can I get a witness?

10 tips for landing and performing work as an expert witness appraiser

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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. Appraisers interested in pursuing this type of work and those looking to enhance existing skills should find the following 10 tips, pointers and suggestions helpful.

PART I 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 various groups and organizations aligned with your field (Appraisal Institute chapters can be very hospitable forums), offer continuing education seminars and 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 in 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 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.

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.

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 II Doing the Work

5

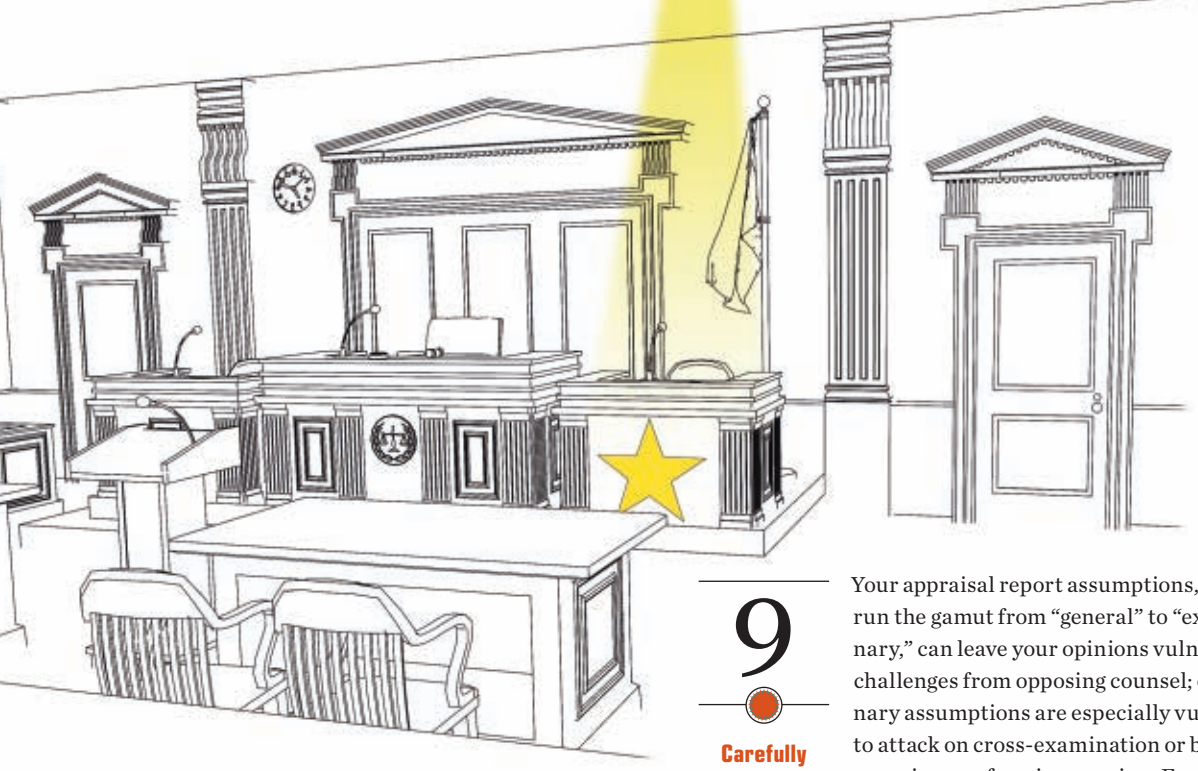
Don't take things personally.

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.

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.

Watch the Appraisal Institute's video "How Appraisers Help Attorneys Prepare for Expert Witness Testimony" for additional information on this subject at **www.youtube.com/watch?v=mvL34_fqSHA**.

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