CLAIM ALERT

10 TIPS FOR LANDING AND PERFORMING WORK AS AN EXPERT WITNESS APPRAISER

Litigation consulting and expert witness work is a rewarding area of practice for many appraisers. The work often is intellectually stimulating and well-compensated— indeed, the hourly rates for highly regarded expert witness appraisers regularly top the rates charged by the attorneys with whom they work. We hope that appraisers interested in pursuing this type of work and those looking to enhance existing skills will find the following 10 tips, pointers and suggestions helpful.

PART ONE: Getting the Work

1. Speak, write, teach and develop a content driven website.

When lawyers need expert witness appraisers, they— just like everyone else in the modern world— start their search on the Internet. If lawyers need an expert witness to testify about the value of a Minnesota grain storage facility, they probably will use key words similar to "real estate appraiser grain storage Minnesota." Appraisers with a particular expertise (say, grain storage facilities) who publish a few articles— really, it only takes a few— can position themselves at the top of the search results. When an attorney sees your name pop up, it creates a strong first impression.

Other ways to promote your expertise: make presentations to groups and organizations aligned with your field (Appraisal Institute chapters can be very hospitable forums), offer continuing education seminars, or maintain a professional website with original, useful content that features your articles and presentations. Lawyers need to believe in your expertise, so if you're targeting work as an expert in divorce cases, write original content along the lines of "10 Tips for Family Law Attorneys when Challenging Residential Appraisals." Take it one step further and mail that article to 50 divorce lawyers in your community.

2. Attend attorney seminars and continuing legal education sessions.

Appraisers can connect with lawyers by attending- or even speaking at- legal seminars and continuing education sessions; it's not unusual for groups to invite appraisers to make presentations. County bar associations and regional chapters of national lawyer organizations often have specialty groups that address such industry practice areas as real estate litigation, property insurance claims, environmental contamination, family law and estates/trusts. Seek out events near you and start networking. For example, one recent seminar presented at a section meeting of the American Bar Association was titled "Condemnation 101, Discovery— Taking the Deposition of the Opposing Appraiser and How Compensation is Determined When the Highest and Best Uses or Per Unit Values Are Not Uniform throughout the Property." Aside from meeting attorneys who hire appraisers, you will see the legal profession's perspective on depositions and highest and best use in condemnation cases.

3. When responding to inquiries for expert work, be mindful of conflict issues.

Appraisers contemplating litigation work need to be aware of conflict traps. Attorney-client communications and attorney work product (i.e., private materials or information containing an attorney's theories, research, impressions or analysis) are highly protected by law. It's not uncommon, however, for an attorney to share confidential information during the process of interviewing or hiring an expert, such as an appraiser, because the attorney assumes it will stay confidential. Problems can arise when counsel on the other side of the case then reaches out to the appraiser for possible engagement (unaware the appraiser had been communicating with opposing counsel). The legal

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concern is that the appraiser— intentionally or not— may share confidential information learned from the first attorney. Situations like this sometimes lead to the disqualification of either the attorney or the expert— or both— from further work on the case.

How can you avoid such a scenario? If an attorney is considering hiring you as an expert, before any detailed discussions about the case take place, first ask for a list with the names of the parties and attorneys on all sides and a caption page to ensure there's no conflict. The caption page typically is the first page of a lawsuit pleading document that lists the names of the parties and the court; however, the caption doesn't always show all parties, which is why you also need the list. Use this information to make sure that you have not been engaged by or received confidential information (even without being hired) from any other parties in the current case or their counsel. You also need to make sure you don't have confidential information relevant to the case that belongs to one of the other parties, which you may have received as the result of prior work.

Start keeping a database of the cases and the identities of the parties with which you've been involved; you can make a very good impression on attorneys seeking to hire you when they see how thoroughly you understand the importance of conflict issues. Failing to show attorneys that you're cognizant of conflicts can make them uncomfortable about hiring you. Finally, before having detailed discussions with attorneys about the possibility of being hired, you need to make it clear that they should not discuss confidential information with you until you actually are hired. If they do so and then don't hire you, you may be disqualified from being hired by opposing counsel. It's good practice to follow up initial inquiries with a friendly but professional email confirming that no confidential information was discussed.

4. Don't let the attorney who hired you be surprised in the middle of a case.

One surefire way to displease an attorney with your services as an expert is to have previously undisclosed information come out during litigation. Negative information or matters that call your objectivity into question usually will come out in discovery. The time to disclose this information is when an attorney is first considering your retention, not during your deposition by opposing counsel. Topics that need to be discussed include business or personal relationships with any of the parties, disciplinary matters, lawsuits relating to your professional work and other work you've performed concerning the property or very similar properties. (Make sure you obtain authorization from prior clients if confidential information is an issue, pursuant to the Uniform Standards of Professional Appraisal Practice).

PART TWO: Doing the Work

5. Don't take things personally.

The nature of litigation means that both you and your expert witness work will be challenged. It can be unpleasant, but any appraiser doing this type of work should accept that it comes with the territory. Still, we see appraisers hired as experts who can't let things go and file retaliatory complaints against other appraisers with state appraiser regulators. Needless to say, the practice is not a good one; an expert needs to deliver viable theories in court to help their clients, not grumble later to the state. Further, your client likely will not be happy that you made their legal issues part of another matter outside of court.

6. Understand the "discoverability" of information in your workfile.

Attorneys and expert witness appraisers need to pay close attention to whether or not draft materials and other preliminary content in their workfiles will be available to the other side in discovery. In federal court, the discoverability of draft reports is pretty clear: under the revised version of Rule 26 of the Federal Rules of Civil Procedure that took effect in 2010, draft reports and communications with the attorney who retained the expert are not subject to regular discovery by the other side.

However, there's a catch: Many states have rules of civil procedure that do not follow the federal rule, which means that if you are a testifying expert in a state court case in, say, California, any draft reports you've created and your correspondence with the attorney may be fully discoverable by opposing counsel. Accordingly, in California and states with similar laws, attorneys generally do not want their testifying experts to create drafts until their likely opinions and underpinnings to them are established. (See state laws on the discoverability of draft reports at www.appraiserlawblog.com/2016/01/appraiser-expert-witness-issue.html.)

The bottom line for appraisers hired as experts with respect to draft reports and written communications with the attorney? Get the attorney's specific direction on this matter at the beginning of the engagement (different attorneys will have different points of view) and maintain your workfile as if everyone in the case— including the opposing side— will see it.

7. Take extra time to do it right.

On your first assignments as an expert witness, expect to spend more time on your work than what you actually bill for. Take time to properly understand the cases, the problems, the properties and the comparables— regardless of whether or not you're getting paid for the extra time. Efficiency comes with experience.

8. Avoid boilerplate language and forms.

For most expert witness work, the most appropriate and persuasive type of report will be a narrative report, not a pre-printed form. Be cautious about using generic statements that may be commonplace in lending assignments because they can diminish your credibility in litigation. Read every word that you use to make sure it can't be misconstrued or twisted.

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9. Carefully consider your assumptions.

Your appraisal report assumptions, which can run the gamut from "general" to "extraordinary," can leave your opinions vulnerable to challenges from opposing counsel; extraordinary assumptions are especially vulnerable to attack on cross-examination or by another appraiser performing a review. Exclude truly unnecessary assumptions and then do the work or research necessary to eliminate the need for other assumptions. Be prepared to vigorously explain and defend any assumptions that remain.

10. Overreaching almost never works.

Inexperienced expert witnesses often overreach in their opinions, ending up with unsupportable conclusions in an effort to please a client. As you can imagine, this plan usually backfires and opens the door for cross examination that erodes your credibility. When overreaching leads to absurdity, the court could entirely disregard an appraiser's opinions, as occurred in a 2011 Tax Court trial. The court threw out the appraisal testimony supporting a taxpayer's outlandish valuation of a conservation easement, stating:

> *In most cases, as in this one, there is no dispute about the qualifications of the appraisers. The problem is created by their willingness to use their résumés and their skills to advocate the position of the party who employs them without regard to objective and relevant facts, contrary to their professional obligations ... justice is frequently portrayed as blindfolded to symbolize impartiality, but we need not blindly admit absurd expert opinions. Boltar, L.L.C. v Commissioner, 136 T.C. No. 14 (April 5, 2011).*

Remember, great appraiser expert witnesses aren't advocates, and must remain impartial appraisers.

TELL TALE CLAIMS...

Rebuild Tore Appraiser Expert Down

Some appraisers seem to think that expert work doesn't expose them to the risk of a professional liability claim in the same way as other areas of work. Our claims show otherwise. Clients and non-clients sue appraisers over their expert witness services too.

In a California claim situation, homeowners whose lavish home had burned to the ground were not satisfied with the offer made to them by their fire insurance company to fund the rebuilding of their home. On the advice of their counsel, the homeowners accepted approximately $3 million from their insurance company offered as the "full replacement cost" but then filed suit against the insurance company alleging that they were underpaid for the loss by $1 million.

The homeowners-plaintiffs' attorney hired an appraiser to act as the expert for the plaintiffs in their case against the insurance company. The appraiser opined that the home had been constructed with the highest quality materials and was meticulously maintained prior to its destruction. It was his opinion that the cost to rebuild the home was $4 million.

The insurance company hired its own expert appraiser. He admitted that the plaintiffs' home was a beautiful, custom dwelling; however, he estimated the full replacement cost was no more than $3 million. He added that the plaintiffs were seeking to "upgrade" many of the features in the rebuild and that the "upgrade" accounted for the $1 million difference of opinion.

Efforts to settle were unsuccessful and the case went to trial. At trial, the jury decided the insurance company's offer of $3 million to the plaintiffs was reasonable and represented the full replacement cost. The jury not only found for the insurance company and against the homeowners, but also awarded the insurance company approximately $200,000 in fees and costs.

The plaintiffs did not accept the decision and hired new counsel. The new attorney filed a lawsuit for the homeowners against their trial attorney, their expert witness appraiser and also the insurance company's expert witness appraiser. In the new lawsuit, the homeowners argued that their former counsel had not properly evaluated the merits of their claims against the insurance company. In essence, they said their counsel should have talked them out of filing suit since he should have known their case would not succeed. They claimed their expert appraiser was negligent in rendering his $4 million loss opinion and should have realized that the value of $3 million was reasonable. Had the prior lawyer and their expert appraiser done their work properly, the homeowners contended they would not have sued their insurer, lost at trial, and now be obligated to pay their former counsel and the insurance company.

The claims against the opposing appraisal expert were also unique. The plaintiffs claimed that the opposing expert owed them a duty to testify truthfully but instead had lied about them and about their "upgrade" motives. They claimed he had disparaged them by saying they were trying to rebuild a far better home and fraudulently force the insurance company

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to pay for this expense. By testifying falsely, the opposing expert "poisoned" the minds of the judge and jury and was partly responsible for the adverse verdict rendered at the trial. The court granted the opposing expert's motion to dismiss stating he owed no duty to the plaintiffs and there was no evidence he had committed perjury when testifying.

The case against the homeowners' own appraiser expert was harder to defend. Defense counsel had to maintain that the appraiser's expert opinion, rendered on behalf of the plaintiffs, was both credible and reasonable, even though it was adjudged to be otherwise. When the two expert opinions were weighed by the judge and jury, they had determined that the insured's opinion was not as credible as the opinion that had been offered by the appraiser hired by the insurance company. Defense counsel laid some of the blame at the feet of the plaintiffs and their former trial counsel. He argued that the jury was influenced by their perception that the plaintiffs were overreaching and trying to get money to which they were not entitled.

In a case already laden with expert appraisers, yet another one had to be hired to assist with the defense. This expert had to opine on behalf of the original expert whose trial opinions were now being questioned. He looked at the insured's cost figures and was able to say that the cost of high end building materials fluctuated. After carefully breaking down all of the cost categories, he was able to show that the $4 million replacement cost opinion was a "matter of opinion" and therefore, credible.

Almost 10 years after the plaintiffs' home had been destroyed in the fire, the lawsuit went to mediation. The insurance company agreed to take only $100,000 of the $200,000 it was awarded against the homeowners. The additional remaining $100,000 was paid by the attorney's E&O carrier and by the appraiser's E&O carrier to put an end to the litigation— and avoid risk of a worse outcome.

After almost 10 years of litigation, the plaintiffs walked away with about $50,000, but they did not have to pay the insurance company, their former trial attorney, their second attorney or the expert appraiser. The expert appraiser never collected fees for the worked he completed, almost $50,000. His E&O insurance company paid over $200,000 in defense fees and settlement to end the lawsuit filed against him by his former clients.

While this case might be an extreme example, it certainly gives insight into the various quagmires that could come about as a result of accepting certain "expert" assignments. One of the lessons is to evaluate your prospective clients carefully as an expert— when you are an expert witness, you are working for clients already in a fight, and they may be the type of people more predisposed to sue you.

Be Wary of the Blame Game

Another claim situation involving an expert witness appraiser reinforces the importance of evaluating the client and the case before accepting an engagement. It also illustrates the importance of making sure that you have enough time— and that the client can pay you for enough time— to handle an expert witness engagement properly.

In this case, the expert witness appraiser agreed to act as an expert for another appraiser who was facing a disciplinary hearing before an administrative law judge. That appraiser had been licensed for about 10 years, and the licensing board had reviewed numerous appraisals prepared by him in response to a complaint. Those reports had a variety of alleged USPAP violations, but the appraiser blamed others for his mistakes. He stated he received incomplete and inappropriate training from his first mentor and was critical of the "limited oversight and instruction" provided by several of his AMC clients. He further claimed in his defense that the appraisal industry had become a "fast-paced, free for all" and that he was just doing what was expected of him by the AMCs.

The appraiser had prior discipline and many of the errors found in recent reports indicated the appraiser did not take his past discipline to heart. The appraiser took no responsibility for his actions, showed no remorse, was evasive with the investigator, and showed disrespect and disregard for the board's reviewer. He said he wasn't being paid enough to produce work meeting the standards imposed by board.

If the expert had looked into the appraiser's history she might have declined to help him but didn't do so because she was short on time. The expert had crossed paths with this appraiser because he attended some classes she taught over the years. She had never worked with him and had no basis to judge his work. She simply thought he seemed like a nice young man.

The appraiser told the expert that he was being unjustly pursued by the board and needed her help. She agreed to act as his expert before even asking to look at any of his work, or any of the reports in question. Due to her own workload, along with a failure of the appraiser's attorney to provide documents, the insured got documents to review only 3 days before the hearing.

The expert was provided with 29 appraisal reports, work files and reviews, and picked 3 random reports to look over. She did not perform a formal appraisal review of any of the 3 reports, due to time and budget constraints.

When questioned at the hearing, the expert admitted to having spent a total of 6 hours preparing for her testimony. Her testimony was not a ringing endorsement of the appraiser's work— she did not find any egregious errors, the appraiser did an adequate job, and he "discussed things that needed discussing". She also said that his work demonstrated improvement but was unable to explain or show any examples of improvements.

The administrative law judge issued a 25 page Opinion and Order. He ordered that the appraiser's license be revoked and that he pay $15,000 in costs. The judge then went on to write in his opinion that, "...cause also exists to impose discipline upon respondent's real estate appraiser 'expert'." Accordingly, the expert received a letter from the licensing board weeks later stating that she was now being investigated relating to her work in the matter.