



Testifying in COURT

Can an expert witness be required to speculate?

BY GAYE RUTAN

As an appraiser, I have found that testifying in court or giving a deposition can be both terrifying and intimidating. It takes a great deal of focus to stay attuned to the attorney's questions, especially if they ask you to respond to speculation.

Here are some scenarios often encountered in court. Knowing the correct answer can go a long way in helping you take control of the situation!

Who controls the pace of questioning while you are on the witness stand?

- a) The attorney asking the questions
- b) The judge
- c) You
- d) All of the above

The answer is you! The witness should always be in control, so if you got this one wrong, it would benefit you to re-gear your thinking before testifying or giving your next deposition.

Here is the key - the attorney cannot ask another question until you have answered their first question. There is no need to feel rushed to answer. Take time to think before responding, especially since the court records do not typically note any pauses

in speaking (particularly in depositions). Take time to think your response all the way through, and ask yourself where the attorney is heading with their questioning.

When you are testifying, your job is to:

- a) Be helpful in cross-examination
- b) Protect yourself in cross-examination
- c) Testify to the facts and give your opinion of value
- d) All of the above

Here is a hint....do not be helpful! The expert witness (appraiser) is responsible for testifying as to the facts used in the report to determine their opinion of market value. Attorneys are paid to extract information from you. Do not give just 'yes' or 'no' answers. Sometimes a little elaboration goes a long way.

Avoid the Traps

Recently, while an attorney was cross-examining me, he kept using the term 'damages.' This stifled me, so I kept repeating, "I can't answer that the way the question is asked." (Notice that I did not say "I can't answer that," which has an entirely different meaning.) Finally, the attorney got frustrated and asked why I could not

answer the question. I said, "Damages have a specific legal definition that I do not apply to this property." I went on to say, "From an appraisal point of view, the property was not damaged. There were no severance damages. From an appraisal point of view, the market value of the property was x dollars per square foot and the part taken is then y dollars."

The attorney went right back in and said, "So the property was damaged!"

"No," I responded, "it was not damaged according to the legal definition of damages."

You can just imagine how very differently this would have turned out if I had stepped over the term, answered the question and allowed him to continue to use the term damages in cross-examination.

Be sure to elaborate sufficiently to get your point across and be credible. Do not try to sell the appraisal to the court, and do not wait for your attorney to pull it out of you in re-direct. It is your opinion of value, so state it, explain it, and do not feel trapped into being too helpful. Be careful. When on the stand, it is very easy to want to say more and be helpful. Do not say any more than necessary, unless it clarifies your point.

When testifying, who has the right answer?

- a) Me, of course I am always right!
- b) The other appraiser (he has a thicker report)
- c) The one with the best attorney
- d) None of the above

The answer is 'd.' Testifying is not a contest to see who has the 'right' answer. Testifying is explaining your professional opinion of value. You are testifying to facts and supporting your opinion. What you are not doing is speculating.

Stick to Your Guns

If the attorney asks you a question that is counter to the facts, be very clear that this is speculation. Once I had an attorney ask me, "If the remaining land was two acres instead of ten, would there have been damages?" Notice this question has two parts. The normal tendency is to answer the second part and say "yes." Then you may be trapped, because you just responded 'yes' to something other than the facts, and this can be misconstrued later to discredit you.

A clear and more logical response would be to ask, "Are you asking me to speculate on something other than the facts of this case?" Notice that the response is very specific about the first part of the question where the attorney is asking you to speculate on something other than the facts.

If the attorney says yes, then one of two things will happen. Either the attorney who hired you will object (sometimes they aren't on the ball and don't object, particularly new attorneys) or you can respond with, "I can't answer anything about the case other than what I know to be the facts."

Today, my testifying skills are a little more polished and I can usually get away with an innocent comment like, "Oh!? Is this a new set of facts for this case?" If you are new to testifying in court, please do not try this, as it can leave you open to a verbal sparring match, which can look combative to a jury and ruin your credibility.

If the attorney keeps pressing, you can say, "I was summoned to testify as to my opinion of value based on the facts in the appraisal. If the facts are other than those used in the appraisal, and you would like me to give an opinion using additional information, I will need all the facts and time to conduct an analysis."

Occasionally, a judge will direct you to respond to the speculation. If that happens, you must get all of the facts before answering. For example, how can you form an opinion if you do not know where the take is located? Be very clear for the record. Ask the attorney to draw a diagram. Then you can say, "I am speculating here to a question about the property that is not consistent with the known facts."

Clarifying the Facts

It is important to note that in deposition, attorneys often ask questions that do not relate to the case at hand but are exploring ideas and questions for another case. Do not let this throw you. Just remember to be verbally clear that this is speculation.

Once I had an attorney use speculation from a deposition, bring it to court and ask me whether I had made this statement.

**"At face value,
it looked as if I
was countering
my own
testimony."**

Then he quoted the statement from the deposition. At face value, it looked as if I was countering my own testimony. Certainly not a good position to be in if you want to remain credible!

I paused and asked if they would show me the statement in the deposition. I took the time to read before and after the underlined statement. When I finished reading, I replied, "Yes, I said this and it is taken out of context. The statement as read to the court is not applicable to the facts of this case. During deposition, you asked me to speculate on something that was not part of this case, and you are now quoting that speculation out of context. The statement in the deposition is very clear that you had asked me a question not pertaining to the facts of the case, and I was very clear that my answer was speculative."

Typically, you would have given your deposition anywhere from one to six months prior to trial. It will be difficult to remember everything you said. However, by re-reading the deposition the day before you testify, you will find yourself sufficiently familiar with the content, and it will be easier to testify with confidence.

In Summary

Remember that the main reason you are on the witness stand is that YOU are the expert. As the expert, you are answering questions as to your conclusions and opinions derived from the facts of the case. You are also answering the unspoken question of the judge and jury, "Do I believe this person?"

When testifying, it is important to look interested, be polite, and not take anything personally. Most importantly, do not speculate unless directed to do so by the judge. Be prepared to feel tired afterward. It takes a great deal of concentration to stay focused on the attorney's questions and your answers for extended periods. This is particularly true the first few times you testify.

Sticking to the facts—and knowing that you can control the pace of questioning—will help instill confidence and earn you credibility as an expert witness. ★