



# Real Estate Appraisers As Expert Witnesses—

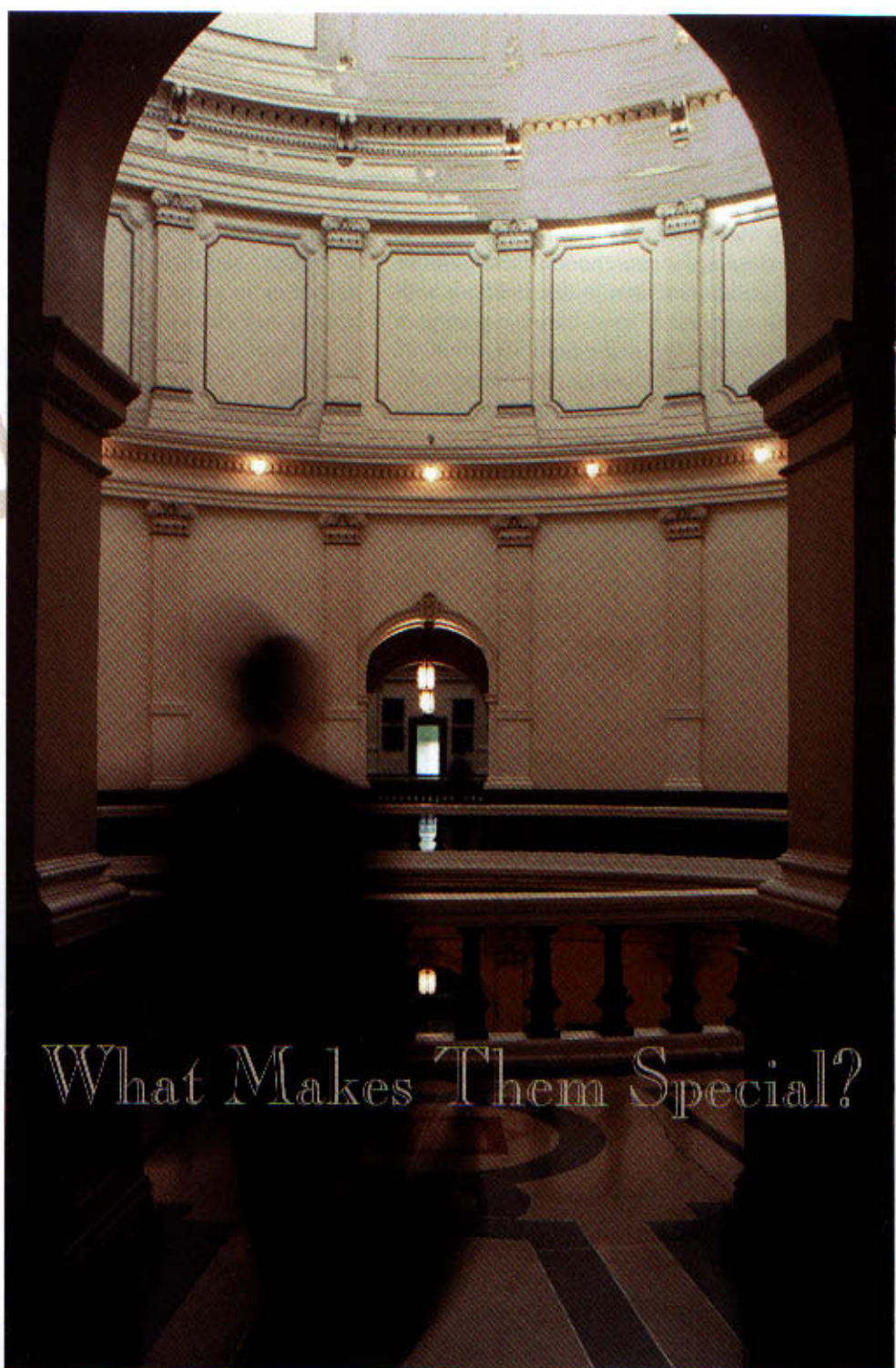
*By John C. Murphy and Roberto Lara*



John C. Murphy



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## What Makes Them Special?

*Bob Dylan said it best. Sometimes, "You don't need a weather man to know which way the wind blows." When it comes to expert witnesses, California Courts agree.!*





ury trial lawyers, however, often depend heavily on expert witnesses— even in disputes as simple as which way the wind is blowing. Jury trial lawyers know that, “in many cases, the most important witnesses are experts.”<sup>2</sup> Expert witnesses often “hold great sway with juries.”<sup>3</sup> Of course, the use of experts can be risky. Expert witnesses are “a lot like dynamite. Handled well, they move mountains. But small mistakes can cause them to blow up in your case.”<sup>4</sup> These facts ring especially true in a major and growing area of civil litigation: eminent domain. In Los Angeles and Orange County, California, alone, 925 eminent domain cases were filed in 1998 and 1999.<sup>5</sup> Of these eminent domain cases, 364 have gone to trial, or are pending trial.<sup>6</sup> As Southern California’s population grows and infrastructure is improved, eminent domain litigation will only increase.



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## EXPERT WITNESSES

Although frequent, condemnation trials are not necessarily glamorous. Eminent domain trials, which almost always involve juries, usually revolve around a single issue: the value of the condemned property. The only persons who may testify concerning value, other than the owner, are expert witnesses.<sup>7</sup>

This is not a recipe for courtroom excitement, to say the least. Every eminent domain lawyer has seen the looks of

boredom flittering across jurors' faces as one expert after another drones on endlessly about this or that "comparable sale." Moreover, many judges and juries often express real distrust of even very well qualified real estate appraiser witnesses.

In fact, the California Legislature has implicitly expressed the same distrust of real estate appraisers. The California Evidence Code sets forth an elaborate set

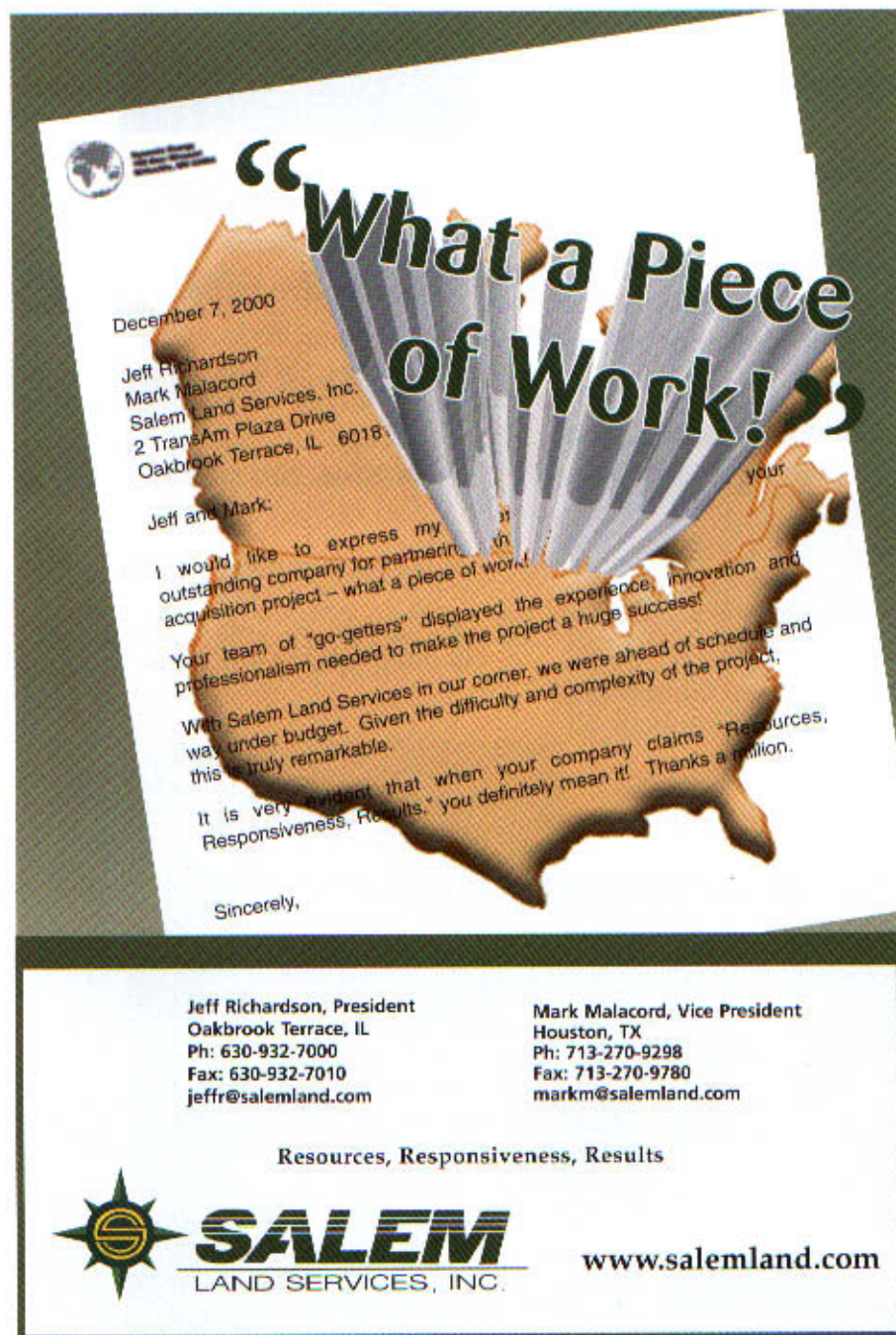
of rules aimed specifically at real estate appraisers' testimony.<sup>8</sup> The Code specifically identifies three permissible approaches to valuation. It specifically defines "comparable sale."<sup>9</sup> Code of Civil Procedure section 1263.320 also defines "fair market value"—and does so in terms which differ from most common appraisal definitions.<sup>10</sup>

California law does not have similar, specific rules governing medical testimony, engineering testimony, or any other form of expert testimony. Why are real estate appraisers treated differently? Several commentators, including editor and publisher of *Just Compensation*, Gideon Kanner, have asked the question repeatedly: Why do real estate appraisers get no (judicial) respect?

Appraisers are treated differently for at least four reasons. First, many judges and jurors do not always view real estate appraisers' area of expertise as particularly remote, arcane or specialized. Almost everyone has to make a decision about the value of real estate at some point in his or her life. Most judges and many jurors have bought a house, or have invested in real estate, at one time or another. Real estate appraisal is not divorced from everyone's common everyday experience the way complicated medical, architectural or engineering issues can be.

Second, lawyers generally use experts to explain why and how an actual event occurred. Doctors explain why a patient died. Architects explain why a building collapsed. Accident reconstruction experts explain why a traffic accident happened. These experts deal with real world events. By contrast, real estate appraisers are charged with predicting the details of a hypothetical sales transaction—a transaction between a non-existent "willing seller," and a non-existent "ready, willing and able buyer." They deal with a transaction that never occurred in the real world, and never will occur.

Moreover, the hypothetical standard which appraisers use is not accurate. The Code of Civil Procedure presupposes a willing seller. But eminent domain does



December 7, 2000

Jeff Richardson  
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not involve a willing seller. It involves an involuntary transaction—a government's taking of private property.

Third, the hypothetical standard appraisers use is not only inaccurate, but also imprecise. It sets forth an objective standard: fair market value. In the real world, however, some owners value their properties more highly than others do. Owners of single family homes, for example, often have deep emotional attachment to their property. California eminent domain law does not even attempt to compensate for this subjective value.

Fourth and most important, real estate appraisers often differ widely in their conclusions. One appraiser may conclude a property lacks any real value, except for agricultural uses. A different appraiser may conclude the same property has huge development potential and great value. Bias, whether acknowledged or not, can dictate an outcome. Even appraisers admit that appraisal is an art, not a science.<sup>12</sup>

Understanding these facts is key to effective use of real estate appraisers as expert witnesses. Dealing with these issues early on in an appraiser's direct testimony can greatly enhance an appraiser's credibility. In other words, lawyers should anticipate that—fairly or unfairly—judges and jurors will treat appraisal witnesses with more than the usual amount of skepticism. Overcoming this skepticism constitutes a key challenge in eminent domain litigation. ■

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#### NOTES

<sup>1</sup> *Jorgensen v. Beach 'N' Bay Realty, Inc.*, 125 Cal. App. 3d 155, 163 (1981).

<sup>2</sup> Steven D. Easton, *How to Win Jury Trials: Building Credibility With Judges and Jurors* 10 (1998); Raoul D. Kennedy & James C. Martin, *California Expert Witness Guide* § 1.1 (2d ed. 2000).

<sup>3</sup> *Ibid.*

<sup>4</sup> Easton, *supra*, 189.

<sup>5</sup> Telephone interview with Los Angeles County Superior Court, Public Information Office (May 25, 2000); Telephone interview with Kevin Stinson, Orange County Superior Court (May 25, 2000).

<sup>6</sup> *Ibid.*

<sup>7</sup> Cal. Evid. Code § 813 (West 2000); 1 Norman E. Matrone & Henry Velt, *Condemnation Practice in California* § 3.1 (2d ed. 1999).

<sup>8</sup> Cal. Evid. Code §§ 810-824 (West 2000).

<sup>9</sup> Cal. Evid. Code §§ 816, 819 and 820 (West 2000).

<sup>10</sup> Cal. Evid. Code § 816 (West 2000).

<sup>11</sup> cf. Cal. Civ. Proc. Code § 1263.320 and J.D. Eaton, *Real Estate Valuation in Litigation* 18 (2d ed. 1995).

<sup>12</sup> See, e.g., Appraisal Institute, *The Appraisal of Real Estate* 80 (11th ed. 1996) ("Each real property is unique and many different types of value can be estimated for a single property.").



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