



The Appraiser as an Expert Witness (Part One)

In this series of articles, we will look at the basics of expert witness work. Judges can be called by various names, so we will use the term *trier of fact*, which describes the person hearing the case for any tribunal and encompasses titles such as hearings officer, magistrate, judge, administrative law judge, and other titles. These articles will be a mix of the author's personal experiences and general information about expert witness work.

The Fact Witness

Generally an expert witness is hired and paid for the work. However, sometimes an appraiser may be called to testify (about a previous appraisal he or she performed) without compensation, and it is important to understand that in such cases the appraiser will be a fact witness and not an expert witness. The appraiser may be served with a subpoena duces tecum, which directs the appraiser to bring the appraisal and other pertinent information to the hearing. Some appraisers attempt to re-familiarize themselves with the appraisal when they are summoned, but it should be understood that there is no requirement in such cases, and it may open the appraiser up to more questions which might have been avoided.

In other words, as a fact witness the appraiser is generally only required to confirm that the appraisal was performed on a certain date and the value was a certain amount. Therefore, the appraiser may be adding to the "free" work by studying the appraisal before testifying, because whatever questions the appraiser knows from memory may be "fair game" on the witness stand.

Guarding Against Bias

Normally when an appraiser is hired as an expert witness for an appraisal, there is a value dispute and the client would benefit from either a higher or lower value, depending on the situation. Of course, the appraiser is supposed to be impartial and unbiased as an expert witness for the court, but the fact that the appraiser knows what will benefit the client may affect the appraiser's judgment. Human nature is such that it is easy for the appraiser to find that he or she has inadvertently slipped into the role of an advocate for the client without consciously realizing it. One reason is that the lawyer for the client is definitely an advocate, and when the appraiser works with the lawyer, the lines can get blurred.

One way to guard against this is to consider if the methodology and opinion of value might be different if the appraisal was for another use. For instance, the appraiser may be hired for a tax appeal, with a shopping mall as the client. If the appraisal was for a bank loan for the mall, would the value (or range of value) be different than for a tax



appeal? If the answer is yes, then bias has crept in, and the appraiser needs to reconsider the value conclusion.

The Expert as a Consultant

The appraiser may be hired to just do an appraisal and critique the opposing side's appraisal, or the appraiser may also act as a consultant to the attorney and help with things like discovery questions, direct examination questions, and technical issues. In my own practice, I am often asked to read the appraisals on both sides of the case, and write a review of them. Since my cases involve complex industrial valuations, and business valuations, even experienced property tax and real estate lawyers need help in understanding the appraisals and finding the faults and errors in them.

However, before I begin expert consulting work, or perform an appraisal for a trial, I tell my prospective client that I must do enough research to determine if I agree with their opinion of value. I do not want to charge the client more than is necessary, because if I cannot confirm their value, I will be of no use to them. Since USPAP requires that I fulfill certain steps and keep certain records even in a preliminary valuation, I set my fee at a minimum for that determination. In some situations, I do not have to do preliminary work, because I can tell from the outset that I agree or disagree with the valuation, based on my experience in the particular industry under appeal.

There have been times when I have agreed to be an expert witness for a client, but have had to decline once I read the appraisals (which were not completed at the time I was engaged) and toured the subject property. In such cases, the initial information was either misleading (not necessarily intentional) or insufficient to determine the value at the outset. Such situations are unpleasant, but the alternative would be to become an advocate rather than an unbiased expert witness. In any event, it is important for the appraiser to never guarantee his or her disposition on a case before all the facts are in, the appraisals are completed, and the necessary research has been conducted. Otherwise, the reputation of the appraiser can be tarnished, as well as the reputation of the appraisal profession.

In other situations, I have been called to do an expert review because the client does not know if the valuation is fair or not. For instance, in a property tax assessment dispute, the assessor may have an appeal pending, and wants a second opinion (besides the opinion of assessor's own appraiser) to get advice on whether to settle or go to a hearing on the matter. I will read both sides and give the assessor my opinion. Another situation similar to this one might be a buyout of a company for which two or more appraisals have been performed, and I am asked to review them and give my opinion of them. The parties involved may use that analysis as another input in negotiating the value of the subject property.



In assisting the attorney at law prepare for the trial, I often help with the discovery questions, (also called interrogatories), to get relevant information that may shed light on the disputed valuation issue. The requested information often includes financial records from the company, product pricing and production history and forecasts, past appraisals and impairment studies, their appraiser's notes and back-up information, etc. As the trial progresses and both sides testify, I may help the lawyer understand the technical issues that have been covered and the flaws in the logic or methodology of the each appraiser's testimony. I can maintain my independence and still help with these analyses, if I do not begin to take sides and become an advocate for the client.

In most cases I have reviewed and submitted written reports to the court for both sides of the issue, but I also make notes on the testimony of the appraisers for the duration of the trial. For this reason, I often am the last witness to testify. By going last, I can sum up the previous testimony of all the appraisers and integrate that into the testimony I give about my reviews. Often mistakes and misunderstandings have occurred, and I will endeavor to explain and clarify them.

In the next article, we will look at ideas for preparing for a hearing.

John Lifflander, ASA, is President of Covenant Consultants, Inc. (www.ccitax.com, email: John@ccitax.com) He is the author of many publications including the textbook ***Fundamentals of Industrial Valuation*** (IAAO 2007) and ***Analyzing Complex Appraisals*** (McGraw Hill 2014) co-authored with Shannon Pratt, PhD. Mr. Lifflander has been appraising for over 30 years, and is a former administrative law judge for the Oregon Department of Revenue for property tax appeals. His expert witness and appraisal work includes Microsoft, Hewlett Packard, Nike, Time-Warner Cable, Georgia Pacific, Weyerhaeuser, Panasonic, Frito-Lay, Oroweat, Alcoa, Simplot, Sharp Electronics, and many others.