

USPAP and Expert Testimony

by Jeffrey K. Jones

I would like to preface this article on expert testimony with a few introductory comments. I am a right-of-way specialist for the Alabama Department of Transportation where my primary duties are appraisal and appraisal review. What is an expert? My dictionary gives two definitions, one pertaining to skill/knowledge of a certain subject and the other pertaining to marksmanship and targets. I fall somewhere between being skilled and being a target.

In the first court case I participated in, the opposing counsel obtained, with a court order, a copy of my appraisal at deposition (not typical in Alabama). I was really sweating bullets, but the State did okay. However, it only took that first visit to the witness stand to convince me that the better the preparation, the better the presentation.

Being an expert appraisal witness for a state agency or any condemning authority presents a unique challenge, especially if the appraiser is employed by the authority or works exclusively for them. It's kind of like going to the dance with your sister; it doesn't mean anything to you, but if people know how you are related, the majority of them will form a negative opinion. The opposing attorney is quick to point out the relationship between the appraiser and the agency, so the appraiser needs to be prepared for some uncomfortable questions (and I don't mean somebody asking to dance with your sister).

The appraiser's position shifts from doing an appraisal for an agency acquisition to being an expert witness in a court case. Both the agency's attorney and the opposing attorney are (and definitely should be) advocates for their

clients. The appraiser offering expert testimony should avoid considering it a win or a lose proposition. The appraiser should not be an advocate for the client's side but should be impartial.

If the appraiser is not careful, however, impartiality can become particularly partial. This may be because pre-trial conferences often stress strategy and include, as a matter of course, discussion of the opposition's position and how to countervail. It is the duality of the situation; it is like a magnetic pull with the appraiser being the needle of a compass. True north, in this analogy, is to be only an advocate for market value.

The jury is impartial, but *you* condemned their neighbor, *you* want to take something that wasn't for sale. *You* have come to their town representing the government and are going after one of the locals who has lived and worked all their life in the community. The judge is impartial as well, but he is elected by the community (in Alabama) and, in the interest of everybody having their say, will allow everything to be admissible on trial day (legal precedents aside). Does any of this sound familiar?

So what is the appraiser's role in this? The Fifth Amendment to the U.S. Constitution reads, "... Nor shall private property be taken for public use, without just compensation." The basis of "just compensation" begins with market value. The Uniform Appraisal Standards for Federal Land Acquisitions says, in summary, that the Uniform Standards of Professional Appraisal Practice (USPAP) are generally the minimum standards by which appraisals will be made. All licensed and certified appraisers who testify for either side are *required* to do so

in compliance with USPAP.

The following list of suggested questions provides the appraiser the opportunity to comply. The appraiser should be prepared to answer, and the agency's counsel should know to ask these questions. Additionally, the opposing appraiser *should* be able to answer these questions. If not, they will appear unprepared, and the agency's counsel could take advantage of this.

Standards Rule 2-1 says appraisal reports (written or oral) must clearly and accurately set forth the appraisal in a manner that will not be misleading; contain sufficient information to enable the jury to understand it properly, and clearly and accurately disclose any extraordinary assumption or limiting condition that directly affects the appraisal and indicate its impact on value.

In addition to 2-1, Standards Rule 2-4 says expert testimony must address the substantive matters of Standards Rule 2-2(b) (Summary Appraisal Report) when possible and appropriate. The questions included in this article cover what seem to be appropriate in a testimony situation, questions 1 through 9 specifically. Questions 10 through 12 sum up the specifics of the appraisal assignment.

SUGGESTED QUESTIONS TO SATISFY APPRAISAL STANDARDS REQUIREMENTS FOR ORAL TESTIMONY

1. Identify the property being appraised. (Address, location, description, topography, size, shape, access, etc.)
2. Identify the real property interest being appraised. (Fee simple interest of ... Mention any deed restrictions, etc.)
3. What is the purpose and intended use of the appraisal? (To establish market

value before and after the highway project for acquisition for ...)

4. Define market value (for Alabama, as given in the Alabama Code 18-1A-72).
5. What is the effective date (date condemnation petition filed) and the date of the report?
6. What was involved in collecting your information and doing the appraisal? (Discuss the scope of the assignment generally and specifically.)
7. Were there any special assumptions and/or limiting conditions affecting your analyses, opinions, and conclusions? (i.e., denied access, deed restrictions, use restrictions, etc.)
8. What did you determine to be the highest and best use of the subject real estate?
9. What procedures did you follow and what information did you consider to support your analyses, opinions, and conclusions? (The appraisal process, the approaches used. Discuss why any of the usual 3 approaches were not used. Here is where the appraiser can provide additional information to comply with Standards Rule 1 not previously covered.)
10. What is your opinion of market value of the property before the acquisition as of the "effective date?" (My opinion of the market value of the subject as of "date" is ...)
11. What is your opinion of market value of the subject property after the acquisition? (Alabama is a "before and after" state.)
12. The difference is your opinion of just compensation in the amount of ... What is this amount for specifically? It is suggested that these questions be asked in order, and after they are asked and answered, the Agency's attorney can ask for further explanation on any parts of the appraisal (i.e., the land chart) which need emphasis.

The following shows the relationship between the questions and the USPAP.

- Question 1 satisfies SR 2-2(b)(i),
2 satisfies SR 2-2(b)(ii),
3 satisfies SR 2-2(b)(iii),
4 satisfies SR 2-2(b)(iv),
5 satisfies SR 2-2(b)(v),
6 satisfies SR 2-2(b)(vi),
7 satisfies SR 2-2(b)(vii),
8 satisfies SR 2-2(b)(ix),
9 satisfies SR 2-2(b)(viii),
(x) and (xi).

In addition to satisfying the above Standards Rules, the following are areas where questions 1-5 can be used to expose the "other" expert(s) to the appearance of USPAP violation and, more importantly (if done correctly), level the playing field in the jury opinion of respective experts:

Under "purpose of appraisal," the before and after concept must be understood and conveyed. If not, the appraiser has violated the competency provision and SR 1-1(a). Also the Eminent Domain Code should be understood since it is the basis of the appraisal assignment and the governing rule of the day.

The appraiser must define market value as it is defined in the Eminent Domain Code. If not, the appraiser is indicating an ignorance to the process, beginning with accepting the assignment, and has violated the competency provision and SR 1-1(a).

The appraiser's effective date of value must be the date the condemnation petition was filed (in Alabama). If not, the expert's opinion is not valid and is a violation of the competency provision and SR 1-1(a), 1-1(b), and 1-1(c).

These examples are generic. Other examples would depend on the particular case, the expert witness, and counsel. The issue is the credibility of the witness, and it is up to counsel to pursue areas appropriate for their own strategy.

The appraiser, as the expert witness, can prepare for these questions in advance and determine areas to expand upon relative to the particular circumstance. For example, if the appraiser is not a local appraiser, Question 6 can be used to identify the local appraisers, real estate agents, public officials, etc. contacted in preparation of the appraisal. Local names recognizable to the jury can aid in legitimizing the appraiser to the jury.

In Alabama, the Department of Transportation's counsel is appointed on each project by the Lt. governor, and sometimes the appointed attorneys have no experience in Eminent Domain work. I have found that the experienced and inexperienced alike have responded favorably to this list of suggested questions I provide. I have done this in some form since that first case I mentioned at the beginning of this article.

Preparing the answers to these ques-

tions gives the appraiser a good review of the appraisal, and it lets the attorney know ahead of time how the appraiser is prepared to testify. It saves both of them time in case preparation. I usually take a few hours, after I have been notified that a particular property is going to court, and prepare answers for these questions.

My experience has been that testimony can be anywhere from a couple of months to a couple of years after I have done the appraisal. Typically the latter. I also prepare a one-page summary of numbers from my report as a reference to take on the stand. If the opposing counsel gets the summary while I'm on the stand, so what, it's just numbers.

The topic of appraisal testimony is showing up more and more in trade periodicals, but the lack of a correlation between testimony and USPAP is what prompted me to write this article. There are many articles written on preparation and testimony. Find them; read them. If called upon to testify, be prepared. Be honest. Do not guess. If you do not know an answer to a question say, "I don't know." Do not wait until you are on the stand to try to answer the above questions.

My advice is not to take the appraisal to the witness stand. The appraisal, as well as other case documents, are at the table of the agency's counsel if needed for reference. Remember, the appraiser is there to testify to an appraisal that was done previously, not to appraise on the witness stand.

Also, I do not favor taking a calculator to the stand because a sharp opposing attorney will have you doing calculations using their numbers and have you espousing their values. The results will be totally contrary to what you have already testified, and will, in effect, impeach or diminish your own testimony. Be prepared to answer all questions included here, and, as a consequence, you will usually be prepared to answer most of the other questions under cross examination.

I always get nervous when called to testify, but it serves as a good test for me as an appraiser. I believe it builds professional character. So if you are ever called upon to testify, follow the words of the modern day philosopher Nike, "Just do it." □