

REST INSURED

Protecting your business and yourself

THE WITNESS TRAP

How appraisers can avoid transforming from expert witness to defendant



By **PETER T. CHRISTENSEN**
general counsel, LIA Administrators & Insurance Services

Appraisers should only be in a courtroom if they're paid to be there as consultants or expert witnesses. Unfortunately, some appraisers have discovered that their expert testimony can quickly transform them from expert to defendant. How does this situation happen, and more importantly, how can it be avoided? Following are three tips that can help keep appraisers who testify as expert witnesses from becoming the focus of a professional liability lawsuit.

1 Trust your instincts about clients and assignments. One distinguishing and perhaps obvious feature of expert witness work is that appraisers are working with parties who already are in litigation. They are involved in a case, they have lawyers and — not surprisingly — they probably are not very happy about it. Anger may have led them to file a lawsuit or maybe they're angry about being sued. Appraisers need to consider that their potential clients may be predisposed to filing lawsuits and that, as their expert witness, they could be the target of a liability claim if their clients are dissatisfied with and allegedly harmed by the work.

When is it best to back away from an assignment? If potential clients are expecting an unrealistic valuation or an impossible litigation result, or if they have gone through a series of lawyers or appraisers — especially if they are bad-mouthing them. These actions indicate that clients may be impossible to satisfy, may make it difficult for appraisers to perform their assignments and, worse, may leave appraisers vulnerable to lawsuits. When our office receives reporting claims for litigation assignments, many appraisers start the call by saying something like, "I knew this guy was going to be a problem. I wish I hadn't taken the assignment."



Peter Christensen is LIA Administrators & Insurance Services' general counsel. A graduate of the University of California, Berkeley's Boalt Hall School of Law, he has been an attorney since 1993 and maintains the blog www.appraiserlawblog.com. LIA has been offering E&O insurance to the appraisal profession since 1977 and manages the Appraisal Institute's endorsed E&O program for appraisers.

2 Develop a strong engagement agreement for expert work and get it signed. Claims about appraisals prepared for mortgages come from myriad parties: lenders, investors, borrowers and even sellers. In contrast, viable claims against expert witness appraisers principally come from just one party — the appraiser's client (or the client of the attorney who retained the appraiser). Why? Typically, the opposing party has no standing to sue the other side's expert witness, and legal immunities generally protect witnesses from being sued by unhappy opposing parties. However, most courts agree that an expert witness, such as an appraiser, can be sued by his or her own client.

Fortunately, appraisers have one very effective tool to combat legal claims by clients: a strong engagement agreement. For the purpose of liability prevention, there are several key points that need to be included in a strong agreement for expert witness services:

- Clarify that opinions and testimony are based on independent, professional judgment and are in no way predetermined.
- State the agreed date(s) of value in the agreement or note that the client will be

When is it best to back away from an assignment? If potential clients are expecting an unrealistic valuation or an impossible litigation result, or if they have gone through a series of lawyers or appraisers — especially if they are bad-mouthing them. These actions indicate that clients may be impossible to satisfy, may make it difficult for appraisers to perform their assignments and, worse, may leave appraisers vulnerable to lawsuits.



responsible for providing the date(s) if the assignment involves performing appraisals, because the date of value often is a purely legal issue and should not be the responsibility of the appraiser.

- Clearly spell out the timing and terms of payment.
- Appraisers should state that they have the right to immediately withdraw as an expert from an assignment for non-payment and also in the event of an ethical or professional standards issue or disagreement.
- Consider including limitations of liability — an important subject covered in the Rest Insured column in the first quarter 2015 issue (www.valuation-digital.com/resourcescatalog/2015_1q?pg=8#pg8).
- Make sure you get the agreement signed — in ink or with an electronic signature.

The Appraisal Institute offers sample engagement agreements online in its Professional Practice section (www.appraisalinstitute.org/professional-practice/professional-practice-documents/sample-agreements-for-services); the samples can serve as a good starting point for addressing the key points mentioned here.

3 Be prudent in fee collection. Appraisers deserve to be paid for their time and services as experts regardless of the outcome of a case — compensation legally

can't be based on the verdict. Unfortunately, when a case doesn't go the way a client had hoped, they may be less inclined to pay the appraisal fee. Therefore, it's important to have clients pay upfront or in installments throughout a case rather than in one lump sum at the conclusion of a trial.

This arrangement not only is fiscally prudent, it prevents appraisers from having to threaten to file a collection action or actually sue a client to collect a fee. In these situations, the client frequently will file a counterclaim against the appraiser alleging the reason for non-payment is appraiser negligence. Our office has seen it happen — in one such case, appraisers sued to collect a sizable fee at the end of a long and complex case that did not end the way the client had wanted, and the appraisers were then countersued for several million dollars in alleged damages. (Remember the first lesson above: because clients already are in litigation, they may be predisposed to sue.)

Appraisers aren't the only professionals who suffer from whiplash when trying to collect unpaid fees. The American Bar Association has published statistics showing that around 20 percent of negligence claims against lawyers are made in counterclaims when lawyers sue for unpaid legal fees. Accordingly, when appraisers find themselves in a position of thinking about suing their client, I recommend answering the following four questions:

- Will the time, effort and cost of suing be worth the recovery?
- Were there any genuine problems with the work that the client could seize upon?
- Has the client expressed grievances to the appraisers about the work?
- Are the unpaid fees worth the risk of having the client countersue for professional negligence?

Appraisers should carefully consider their answers to these questions, weighing the consequences of each one before heading down to the courthouse to sue their client. 📌



Go to www.liability.com or call 800-334-0652 for more information.