect to the report of a Master under Rule 53 of the Federal Rules. Accordingly, the court may

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27 See, e.g., United States v. 2,635.04 Acres of Land, More or Less, 336 F.2d 646 (6th Cir. 1964). As to a similar rule of thumb in state courts, see Bell, Preserving Error for Appeal of the Eminent Domain Case, 1959 S.W.L.F. INST. ON EMINENT DOMAIN 151.
28 For a survey of the most recurring errors cited in federal condemnation appeals, see infra text accompanying notes 41-89.
29 In New York, for example, the powers of the intermediate appellate court and court of last resort differ markedly. The appellate division must affirm or reject the findings of commissioners which were adopted below; the court may not modify the order under review. In cases tried to a judge without a jury, however, the appellate division may modify, as well as affirm or reverse. The powers of the New York Court of Appeals also vary with the originating tribunal as well as with the action taken by the appellate division. In cases originating in an order approving the findings of commissioners, the court is limited to affirming or reversing. In cases originating in a nonjury trial before a judge, if only quantum is at issue, the court must choose between the award of the trial court and that set by the appellate division. It should be noted, however, that the court may modify the awards of both lower courts in such cases, if an erroneous valuation or other legal theory was applied. See generally Cohen & Karger, Powers of the New York Court of Appeals (rev. ed. 1952). For a survey of other state procedures, see Sackman, supra note 8, at 145-46.
30 Rule 53 of the Federal Rules of Civil Procedure provides in part as follows:
In an action to be tried without a jury the court shall accept the master's findings of
modify or reject the findings, in whole or in part, elicit further evidence, or recommit the case to the commissioners. Where the error is clear on the record and the question is one which lends itself to a legal determination, the court may correct the error without further proceedings of any kind. In a few instances, federal district courts have gone so far as to relieve the commissioners of a case (especially in instances wherein they have unduly procrastinated), even before the commissioners reached their findings.

The United States court of appeals has broad powers with respect to a condemnation award under review. Irrespective of whether the case below was tried by a judge, jury or commission, the court of appeals may affirm, reverse, or modify the findings. It is likely to follow the latter course where the error on the record is clear and lends itself to ready adjustment. Thus, for example, the court is more likely to draw its own inferences where the trier of the facts below had to draw inferences from documentary proof in the record. Again, if the award is either grossly excessive or deficient, the court may cure the defect via remittur, unless the party agrees to accept a specified figure. The court of appeals will send the entire matter back for a new trial where the error or errors below were such as to vitiate the initial trial (thereby making it impossible to salvage what had already been done). Thus, for example, a plenary new trial was awarded where the government's experts had testified on the basis of the erroneous assumption that the parcel was smaller than it actually was. Here the court granted a new trial and refused

fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6(d). The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.


36 Thus, for example, in United States v. 86.52 Acres of Land, More or Less, 250 F. Supp. 619 (W.D. Mo. 1966), a new trial was ordered unless the condemnee consented to reduce the award from $6,245 to $1,925.
to remand the case for a judgment based on the lower of two appraisals offered by the condemnee's experts. Similarly, a jury verdict was set aside and a new trial ordered where a claimant's witness testified, over objection, to unexercised options on contiguous tracts, where there was no other evidence in the record from which the jury could have made so high an award.

In state practice, condemnee's counsel should examine the local statutory framework to determine the forms of relief which the appellate court may grant, and shape his legal arguments accordingly. Among the questions to be researched is whether the appellate tribunal's course of action varies depending upon whether the award under review is that of a judge, jury, or commission. Similarly, counsel should seek to ascertain whether the available forms of relief differ at various stages of appeals, as one ascends the ladder. It should be noted, however, that a new trial may not be desirable in every case. Where, for example, favorable findings have been made below, it may behoove counsel to strive for limited results on appeal, as, for example, a modification of the findings below or a remand for additional proceedings, limited, however, to certain portions of the case.

**ILLUSTRATIVE GROUNDS FOR APPEAL**

Just as a capable attorney prepares a memorandum of law preparatory to trying a case (or perhaps drafting his initial pleading), it is a sound practice for the condemnee's counsel to be acquainted in advance with the errors which have proved productive of reversals in his own jurisdiction. Thus, for example, in one state the courts might closely scrutinize expert testimony, while in another, erroneous charges to the jury or commissioners might be the most productive grounds for appeal. Again, it is axiomatic that the condemnee would not be appealing unless he felt the award below was inadequate. However, his objective of an increased award or new hearing may best be obtained by directing his attack to legal errors in the record (on the assumption that they alone or in combination misled the trier of the fact and conceivably accounted for the unsatisfactory award). The following classes of cases represent some of the most

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37 Benecke v. United States, 356 F.2d 439 (5th Cir. 1966).
38 United States v. Smith, 355 F.2d 807 (5th Cir. 1966).
39 See supra notes 27-29.
40 On the prohibition against a party to raise new issues on a remand, see infra notes 93-94.
frequently raised issues on appeal in federal condemnations, and are no doubt symptomatic of state practice as well.

(1) Denial of a Jury Trial

Rule 71A of the Federal Rules of Civil Procedure, absent a special statute designating a different tribunal, states "any party may have a trial by jury of the issue of just compensation by filing a demand therefor within the time allowed for answer or within such further time as the court may fix, unless the court in its discretion orders that, because of the character, location or quantity of the property to be condemned, or for other reasons in the interest of justice, the issue of compensation shall be determined by a commission of three persons appointed by it." If neither of the foregoing procedures are invoked, all issues are tried by the court without a jury.

Although there is no constitutional right to a jury trial in condemnation cases, it is the favored method of trial in most states and in the federal courts. So much was this so, that reversals were obtained of district court references to commissioners, where "compelling reasons" for such a reference were not found to be present. Thus, for example, it was held that court calendar congestion alone was not a sufficient basis for denying a request for a jury trial. Indicative of the reasons which might support a reference were the nature of the property, terrain, and uses, the nature of the rights or interests for which compensation is sought, the complexity of issues, impossibility of trying the issues before a single jury, and probability that the appointment of commissioners would result in more uniform awards. The leading case on the subject, United States v. Merz, took a similar view in 1964, with Mr. Justice Douglas declaring that "the use of a commission to resolve the issue of just compensation
is justified by the facility with which commissioners may inspect the property and a likelihood that uniformity of awards may be realized expeditiously.\textsuperscript{47} This would indicate that henceforth courts of appeal may not be as ready to set aside a reference to commissioners as they were in the past.

Assuming arguendo that a denial of a jury trial is unwarranted, the claimant is faced with a procedural stumbling block insofar as an order of reference would ordinarily be considered a non-appealable, non-final order. If no appeal is taken from the order of reference until the case has been completed before commissioners, the court of appeals is unlikely to set aside proper findings of the commission on the ground that a jury trial should have been had in the first instance. Nevertheless, many courts have held that an order of reference is a non-final order and hence not appealable.\textsuperscript{48} At least one circuit has taken a contrary view, indicating that a mandamus proceeding may be available, in a proper case, to compel the district court to grant the requested jury trial.\textsuperscript{49} The outcome of this question in state courts would vary from jurisdiction to jurisdiction.\textsuperscript{50}

(2) Failure of the Trier of the Facts to Make an Adequate Record

A frequent complaint of reviewing courts, both state and federal, is that the trier of the facts failed to make an adequate record of the proceedings below, thereby frustrating appellate review. With increasing frequency this complaint has been voiced with respect to the work-product of both judges\textsuperscript{51} and commissioners.\textsuperscript{52} It provides an excellent avenue of approach on appeal, provided, of course, the appellant has not contributed to the defect by his conduct below. As previously noted, the claimant's lawyer should take all the steps

\textsuperscript{47} Id. at 197.
\textsuperscript{48} See, e.g., United States v. 91.69 Acres of Land, More or Less, 334 F.2d 229 (4th Cir. 1964); Beneke v. Weick, 275 F.2d 38 (6th Cir. 1960).
\textsuperscript{49} See United States v. Hall, 274 F.2d 856 (9th Cir.), cert. denied, 362 U.S. 990 (1960).
\textsuperscript{50} For a survey of instances in which a reference to commissioners would be proper, see S. Searles, \textit{Trends in the Law of Condemnation}, \textit{Condemnation Appraisal Practice} 534, 541 (Am. Inst. Real Estate Appraisers 1961).
\textsuperscript{51} See, e.g., City of Jamestown v. Spetko, 15 App. Div. 2d 789, 224 N.Y.S.2d 776 (4th Dep't 1962). On the relative advantages of trial by jury and trial by commissioners, see P. ROHAN & M. RESKIN, supra note 7.
necessary to have a detailed transcript made, to make excluded evidence available to the reviewing court in the record, to request appropriate charges, and to seek special findings where the outcome depends in large measure upon the answer given to certain key questions or issues. Again, where various elements of damage to a parcel may be segregated, clarity may demand that they be separately listed for the benefit of the reviewing court.\textsuperscript{53}

Despite earlier precedents to the contrary, it is now generally agreed that commissioners and judges, trying cases without a jury, are both required to make findings dispositive of the key issues raised before them. In \textit{United States v. Merz}, this duty was delineated as follows:

The judge who uses commissioners, however, establishes a tribunal that may become freewheeling, taking the law from itself, unless subject to close supervision. The first responsibility of the District Court, apart from the selection of responsible commissioners, is careful instruction of them on the law. That was done in one of the present cases. But the instructions should explain with some particularity the qualifications of expert witnesses, the weight to be given other opinion evidence, competent evidence of value, the best evidence of value, illustrative examples of severance damages, and the like. The commissioners should be instructed as to the manner of the hearing and the method of conducting it, of the right to view the property, and of the limited purpose of viewing. They should be instructed on the kind of evidence that is inadmissible and the manner of ruling on it. The commissioners should also be instructed as to the kind of report to be filed. Since by Rule 71A(h) the report has the effect of a master's findings of fact under Rule 55(e)(2), the commission should be instructed as to what kind of findings should be included. Conclusory findings are alone not sufficient, for the commission's findings shall be accepted by the court "unless clearly erroneous"; and conclusory findings as made in these cases are normally not reviewable by that standard, even when the District Court reads the record, for it will have no way of knowing what path the commissioners took through the maze of conflicting evidence. See United States v. Lewis, 308 F.2d 453, 458. The commissioners need not make detailed findings such as judges do who try a case without a jury. Commissioners, we assume, will normally be laymen, inexperienced in the

\textsuperscript{53} The following directive is worthy of note: "It would be helpful for a final determination of the issues if the Special Term would make a new decision to include specific findings as to the sums allowed for direct taking, consequential damage, and for fixtures, together with an indication as to which items were held to constitute fixtures." \textit{In re City of New York}, 10 App. Div. 2d 865, 199 N.Y.S.2d 915 (2d Dep't 1960).

One experienced practitioner suggests that where impending change of zone is a factor, the trier of the facts list separately a basic value per parcel and the increment attributed to the zoning factor. Sackman, \textit{Condemnation Appeals}, 8TH S.W.L.F. INST. ON EMINENT DOMAIN 127, 132 (1968).
law. But laymen can be instructed to reveal the reasoning they use in deciding on a particular award, what standard they try to follow, which line of testimony they adopt, what measure of severance damages they use, and so on. We do not say that every contested issue raised on the record before the commission must be resolved by a separate finding of fact. We do not say that there must be an array of findings of subsidiary facts to demonstrate that the ultimate finding of value is soundly and legally based. The path followed by the commissioners in reaching the amount of the award can, however, be distinctly marked. Such a requirement is within the competence of laymen; and laymen, like judges, will give more careful consideration to the problem if they are required to state not only the end result of their inquiry, but the process by which they reached it.54

Similar directives are being issued by state appellate courts with increasing frequency.55

(3) Misconduct of Judge, Jurors, Commissioners, or Attorneys

As in most judicial proceedings, a reversal may be obtained where timely objection was taken to misconduct on the part of one of the participants. Expressions of bias by a judge or commissioner,56 interference with the function of the attorney or jury,57 reliance by jurors on unauthorized publications, and similar errors should be raised on appeal.58 The same is true of inflammatory remarks of counsel in opening or closing to the jury.59 However, the latter is a two-edged sword and condemners have secured reversals in more than one instance on the strength of unwarranted and prejudicial statements volunteered by the condemnee's counsel. Thus, for example, overzealous remarks concerning the limited value of today's dollar

54 376 U.S. at 198-99. The Court distinguished a condemnation case tried by a jury, insofar as the jury remained under the Court's direction and control throughout the trial. Accordingly, a jury's general verdict as to damages would not be overturned for lack of particularized findings.


56 See, e.g., United States v. Lewis, 308 F.2d 453 (9th Cir. 1962); United States v. Silver Queen Mining Co., 285 F.2d 506 (10th Cir. 1960); In re Freeport Brook Drain, 22 App. Div. 2d 928, 255 N.Y.S.2d 701 (2d Dep't 1964); In re Real Properties in Town of Easthampton, 22 Misc. 2d 376, 248 N.Y.S.2d 187 (Sup. Ct. 1963).

57 See, e.g., H & R Corp. v. District of Columbia, 351 F.2d 740 (D.C. Cir. 1965); United States v. 18.46 Acres of Land, More or Less, 912 F.2d 287 (2d Cir. 1963).

58 See, e.g., United States v. Certain Interests in Property in Monterey County, 186 F. Supp. 187 (D.C. Cir. 1960), aff'd, 308 F.2d 595 (9th Cir. 1962); See generally Bell, Preserving Error For Appeal Of The Eminent Domain Case, 1959 S.W.L.F. INST. ON EMINENT DOMAIN 151, 157.

59 See, e.g., United States v. 158.76 Acres of Land, More or Less, 298 F.2d 559 (2d Cir. 1962).
and the unlimited resources of the condemning authority should be scrupulously avoided.

(4) Errors in the Judge's Charge

Although many charges are routine in condemnation cases, errors in charges and denials of requests to charge have proved a fertile source of grounds for appeal. Once again, however, the opinion in United States v. Merz lays down several prerequisites in this area, especially as regards trials conducted by commissioners:

Moreover, the litigants have a responsibility to assist the process by specifying their objections to instructions, by offering alternative ones, and by making their timely objections to the report in specific, rather than generalized form, as required by equity practice.60

In both state and federal practice, it is advisable to prepare written requests to charge well in advance, along with citations to relevant supporting authorities. As the Merz opinion indicates, objections to the judge's proposed charge to a jury or commissioners should also be submitted in advance, along with alternative charges.

It should also be noted that jury charges may constitute reversible error, where they have the effect of taking disputed fact questions out of the jury's hands. Thus, for example, in most instances, questions of credibility should not be resolved by the court.61 Similarly, contested factual issues, such as the relevance of certain sales or the imminence of a change of zone will normally present issues for the trier of the facts, and the judge's charge should contain no indication to the contrary.62

(5) Comparable Sales

The crux of a great many condemnation cases lies in the presentation of comparable sales by the contesting parties. While the admission or exclusion of sales offered as "comparable" is entrusted to the court's sound discretion, errors in both the admission and exclusion of proffered sales may provide a fruitful avenue of appeal. Thus, for example, it has been held error to exclude a relevant,

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60 376 U.S. at 199.

For the view that a large number of comparable sales should be employed by the expert witness, see Coon, The Appellate Lawyer Looks at Opinion Evidence in an Appropriation Case, 39 N.Y.S.B.J. 305, 308-10 (1967).
recent sale, in a case wherein the extent of recent increases in value was at issue.\textsuperscript{63} Again, where the appellate court finds that sales admitted over objection as comparable sales are utterly different from the subject parcel, a reversal will normally result.\textsuperscript{64} On the other hand, at least one court has indicated that the claimant's attorney must seize the opportunity to impugn such defective sales via cross-examination.\textsuperscript{65} It is also established that comparable sales need not be offered in each and every condemnation case, and an award may be bottomed on other evidence.\textsuperscript{66} Although such sales are often said to be the best evidence of market value, it has been held proper to refuse to so charge in a case wherein the proffered sales were sharply contested on the question of comparability.\textsuperscript{67}

(6) Expert Testimony

Failure to properly qualify an expert, his failure to lay a foundation for his conclusions, and his reliance upon faulty information or legal principles, have all proved an adequate basis for reversing a lower court's award. It is not sufficient that an expert be a real estate broker or professional appraiser, if it is not demonstrated on the record that he is in fact familiar with the parcel and neighborhood in question.\textsuperscript{68} Conversely, if such familiarity is demonstrated, an individual may qualify as an expert witness, although his profession is not directly related to real estate transactions.\textsuperscript{69} Even the layman may testify as to his property's value (although the weight of his testimony may not be great).\textsuperscript{70} Where the expert's qualifications are

\textsuperscript{63} United States v. 63.04 Acres of Land, More or Less, 245 F.2d 140 (2d Cir. 1957).
\textsuperscript{64} United States v. Smith, 355 F.2d 807 (5th Cir. 1966); Yennock v. State, 23 App. Div. 2d 809, 258 N.Y.S.2d 490 (4th Dep't 1965).
\textsuperscript{65} See United States v. Eden Memorial Park Ass'n, 350 F.2d 933 (9th Cir. 1965); United States v. 18.46 Acres of Land, More or Less, 312 F.2d 287 (2d Cir. 1963). Where the applicable procedural rules require exchanges of appraisals and/or comparable sales before trial, or permit discovery of such items, the time remaining before trial should be utilized in investigating possible flaws in the condemnor's appraisal or comparable sales.

Where the judge's charge to the jury or commissioners on the use to be made of comparable sales testimony is erroneous, prompt objection should be made. See United States v. 84.4 Acres of Land, More or Less, 348 F.2d 117 (3d Cir. 1965).

\textsuperscript{66} United States v. Sowards, 370 F.2d 87 (10th Cir. 1966).
\textsuperscript{67} United States v. Baker, 279 F.2d 603 (9th Cir. 1960).
\textsuperscript{68} United States v. 60.14 Acres of Land, More or Less, 362 F.2d 660 (3d Cir. 1965); United States v. Johnson, 285 F.2d 35 (9th Cir. 1960). The appraisal expert should not merely adopt prior testimony of another expert witness, but should instead demonstrate fully his familiarity with the subject property and the appropriate methods of evaluating it. Moreover, all or part of his written appraisal should be made part of the record as an exhibit.

\textsuperscript{69} United States v. Certain Parcels of Land, 145 F.2d 374 (3d Cir. 1944); Love v. United States, 141 F.2d 981 (8th Cir. 1944).
\textsuperscript{70} United States v. 86.52 Acres of Land, More or Less, 250 F. Supp. 619 (W.D. Mo. 1966).
impressive, it has been held that the claimant's counsel has a right to present those credentials and is not required to stipulate as to them at the behest of the condemnor. In any event, the expert's familiarity with the property and area must appear in the record in one form or another.

As noted earlier, appellate courts have exhibited a growing impatience with appraisal testimony couched exclusively in terms of mere conclusions. Failure to spell out the expert's chain of reasoning, valuation theory, and basic factual assumptions may vitiate his testimony entirely. The same is true where the expert's testimony discloses reliance upon an incorrect legal theory or factual data. Typical errors include incorrect assumptions as to acreage, zoning and comparable sales, as well as reliance upon pieces of evidence (such as unexercised options) which are clearly inadmissible. It should be noted, however, that the courts have not adhered strictly to hearsay and other evidentiary rules with respect to the expert's factual bases for his conclusions. Thus, for example, the test of a comparable sale has been relaxed somewhat when the sales are not offered as comparables but as background data relied upon by the expert in formulating his own conclusions as to value. It should also be noted that appellate courts will look with disfavor upon alleged errors in expert testimony, if claimant's counsel has made little effort to point up these errors below, through timely objections and cross-examination.

One further aspect of expert testimony should be noted, that is, it is considered to be advisory only. Nevertheless, the trier of the facts cannot ordinarily go outside of the record and reach a determination lacking support in the record. Accordingly, most awards

71 Wolf v. Commonwealth of Puerto Rico, 341 F.2d 945 (1st Cir. 1965).
72 "All courts recognize the reasons given by an expert may be of utmost importance in weighing the value of the opinions given. All of the varying circumstances and elements which a reasonable person would consider in arriving at fair market value, including items which fairly afford a test of the accuracy of the reasons given by the expert appraisers in arriving at their ultimate conclusions of value, are properly subject of evidentiary proof." Riverside v. Kraft, 203 Cal. App. 2d 300, 304, 21 Cal. Rptr. 425, 428 (1962).
74 See, e.g., United States v. Smith, 355 F.2d 807 (5th Cir. 1966); United States v. Certain Interests in Property, 296 F.2d 264 (4th Cir. 1961).
75 See United States v. Featherton, 325 F.2d 539 (10th Cir. 1963); United States v. Johnson, 285 F.2d 35 (9th Cir. 1960); United States v. Certain Interests in Property in Cascade County, 205 F. Supp. 745 (D. Mont. 1962).
fall within the "range of testimony," and hence can be easily sustained as consonant with the expert's views expressed on the trial.\(^7\) On rare occasion, however, there may be sufficient other evidence in the case to enable the trier of the facts to reject the expert testimony offered by both sides.\(^7\)

(7) Hearsay and Other Violations of the Rules of Evidence

It is widely recognized that it is a practical impossibility to adhere strictly to all the rules of evidence in condemnation cases, especially where such claims are tried before commissioners. Similarly, as in civil appeals generally, appellate courts are prone to disregard technical errors below, where the errors complained of constitute "harmless error."\(^7\) As a consequence, it is not fruitful to belabor inconsequential violation of the hearsay, best evidence and other traditional rules of evidence, unless the cumulative impact of the errors below was to materially affect the award. Most of these objections go to the manner in which a fact was proven, as opposed to the basic admissibility of the fact itself. However, where a piece of evidence is offered as an independent indicator of value (as, for example, an unexercised option to purchase), or forms an important link in an appraisal expert's testimony, objections to admissibility should be pushed, if evidence of that particular type is not admissible for the intended purpose.\(^8\)

This is not to say that hearsay and other objections should be waived indiscriminately at the trial below. In addition to their possible cumulative effect, objections to such testimony tend to call the attention of the trier of the facts to imperfections in the proffered evidence, and to reduce its weight accordingly.\(^8\)

\(^7\) See, e.g., United States v. 2,635.04 Acres of Land, More or Less, 336 F.2d 646 (6th Cir. 1964); Scale v. United States, 243 F.2d 145 (5th Cir. 1957).

\(^8\) See, e.g., United States v. Smoot Sand & Gravel Corp., 248 F.2d 822 (4th Cir. 1957); Hazard Lewis Farms, Inc. v. State, 1 App. Div. 2d 923, 149 N.Y.S.2d 658 (3d Dep't 1956).


\(^8\) See, e.g., United States v. Smith, 355 F.2d 807 (5th Cir. 1966). Reliance upon an erroneous theory of value, or the improper application of a correct theory of value should also be made the subject of objections and appeals. See Coon, supra note 73, at 310-12.

\(^8\) See Bell, Preserving Error For Appeal Of The Eminent Domain Case, 1959 S.W.L.F. Inst. On Eminent Domain 101, 162-63.
(8) Inadequacy or Excessiveness

Most condemnation awards fall within the "range of testimony" and hence are all but immune from attack on the mere question of quantum. Nevertheless, as in sporadic negligence cases, appellate courts occasionally find an award to be so high (or low) as to "shock the conscience." As often as not, however, the court finds the error to be an overly generous award, as opposed to a meager one. In view of this, and in view of the tendency of this line of argument to dull the sharpness of an appellant's legal arguments, a frontal assault on the question of quantum should be used sparingly.

(9) Impending Change of Zone

Whether a change of zone (or the granting of a variance) is sufficiently imminent to have an effect on market value is normally a question for the trier of the facts based on all the evidence. Where such is the case, the court should avoid interfering with that function by passing on questions of credibility or by a charge which gives the jury the impression that the question is one of law for the court. Absent a proper foundation, however, an objection can be taken to expert testimony based on an assumed change of zone. Moreover, where there is evidence on the question, care should still be taken not to permit one's expert to rely upon the impending change of zone as an accomplished fact.

(10) Propriety of a View

Appellate courts are kindly disposed to a view, in much the same way as they credit the trier of the facts with having gained insight by seeing and hearing the witnesses. Moreover, the granting of a view to the jury or commission typically rests in the trial court's sound discretion. Accordingly, the mere fact that a view was taken, without more, will seldom prove availing on appeal. Where the view should not have been granted because of changed conditions, where the view was taken without the court's knowledge or permis-

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83 See, e.g., H & R Corp. v. District of Columbia, 331 F.2d 740 (D.C. Cir. 1965).
sion, or was influenced by one side, a reversal may result. In any event, objections to the view should be voiced at the earliest possible moment.

(11) Lack of Necessity or Other Legal Objection to the Propriety of the Taking

Absent an allegation of fraud or bad faith of some kind, federal appellate courts have not been receptive to legal arguments directed to the legality of the taking. Thus, for example, attacks made on the "necessity" for the taking have generally proved unavailing. State courts, however, have proved slightly more receptive to such arguments, although they have generally been rejected. In any event, if counsel has serious thoughts of fashioning an argument along these lines, he should consider raising the question by the way of an order to show cause, injunction or other extraordinary remedy, coupled with an immediate appeal. If this type of argument is taken up as part of the full case, the property may be completely destroyed before the case is reached for appellate argument.

(12) Res Judicata

As the extract quoted from the Merz case indicates, objections must be raised with specificity and preserved for use on appeal. A party who does not appeal cannot take the benefit of a reversal secured by another party similarly situated. Also, objections which were not raised below cannot be voiced for the first time on appeal or on remand of the case for additional proceedings. The res

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87 See Webb v. United States, 256 F.2d 669 (4th Cir. 1958). The denial of a view requested by the condemnor should also be questioned, as well as changed conditions in cases in which the view is granted over the condemnor's objections.


89 On the availability of injunctions and other extraordinary remedies to contest the legality of a taking, see Martin v. United States, 270 F.2d 65 (4th Cir. 1959); Iowa Elec. Light & Power Co. v. City of Lyons, 166 F. Supp. 676 (D. Neb. 1958), aff'd, 265 F.2d 273 (8th Cir. 1959).

90 376 U.S. at 199.

91 Objections properly interposed may be waived if not reviewed when similar inadmissible evidence is subsequently offered, or if the condemnor himself offers the same type of objectionable evidence. See United States v. Bodie Island, 262 F. Supp. 190 (E.D. N.C. 1967).

92 See Annat v. Beard, 277 F.2d 554 (5th Cir. 1960).

judicata rationale embodied in these decisions has been applied to both the condemnee and to the federal government.94

REQUEST FOR A NEW TRIAL

As part of one's appellate strategy, a timely motion for a new trial may be lodged with the trial court, based upon alleged errors. In some states, such a motion is required before an appeal can be perfected.95 Such a motion would, of course, serve its most useful function where the case was originally tried to a jury. However, the chances of success on such a motion (whether based on newly discovered evidence or otherwise) are remote, absent a readily discernable legal error or an award which is clearly contrary to the evidence.96

THE CONDEMNATION BRIEF AND ORAL ARGUMENT

As noted earlier, a condemnee appealing from an award has an uphill fight for several reasons. The appellate court quite correctly acknowledges that the function of trying the matter in the first instance belongs to the trier of the facts, and that the latter saw and heard the witnesses (and possibly viewed the site). Moreover, there is a tacit assumption that the condemnee's main, if not exclusive, complaint is that the award is not large enough. Finally, there is the probability that the award (whatever its faults may be), falls within the range of testimony offered on the trial. Faced with this array, the condemnee's counsel must fashion a brief which will draw the court's attention to the fact that the case involves substantial questions of law and potential injustice. In order to succeed, the brief cannot get bogged down in factual minutiae or technical problems.97 Instead, it should seize upon the significant legal errors,

94 See, e.g., United States v. Certain Property Located in the Borough of Manhattan, 344 F.2d 142 (2d Cir. 1965).
95 See generally Bell, Preserving Error For Appeal of the Condemnation Award, 1959 S.W.L.F. INST. ON EMINENT DOMAIN 151, 158.
97 Neither the brief nor the oral argument should be weighted down with intricate factual data. Such material is available to the reviewing court in the record. Instead the brief should provide the court with sound legal grounds for reversing an inadequate award, thereby making it unnecessary in a real sense for the judges to get bogged down in the factual minutiae. See the model condemnation brief set forth in P. ROHAN & M. RESKIN, CONDEMNATION PROCEDURES & TECHNIQUES § 9.10 (1968).
thereby drawing the court's attention from the factual maze to the more familiar legal bases for decision. Where locations, directions or other aspects of the property play a key role, the court should be oriented through use of selected exhibits, maps, and diagrams in the appellate brief.  

Oral argument should not be neglected in condemnation appeals. Submission without argument tends to leave the impression that the appeal is like a great many others, that is, largely an expression of dissatisfaction with the amount obtained below. Oral argument should be seized upon as a vehicle for underscoring the legal errors below and their probable effect upon the outcome at the trial level. The oral presentation also affords counsel one last opportunity to resolve doubts that may have arisen in the appellate judges' mind as to the facts, the equities, and the law applicable to the case.  

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98 One experienced practitioner suggests the advisability of preparing one's own diagrams, in a proper case, for inclusion in the brief. See Sackman, Condemnation Appeals, 8th S.W.L.F. INST. ON EMINENT DOMAIN 127, 157 (1968). On oral argument generally see Breitel, Counsel on Appeal (1968); Cuomo, The New York Court of Appeals: A Practical Perspective, 34 ST. JOHN'S L. REV. 197 (1960).