The Appraiser as Testifying or Consulting Expert

Part Three – The Appraiser in Court

So far in this series, we have discussed: i) the basic importance and selection of appraisers as formal and informal experts in and out of court; and ii) exactly what is required, from a legal perspective, for an appraiser to be sufficiently qualified, reliable and relevant to present opinions in court as an "expert." These fundamentals determine the *basic admissibility* of any expert's opinions. However, only after these hurdles are cleared and the expert takes the stand can the true *persuasiveness* of his or her testimony be maximized. In other words, all the foregoing has been mere prelude. Achieving the full power and impact of the appraiser's expert opinions is the ultimate goal when trying to influence the judge's or jury's ultimate determination of value.

PERCEPTION IS NINE-TENTHS OF REALITY

As with virtually all human communication, the value of expert testimony is strongly impacted both by: 1) the actual manner in which the information is communicated; and ii) the perceptions of those appointed to hear and render a formal (or informal) "verdict" based on the information communicated. In short, both appraiser and sponsoring counsel must know their audience and tailor their joint presentation to best appeal to the largest segment of that audience.

Also, like it or not, value is largely impacted by subjective perceptions (at least, in most actual and would-be owners' and taxing authorities' minds). Consequently, the perceptions an appraiser creates by his/her professional opinions, rationale, methodologies and manner of presentation can be extraordinarily helpful both in managing the expectations of a property owner and the valuations of those on the other side of any value determination. Each is critical: the intractable, but insupportable, opinion of value of a property owner can be as detrimental to a final resolution or agreement on value as a buyer's or chief appraiser's mere decree of value, or what each thinks they actually *need* to conclude the value controversy.[1] To get value right, it is thus often

[1] In this regard, for example, the arguably "true" taxable value of a property may result in a far different tax than an owner pragmatically is able to pay. If a chief appraiser's or other expert's opinion of value results in an outcome which literally taxes the property owner out of the taxing jurisdiction, everyone loses. Under such circumstances, it is critical for both sides to understand a commercial appraisal at least should be fairly consistent with the property owner's ability to generate enough income from the property to fund the taxes assessed on it. Hence, to manage or shape this perception, extra emphasis or consideration may need to be given by both sides to the income approach.

Similarly, it is no secret – especially to large taxpayers in rural jurisdictions - that humans being what they are, opinions of taxable values can be inappropriately inflated by the specific needs of school districts, counties or other taxing jurisdictions which absolutely require sufficient funds to service and protect property owners within their

important to get *perceptions* right first (or, at least, get them fully disclosed and out on the table).

Different presentations and approaches to value obviously create – and done right in court, are *intended* to create – different perceptions and ultimate conclusions about their subject. Of course, perception management must be handled with care, and in the appropriate context. To illustrate, it can result in reversible error in a property tax lawsuit for any mention to be made of the impact a low valuation could have on the school children and/or first responders in a taxing jurisdiction. The expert appraiser must be ever mindful of the boundaries of his or her testimony, and the propriety of referencing "collateral" facts, even if solely for the purposes of impeachment. This, in particular, is an area where sponsoring counsel and the expert appraiser must carefully collaborate so the appraiser is *sufficiently* informed of *pertinent* facts without being unduly influenced.

Another potential problem of perception can arise when a property owner possesses and/or actually has publicized information and value representations which are at odds with the purposes for which the appraiser has been hired and/or the appraisal he or she ultimately provides. Contradicting the client's own evaluations can easily result in a "kiss of death" for the expert's contrary trial (or ARB) testimony and credibility. As but one case in point, a property owner whose primary interest is in selling certain assets for as much as possible is not likely to develop evidence which would enhance the owner's position when tax assessment time arrives. Indeed, it is not unusual for settlements to occur almost spontaneously with a court's ruling that the client's data room is subject to discovery in a tax-related lawsuit. Regardless, both appraiser and sponsoring counsel must be aware of and prepared to deal effectively with the perceptions created by their property owner/client's previously prepared sales and/or refinancing literature, cost segregation studies, informal asset valuations and other evidence which, once/if ruled discoverable, could undermine, if not altogether contradict, the expert appraiser's opinion of market value for property tax purposes. It can be devastating when client, counsel and/or their appraiser overlook or are unaware of the potential for related contradictions until it is effectively too late to do damage control.

To summarize, an appraisal obviously can give rise to a war of multiple battles of competing interests and perspectives. The expert appraiser must do his/her best to steer clear of (or work to "defuse") anything that is not truly relevant to an unbiased determination of value, or risk severe impeachment. As illustrated above, the owner's *own* interests may conflict both internally and externally when it comes to valuing their property. Also, taxing jurisdictions, of course, want the most revenue legally possible. Also, appraisal consultants may be consciously or unconsciously impacted not only by their client's desire for expense management or reductions and the need for efficiency and expediency, but by the terms of their own contract(s) which define the parameters of their assignments and their compensation (especially when the latter involves any

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borders. These sorts of "need perceptions" can inappropriately impact or cloud opinions of value, even for the most conscientious of appraisers, if they are not acknowledged and addressed head-on (and, perhaps, "truth tested" by a greater emphasis on a sales comparison approach, where possible and if appropriate).

contingent fees). None of this is said to suggest unethical behavior or conflicts of interest are the norm. It is simply to recognize that certain "human factors" may act individually or collectively to create an impression of underlying bias which any cross-examining attorney is likely to develop. The appraiser as expert witness must be prepared to defend or otherwise answer for his/her conclusions in light thereof. This is just one more reason why the expert appraiser's Golden Rule must be "credibility first; credibility always!" The simple fact is that where there are differences of opinion – expert or otherwise – the most *credible* witness generally is regarded as the most convincing.

Consequently, especially in a courtroom governed by a mere "preponderance" evidentiary standard, extra effort spent making an appraiser's testimony more logical, professional and persuasive is almost always well spent. High impact visual aids; well written reports which can be understood by a lay person; and effective analogies and other examples can mean the difference between a win and a loss. In the courtroom, "truth" is just what a judge or jury says it is. Therefore, the most effective expert generally not only will have impeccably reasoned and supported opinions, but also be able to engage in enough "sales and marketing" techniques to effectively convince the fact finder to "buy" his/her client's position.

IDENTIFYING PROPERTY WHICH IS, AND ISN'T, SUBJECT TO APPRAISAL

Once an appraiser is qualified as an expert and allowed to provide substantive testimony to a fact finder, the first thing he/she must do is provide a clear and concise description of the property being valued. This can be a deceptively simple goal which actually is radically impacted by a variety of outside influences. Even when the appraiser is acting with the best of intentions, her/his analysis can be impacted by such things as: (i) the owner's sentimental attachment to the property; (ii) the character of property as wholly or partly non-taxable or exempt; iii) the impact of exempt or non-taxable property on the value of taxable property (particularly in the context of a unitized evaluation); and/or (iii) simple misunderstandings regarding the fundamental scope of the appraiser's assignment.

As but one painful example (for the appraiser, at least), an appraisal district's valuation of a wind farm's land was challenged by the property owner as being excessive. In depositions, time and again, the taxing jurisdictions' representatives and junior appraisers who assisted the main testifying expert appraiser swore their appraisal encompassed *only* the value of the *actual land* on which the wind turbines sat (evaluated primarily using the income approach). They understood the appraisal was only *supposed* to cover the land, because only the real property's value was taxable in the given context. However, when the lead appraiser finally testified, he established the contested valuation (again, primarily focused on the income approach) really included not only the land (as it properly should have), but also the wind turbines, underground wiring, concrete foundations and other accouterments of the wind farm which were not, in fact, the subject of the lawsuit. Inexorably, the lead appraiser's fundamental misunderstanding of both the

scope of his engagement and governing tax law (presumably, incorrectly communicated to him by the appraisal district's counsel) resulted in a completely erroneous and inadmissible appraisal and a quick settlement of the controversy in its entirety.

DETERMINING THE BEST METHODOLOGY AND APPROPRIATE STANDARD OF VALUE

As USPAP and virtually every appraisal treatise ever written make abundantly clear, one approach to value does not always fit all properties. A savvy testifying expert appraiser is never married to a single approach (as are many county tax appraisers who must, of necessity, utilize mass appraisal techniques and generally base them on the cost approach). The "investment" perspective of the income approach; the "market" view of the sales comparison approach; and the "economic/engineering" analysis of the cost approach each focus on a "different part of the elephant" and generally are intended to work *together* to create a complete picture of the beast. However, there are occasions where one or more of these approaches simply does not reasonably apply to a given asset, and the credible expert must be both sufficiently supported factually and persuasive enough to convince the fact finder that use of an inappropriate approach will actually *distort* the overall value opinion, rather than *enhance* it.

For example, for power plants and refineries whose revenues and/or expenses may be contractually controlled rather than market controlled, finding true "comparables" for a sales comparison approach can be a daunting, or even impossible, task. Power purchase contracts and tolling agreements are notoriously confidential and zealously guarded from disclosure by the parties to them. Consequently, where an appraiser does not know enough about such governing contracts (which frequently are regarded themselves as non-taxable intangible assets for property tax purposes) to credibly adjust for them using reasonably available "market" information, he/she has every right, and a professional *obligation*, to disregard the sales comparison approach because there is not sufficient data available to support it.

It is also critically important that the appraiser fully understand the applicable standard of value which needs to be applied in any given appraisal. Typically, "market value" or some reasonable equivalent is applied, particularly in property tax appraisals, but this is a decision best left to, and clearly communicated to the appraiser by, counsel. Loosely known as the "willing buyer, willing seller" standard, depending on the jurisdiction, market value may be defined legally in far greater and exacting detail, as in Texas:

> [Market value is] the price at which a property would transfer for cash or its equivalent under prevailing market conditions if: (A) exposed for sale in the open market with a reasonable time for the seller to find a purchase; (B) both the seller and the purchaser know of all the uses and purposes to which the property is adapted and for which it is capable of being used and of the enforceable restrictions on its use; and (C) both the

> seller and purchaser seek to maximize their gains, and neither is in a position to take advantage of the exigencies of the other. *See* TEX. TAX CODE §1.04(7).

In summary:

> The market value of property shall be determined by the application of generally accepted appraisal methods and techniques. If the appraisal district determines the appraised value of a property using mass appraisal standards, the mass appraisal standards must comply with the Uniform Standards of Professional Appraisal Practice. The same or similar appraisal methods and techniques shall be used in appraising the same or similar kinds of property. However, each property shall be appraised based upon the individual characteristics that affects the property's market value, and all available evidence that is specific to the value of the property shall be taken into account in determining the property's market value. *See* TEX. TAX CODE §23.01(b).

PREPARATION AND PRESENTATION OF THE VALUE OPINION

With: i) the correct property identified and value-isolated to the fullest extent possible; ii) the proper approaches justified and properly applied; and iii) the governing standard of value established, the appraiser is finally in a position to discuss with the fact finder the actual appraisal process used and his/her opinion of value, including the reasons therefore and any applicable value reconciliation or correlation. It is here that most appraisers would leave their audiences in the proverbial "weeds" of hypertechnicality with professional jargon and calculations which can only be explained through the actual use of an Excel spreadsheet (which most jurors do not understand, either). Consequently, it also is here that counsel, and/or a competent trial consultant, needs to step in to assist the appraiser in simplifying explanations and illustrating rationale. To accomplish this, there is no better tool than a series of PowerPoint slides which can graphically interpose various steps of the appraisal process into a comprehensible, visible whole the fact-finder actually can understand (at least, with relatively minor exceptions).

When a PowerPoint presentation is properly done so as to establish professional competence and credibility on its face, small problems are diminished in importance compared to overall conclusions. Nothing is more important, then, than the thought that goes into the preparation of a PowerPoint for court. First and foremost, there is a fine line between attention grabbing and distracting; cross it and risk being seen as condescending at your peril. Second, there is no need for the PowerPoint (or whatever graphic jury aids or exhibits the appraiser and counsel choose to use during testimony) to reiterate *everything* the expert plans to say. At most, graphics should serve as "Cliff

Notes" of the expert's appraisal report. In that way, the expert's *testimony* can zero in on the most important points while leaving the hypertechnical explanations for his underlying report and those fact-finders willing to slog through it.[2] It is always best to let the expert teach using his/her own words and opinions, and then illustrate or demonstrate them graphically in a more summary manner.[3]

CROSS-EXAMINATION AND REBUTTAL TESTIMONY

It is an inexperienced expert indeed who thinks their task is complete with direct testimony. In fact, most everyone – juries included – seem to understand that the real controversy resolution and expert credibility is established during cross-examination and/or rebuttal testimony. Cross-examination typically immediately follows direct testimony and is an opportunity for opposing counsel to impeach or contradict the witness with his own or other evidence to his face. Rebuttal testimony, on the other hand, involves criticism of and challenges to the testimony of one witness through the testimony of another witness. In court, rebuttal can be as simple as having opposing experts each explain why the other is wrong. However, it can be as complex as bringing in completely new, third-party witnesses to give expert testimony as to why an opposing expert's opinion was fatally flawed.

Any expert who cannot "win" – or, at least, survive - cross-examination and rebuttal is not likely to win *any* case, as even a lay person would probably guess. The expert appraiser willing to be subjected to whatever "mock" cross-examination counsel thinks appropriate and who prepares to testify by considering and answering particularly difficult rebuttal points is much more likely to be seen as credible, even in a losing cause.

Finally, the best experts understand that, no matter how important their testimony may be, the case is not just about them and their performance as witnesses. They are willing to work to understand exactly where their testimony fits in the overall presentation of the case, and even, when it is possible to do so without infringing on their professional

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[2] This assumes the expert's report gets into evidence. The reports themselves actually are inadmissible hearsay. *See, e.g.,* TEX.R.CIV.EVID. 801-803. Thus, they normally should only come into evidence by agreement, usually only reached when each side perceives the chance to gain a different tactical advantage from their admission. When reports are not admitted, it is not atypical for fact-finders simply to fill in any technical "gaps" in the testimony in favor of the appraiser perceived as most credible.

Potentially as important, but more subtly, non-judicious use of PowerPoint presentations can lead to claims by the opposition that the expert is being improperly led through his testimony. Even where such objections are overruled, they may convince the jury that the expert is "tied to his notes" and therefore not as credible as one who is seen as more able to speak extemporaneously.

[3] Even this strategy has a potential drawback: it runs the risk of having certain materials excluded from evidence as being cumulative of prior evidence. *See, e.g.,* TEX.R.CIV.EVID. 403. Experienced counsel can usually guide the appraiser in achieving a happy medium which satisfies both legal requirements and the needs for simple comprehension and understanding.

independence and integrity, assist counsel in analyzing and critiquing contrary evidence and in formulating plans to deal with it.[4]

FINAL TIPS FOR THE TESTIFYING EXPERT

In closing out this series, its seems appropriate to both refocus on some critical points and discuss a few additional practical "tips" which have been found effective in assisting experts to make the most credible presentations possible.

1. *The best experts do not lecture; they teach.* Effective experts avoid the temptations of arrogance and condescension.

2. *Experts get it right the first time*. In general, anything a testifying expert writes, reviews or otherwise creates – even if in draft form – is discoverable by the other side. If an expert's drafts, notes and/or reports (in the given case or others) appear inconsistent with his/her final conclusions, the impact on credibility can be devastating. Therefore, an excellent rule of thumb is, "Don't write it down until you are sure it is correct."

3. *An expert is ever-mindful of the need for consistency*. As per the foregoing, nothing is worse than having an expert impeached by an article she/he previously published, or some prior testimony in favor of "the other side," whatever side that happens to be.[5] This is not to say any expert should be a slave to only plaintiffs or defendants, or only to public or private entities. In fact, some limited amount of "cross-testifying" can be pragmatically helpful for the expert and enhance credibility at the same time. The key, however, is that the expert consistently sticks with the same practices, procedures and fundamental principles to undergird all of his/her testimony in whatever context it is given.

4. *Avoid the "hired gun" and "ivory tower" mentalities*. Credibility and persuasiveness are not just about being right. An effective expert must exhibit an understanding of "real world" facts and be willing and able to adapt when evidence does not come in as anticipated. Professional pontification is rarely appreciated by jurors. To the contrary, it is not unusual for lay people to respond negatively to experts who clearly present as if they think they are the smartest people in the room, even if they obviously are. Learn to use the art of lighthearted self-deprecation.

5. *Know what you don't know and know why you don't* need *to know it*. To follow-up on the last point, it is pretty much a given that no one knows everything. Curiously, perhaps, most jurors actually tend to elevate overall credibility above unwavering perfection. Experts who can "play on the home team's field" and calmly and non-defensively explain away alleged flaws in their own positions without being dogmatic are

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[4] Of course, if this is overdone, the expert may be subject to criticism as being a mere "advocate" for his/her client. Once again, counsel should provide appropriate guidance on the scope and detail of any non-testimonial assistance the expert appraiser may offer.

[5] It is, in fact, wholly improper, and quite possibly unethical, for any expert even to take on an assignment knowing that she/he has previously testified to the contrary in another case, at least without disclosing the fact and allowing counsel to determine whether or not the case is sufficiently distinguishable to merit the expert's retention.

generally seen as the most persuasive. Experts who can patiently admit to ignorance and explain why it is irrelevant to the ultimate issues in the case are definite "keepers."

6. *Effective experts make a list of indisputable facts favorable to their client's side and commit to them as foundational principles underlying their reports and opinions.* They also ask counsel to get opposing experts to either agree with or dispute them.

7. *Make the opposing expert look hypocritical for not taking action you feel should have been taken; and make him/her look hypercritical when their detailed analysis is too complex or missing a "big picture" perspective.*

8. *Attend opposing experts' depositions*. Make sure counsel makes all opposing experts preserve and bring originals of all their work product and draft reports to the deposition. Encourage counsel to have the opposing expert explain any differences between draft and final reports.

9. *Clearly and irrefutably establish your areas of expertise, but do so with appropriate humility.* Assist counsel in limiting the scope of opposing experts' testimony by committing them to testify only to matters truly pertinent to your case and to admit relevant areas in which they would not hold themselves out as experts.

10. *Effective experts simply do not allow opposing counsel to commit them to agree that their reports contain* all *opinions and facts the expert may ever testify about in the case.* Leave "wiggle room" in case new evidence is found or a new case theory emerges. (But remember this, too, can be overdone.)

11. *Do not respond differently to questions for which you have already given favorable responses.* You may not have to respond at all.

AND THE FINAL TIP: once effective experts get their points across, they stop talking before they say one thing too many!

'Nuff said!

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