

FITTING THE TEAM TO THE CONDEMNATION CASE:
Why Two Lawyers Are Better Than One or Three

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I. INTRODUCTION

In a condemnation case, as in “Goldilocks and the Three Bears,” it can be difficult to get the presentation “just right.” The fact finder—whether a jury, a judge, a mediator, or attorneys trying to settle a case—must be given a “meal” that is not too small and not too large. The presentation must neither be too overwhelming, or too scanty, but just the right size to convey the essential evidence leading to the inevitable conclusion you seek. Certainly, the amount of *evidence* you present and the number of *witnesses* you use to present it are important considerations. You may *not* have thought about how important the number of *lawyers* can be. However, the size of the team of lawyers used to prepare and present the case at trial may be just as critical.

If the trial “team” consists of just *one* lawyer, even a very good one, he will have to make choices about how to allocate his limited time and energy and some parts of the trial will not be as well-prepared as others. The single lawyer will have to tackle the parts of the trial he does worst, as well as those he does best. He will not have a second pair of eyes and ears to provide a second opinion on matters of strategy. On the other hand, if *three* lawyers are actively involved in the trial, it is harder to keep all three “in the loop” on information and strategy and to keep all of the lawyers focused on the same theme or message. We believe that the key to winning condemnation cases is to persuade the jury that there is only *one* true story and it is the story your team is telling. When three lawyers work to prepare their witnesses and arguments, it may be difficult to integrate the various parts of the case into a seamless whole. The resulting trial may look like three different versions of the same story, rather than a single true story.

The premise of this paper is that, as a rule, condemnation cases can be handled most effectively from inception through conclusion by a team of two lawyers, not one or three, as long as those two lawyers are comfortable enough that they can create, communicate, delegate and respect each other. If so, then the two-lawyer team can effectively prepare and present the case without running the risks inherent in under-staffing or over-staffing the case.

II. ONE IS THE LONELIEST NUMBER

The advantages of handling the trial preparation and trial with a two person team, rather than a single lawyer, cannot be underestimated. Some of the advantages are obvious. There are others that you may not even notice until you have to try a case alone. The “pros” of using a two-person team include:

* Each lawyer has more time before the trial to prepare for the tasks he or she will be primarily responsible for during the trial. Better pre-trial preparation produces a better trial and reserves more time during the trial for the work that must take place after the trial is underway. If only one attorney is preparing and trying the case, he may not have as much time as he would like to spend researching issues, preparing jury selection, or outlining each and every direct and cross examination. On the other hand, if the work is divided among two lawyers, each can devote more time in the months, weeks and days before the trial date to preparing for the direct and cross examinations he will make at trial. This makes for more well-prepared witnesses, smoother and more conversational direct examinations and more incisive cross-examinations. Each lawyer has more time to anticipate evidentiary issues presented by the witnesses and exhibits he is responsible for during his case in chief and to prepare to overcome anticipated objections. This makes it more likely that his evidence will actually be admitted and that the jury will actually hear the evidence he wants it to hear. Of course, when the lawyer is reasonably confident that his evidence will be admissible, it is easier to prepare jury selection, opening statement and closing argument relying on that evidence.

* Two lawyers can better handle last-minute pre-trial preparation and last minute settlement negotiations. Even with two lawyers working on the case, the best-laid plans for trial-preparation can be, and usually are, disrupted by last minute motions, late-designated witnesses and newly-produced exhibits. Just as predictably, settlement negotiations that ended months earlier may miraculously resume on the eve of trial. Everyone must agree that settlement opportunities should be fully explored before trial, but talk of settlement can be a distraction from last minute trial preparation. Settlement negotiations with opposing counsel and communication with clients about settlement offers can consume valuable last minute trial preparation time. Settlement negotiations can also lull counsel into a false sense of security and detract from the urgency of trial preparation. It is hard to prepare for battle when you are unsure whether you will have to fight.

If two lawyers are working on the case, one may undertake the responsibility for negotiating with opposing counsel about settlement while the other continues to prepare motions *in limine*, schedule witnesses and organize exhibits. This will ensure that, if a fair settlement cannot be reached, the case will be ready for trial. This division of last-minute responsibilities also provides balance. The lawyer who has been negotiating with opposing counsel about settlement will be encouraged and empowered by the knowledge that his partner is preparing for trial. At the same time, the lawyer who is preparing for trial will be assured that all chances of settlement have been explored, so that, if the case is tried, it is simply because there was no other reasonable choice.

* Two lawyers can keep up with the flow of information presented during the trial better than one lawyer can and synthesize it for immediate use. When the trial is underway, the flow of information becomes fast and furious. It can be almost impossible for one lawyer to act and react to the information and simultaneously create a record of what has happened and a plan for what to do next. It is much easier for a two-person team. It is difficult enough to decide what follow up question to ask a slippery and hostile expert witness while listening to the deliberately evasive answer he has given to the preceding question. It is even more difficult to think of your follow up question when you are trying to take notes of the witness's testimony,

listen to opposing counsel's objection and the judge's ruling on it and search in your file for the case that says the objection should be overruled. If a single attorney is trying the case, he must process all of these events as soon as they occur- the objections made, the judge's rulings, the evidence presented and the jury's reaction. The same attorney must immediately decide what to do with the information: whether to ask a different question, and if so, what; whether to ask the Court for a bench conference or to be heard out of the jury's presence; whether to try to get the evidence in through some other witness or exhibit; whether to make an offer of proof. If a second attorney is helping to try the case, he can make notes of the witness's testimony, scribble a note to the questioning attorney suggesting a follow-up question or a response to the objection, and find the case proving that the objection should be over-ruled.

* Just as two lawyers are better than one at managing the flow of information during trial, two lawyers are also better than one at managing the movement of documents and exhibits. Assistance with exhibits, by a second lawyer who knows the case just as well as the first and can anticipate his needs, can make a world of difference in whether the trial goes smoothly. Even if an attorney has thoughtfully considered what documents or exhibits he will need to cross-examine a witness, marked the exhibits and placed them in the ready position, the twists and turns of testimony may present the need or the opportunity to use other, unanticipated documents. If the second lawyer knows the case well enough to be aware of the existence of the documents and to perceive that the unanticipated testimony has made them relevant, he can quickly locate, mark and provide the documents to the questioning attorney for immediate use. This may seem like a very minor advantage, but a positive trial outcome depends, in part, on the jury's perception of how well or smoothly the case is going. If the questioning attorney has to rummage through his files for several minutes to find the documents he needs, the drama of the moment is lost, the jury begins to shuffle its feet and giggle, and the witness has time to think of an explanation. If this happens enough times, the jury begins to perceive that the questioning attorney is disorganized and that the cross-examination is ineffective. The questioning attorney may decide not to seize the opportunity the next time and instead let the witness off the hook, rather than having to search for a needed document.

* If trial responsibilities are shared, each lawyer can prepare and present the parts of the trial he or she does best, so that the team's strengths are maximized and its weaknesses are minimized. In our practice, the division of responsibilities for preparing and trying cases has evolved into a pattern that we now use as a rule, and depart from only in exceptional circumstances. We assign responsibility for the task to the partner who can do it the best, based on aptitude, experience and interest. There is plenty of work to go around and we are fortunate that our strengths and weaknesses lie in different areas. One of us loves legal research and has computer skills. Typically, during the pre-trial phase, that one of us works on procedure, including planning for, drafting, researching and arguing motions of all types. The other has a knack for understanding what will motivate people—whether jurors, judges, or opposing counsel—to listen to him. That one concentrates on pre-trial strategy, including deciding what theme and what type of evidence will be persuasive. One of us has the patience to dig into unfamiliar or complicated areas, such as engineering or environmental regulation.

* Dividing trial responsibilities consistently over many cases gives the attorneys the opportunity to develop expertise in diverse subjects of expert testimony. In our practice, one

lawyer generally handles all appraisal witnesses, both on direct and on cross-examination, and the other lawyer handles non-appraisal witnesses, including the property owner, engineers, environmental scientists, developers, surveyors and architects. When a lawyer examines expert witnesses in engineering many times, he need not re-create the wheel each time. Each time, the lawyer has more experience with the subject matter, with technical terms and with techniques these witnesses may use to avoid answering questions. The lawyer who has examined a particular type of expert many times knows how to use the correct terms of art to ask the question that will lead to the desired answer, rather than to “I don’t understand the question.” The lawyer will be much more confident if he knows that he knows as much about the subject matter as the expert he is examining. This creates, generally, a smoother, more relaxed direct examination and a more focused and effective cross-examination.

* Dividing trial responsibilities between two lawyers allows the lawyers to rest and makes the trial more interesting for the jury. If we can, we try to divide our trial responsibilities so that each lawyer has a break between tasks. This gives the lawyer a chance to rest and restore his or her physical and mental facilities, and to be fully prepared for the next job. It also keeps the jury interested, because it gets to see and hear a different lawyer rather than hearing from the same lawyer all day long. Finally, it keeps opposing witnesses guessing, as they do not know who will be examining them.

* Dividing trial responsibilities between two lawyers increases the likelihood that the jury and the judge will like and respect both lawyers. To the extent that we can, we divide the trial responsibilities in such a way that the judge and jury can get to know and respect both lawyers early in the trial. If the judge and jury see both lawyers making important contributions to the trial, the judge and jury will respect both lawyers and will give credence to what both lawyers say. On the other hand, if the judge perceives that one of the lawyers is “second chair,” he may be less attentive to and more skeptical of that lawyer’s arguments. If the jury believes that one lawyer is subordinate, it may think the witnesses that lawyer examines are less important. To give both lawyers a chance to make a favorable impression early on, we usually have one lawyer handle the pre-trial conference, while the other has primary responsibility for the pre-trial motions. One lawyer is responsible for jury selection, while the other does opening statement. If all goes well, each of the two lawyers will have had plenty of time early in the trial to address the judge and jury and to begin to establish a rapport with them. If two lawyers have the opportunity to make a favorable impression on the jury, there is more chance that each juror will identify with at least one of the members of the trial team.

* If two lawyers try a number of cases together, each lawyer can learn from the views, methods and practices of the other. This is a big help to attorneys who have little trial experience, but can be equally important to seasoned trial lawyers. An attorney who has many years of trial experience may take the same approach to each opening statement, with the result that each opening sounds as if it is out of a can. The attorney may have done the opening so many times that he could do it in his sleep, and it may sound just that way. If the team of attorneys occasionally shifts responsibilities, each attorney gets fresh ideas from the other. Each attorney also observes the other’s questioning of witnesses and use of exhibits and can see

whether the jury seems to understand the evidence. If not, the second attorney learns that he needs to make the point in a different way, with another witness.

* If two attorneys are involved in trial preparation and trial, there are more varied opportunities for communication with opposing counsel and with the client. One lawyer may communicate more effectively than the other with opposing counsel, or with the client. For any number of reasons, some personalities click while others clash. Two attorneys can also play a “good cop/bad cop” routine with the opposing counsel or with the client.

III. THREE CAN BE A CROWD

With all these advantages to having a team, rather than flying solo, one might simply conclude that bigger is better. If two lawyers are better than one, aren't three better than two? Although there may be some circumstances when three lawyers are needed on a condemnation trial team, it is more likely that three lawyers would be “overkill,” and that the advantages of a two-partner team would be outweighed by other disadvantages. Among the disadvantages:

* The chances for miscommunication with opposing counsel, the client and the Court are increased. Think of the children's game, Rumor. As information is passed through more people, it is more likely that important details may be left out or misunderstood. This is especially true in such areas as settlement negotiations, when the success or failure of the negotiations may depend on a nuance or inflection.

* It is more difficult to stay true to the theme of the case if there are three people telling the story. The risk is that the three lawyers' have slightly different views or understandings of the theme or message you are collectively trying to convey. These slightly divergent views skew the work product each produces, so that it can be difficult to integrate the parts of the case into a coherent whole.

* It is harder to develop rapport with the jury and judge if more lawyers participate and each lawyer has a smaller role.

* It is harder to delegate responsibility. It may be more difficult to segregate responsibilities into three parts, as there will inevitably be inter-relationships between the anticipated testimonies of witnesses. As a practical matter, it is harder to keep up with and use the file if there are a greater number of hands in the file, using the same exhibits and transcripts.

* The extra help may tempt the team to call more witnesses than are needed;

* The jury may guess there is a correlation between the wealth of the client and the number of lawyers on his team;

* It costs more, in terms of time and money, to have three lawyers, rather than two, try the case.

The view that two lawyers are better than one, and better than three, is one view only. It is also true that the number of potentially successful models to a successful verdict is limited only by the number of creative minds trying to get there. Needless to say, what works for one person-or one team of lawyers- might not work perfectly for the next.

IV. MAKING THE TRIAL TEAM WORK

Whether the team consists of two lawyers or three, all must:

1. Understand the theme of the case and how it relates to the evidence each will present;
2. Communicate fully, accurately and promptly with each other;
3. Delegate responsibility in a manner that allows each partner to trust the other's ability, so that you avoid duplication of efforts; and
4. Treat the other partner with respect, especially in front of the jury.

Stay On Home base

Whether a condemnation case is staffed by an army of one or many, the team should have a clear understanding of what the goal is. By that, we don't simply mean getting the highest verdict (or lowest, if you represent the condemnor). The goal is to persuade the jury that the *only* way to see the evidence is the way that you see it and that the only truth is the truth you are telling. Obviously, if the lawyers working together on the team see the case differently from each other, they will not present a coherent, consistent story to the jury (or judge, mediator, or opposing counsel.) If each member of the team has his own view of what the most important message is, the jury will hear three different "most important" things. We believe it is much better for the jury to hear the single most important message over and over.

It may seem very obvious that two partners should agree on the theme of the case they are trying together, but sometimes lawyers become so caught up in the details of the case, that they lose sight of the theme. When the trees cause one of them to lose sight of the forest, there is a risk that they may present conflicting evidence. Suppose, for example, the partners are representing a property owner who owns a hotel property impacted by what appears to be a relatively minor partial taking. In order to present evidence of a change in the highest and best use from hotel to something else, the attorneys may need to show that the hotel was barely profitable before the taking, not that its business was booming. If the hotel was just barely in the black before the taking, the relatively minor impact may have been just enough to put the hotel in the red. In this case, each of the partners must remember to resist the temptation to argue what a fabulous location the property enjoyed, or to present comparable sales of hotels that were thriving. Each of the partners must understand and agree the theme is that the hotel was sustainable, but barely so. Then, each partner can communicate this theme to each witness he or she is responsible for examining, to make sure each witness understands and is true to the theme in his testimony.

Share Information

Each partner must diligently work to ensure that he or she shares information gleaned from his research and preparation with the other, to present a coherent, consistent story and to avoid undermining the other's evidence and arguments. As every law student hears in trial advocacy class, evidence is like a house of cards. Each piece of evidence rests and builds upon another, and if one of the pieces is found to be unreliable, the entire house may come crashing down.

Suppose, for example, an appraiser's value conclusion is based, in part, on the premise that an existing single story structure could have been used as the foundation for a multi-story high-rise if it had not been taken. The premise that the structure could support upward expansion is based, in part, on the opinion of a structural engineer regarding the weight bearing capacity of the steel members. The structural engineer's opinion about the weight bearing capacity of the steel members is based, in part, on the opinion of a soils engineer concerning the shrink and swell characteristics of the soils. In such a situation, it is crucial that the partners-who may be working with, preparing and examining different witnesses-understand the limitations and assumptions of each witness's opinion and how those limitations and assumptions affect the opinions of other expert witnesses.

Usually, each partner will be responsible for communicating the substance of his or her witness's anticipated testimony to the other partner, as the attorneys may want to avoid having the expert witnesses prepare potentially discoverable reports detailing the limitations and assumptions on which their opinions are based. The communicating partner must be sure to share each nuance of the anticipated testimony that might possibly affect the opinion of another witness. It is helpful for the partner preparing the witness to take detailed notes of the witness preparation session, and to go over those notes in detail with the partner who is preparing to examine related witnesses. Each partner must be sure to ask each witness who relies in part on another witness whether there are any facts or circumstances that are essential to his opinion, or which might change his opinion. Each partner who is preparing the predicate witness must be sure to discuss these essential facts with him and emphasize how important it is that he be absolutely sure of his conclusion on those issues.

This attention to communication must continue through the trial itself. Each attorney should listen attentively to the testimony elicited by his partner and suggest additional areas of examination. (Brief notes written legibly in large letters work better for this than incomprehensible scribbles or a tug on the sleeve and a whisper.) The listening attorney should also note how the testimony elicited by the questioning partner relates to anticipated testimony by other witnesses. For example, if a broker testifies on direct examination that market demand was weak in the area of the subject property for a period of time, the attorney who will examine the appraiser must be sure to alert him to this testimony so that he can be prepared for questions about it.

Trust Your Partner

If you share the trial of your condemnation case with another lawyer, you will have more time to prepare for the parts of the trial you do best and will benefit from having a second opinion about how best to present evidence or make an argument. You will not realize these benefits, though, unless you are willing and able to delegate important tasks to your partner.

Lawyers can debate whether the most important part of trial is jury selection, or closing argument, direct examination or cross examination. Most lawyers will tell admit that they do not perform all parts equally well, but that, instead, they have most favorite and hated parts. When a single lawyer is trying an entire case alone, he is bound to be less proficient at some parts of the trial than others. The lawyer may be tempted to spend more time than he should preparing for cross-examination, which he enjoys, but skimp on preparing for jury selection, which he detests.

Since days spent in trial are long, there is generally very little time left at the end of the day and during the night to prepare for the events of the next day. When the lack of time is added to the lack of proficiency or interest in some parts of the trial, the value of staffing a trial with two lawyers is apparent. The lawyers can divide the tasks according to their interests and abilities and each partner will have more time to focus on the tasks that are his or her primary responsibility. In order for this to work, however, the partners must agree to a division of labor that draws on each other's strengths. Once this division of labor is accomplished, each lawyer must trust the other to do as well on the task as he would do himself. If the lawyers insist on preparing the entire case together, with no division of labor, or if they insist on micro-managing each piece of the case, there will be tremendous duplication of effort and waste of valuable time. A division of labor that works well in one case can become a pattern that applies in other cases, making the preparation and trial of every condemnation case much simpler.

We have tried to work out a pattern of trial assignments that we follow, generally, in every case. We take into account the strengths and weaknesses of the trial attorneys, their experience with the subject matter and the specific expert witnesses, the need to allow each to develop a rapport with the jury and the judge, and the need to allow time for rest and trial preparation between tasks. If we have considered each of these criteria, we can be reasonably sure that we have divided the trial work to produce the optimum result. We find that assigning the tasks this way goes a long way toward preventing micro-managing and second guessing between partners.

Treat Your Partner With Respect In Front Of The Jury

No matter how well two partners have worked prior to trial, a time will almost certainly come during the trial when they disagree. The difference of opinion may be a judgment call, so that either or neither of the attorneys can claim he is "right." Or, one of the attorneys may have simply made a mistake. It happens to everyone. If one partner commits an error, the other must be very careful not to appear to criticize or reprimand him in front of the jury. If he does, several things will happen. First, the jury will realize the lawyer has made a mistake. If it is not called to the jury's attention, the jury might not even notice the error, or realize the significance of it. Much of the outcome of the trial depends on the jury's perception of who is "winning" the case. If you are scolding your partner, you must not believe things are going very well for your side.

Second, the criticism will destroy the jurors' view of the lawyers as a team. As a team, the lawyers are worth more than the sum of the parts. Each lawyer builds the other lawyer's credibility. When the lawyers turn on each other, they destroy the credibility of *both* of the lawyers, not just the one who made the mistake.

Respect also requires you to be attentive to the arguments and examinations your partner makes. It may be tempting to work on the outline of the examination of the next witness you will be questioning, rather than taking notes during the testimony elicited by your partner, but you should resist. If you are not listening, it sends a message to the jury and to your partner that you think what he is doing is not important. You owe your partner your attention and your help. If you help your partner, his parts of the case, and yours, will have a better flow. If you are paying attention, you can anticipate when your partner will need particular documents, photographs or cases and have them ready. You can keep track of the exhibits that are introduced, which will make your examination go more smoothly. You will hear the subtle pieces of evidence that you may need to integrate into the examination of your next witness. If you take careful notes, your partner will have a detailed summary of the testimony to use when preparing for the closing arguments and motions that will come several days later.

V. CONCLUSION

If you are used to trying cases by yourself, we urge you to seize the chance to try a case with a partner. As long as you agree with each other about the theme of the case and communicate with each other about the details of the evidence, delegate responsibility for trial preparation and trial tasks in a manner that makes sense and treat each other with respect, we predict you will find the benefits outweigh the fact that you have to share the glory. Trying a case together creates a very special camaraderie.

The positive aspects of trying a case with a partner can be lost if you add a third person to your trial team. Although exceptional cases certainly exist, two lawyers are generally enough to handle the work of trying a condemnation case. If a third lawyer is added to the trial team, you run the risk of sending the jury mixed signals about what the message is and diluting the impact each lawyer can make on the jury. Just as in "Goldilocks and the Three Bears," the biggest bowl of porridge is not always the best.