Lawyers and real estate appraisers

How they can prepare for litigation

by Rex C. Howe

Real estate appraisers must be objective; they may not be advocates. Pleading the cause of the client is the role of the attorney. The role of the witness is to present the facts and to use his expertise to interpret those facts to reach an objective conclusion.

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More than 75 percent of U.S. real estate appraisers have had no experience dealing with attorneys. Many, however, will gain this kind of exposure as valuation questions become much more important. At first, however, many attorneys will have to use real estate appraisers who have little background in dealing with attorneys and in testifying in courtrooms.

Attorneys need to understand that appraisal work is inexact. Regardless of how many appraisal methods the appraiser knows, in the final analysis, appraising is a matter of judgment — educated and trained but judgment nonetheless. Attorneys must realize that well-informed, well-trained, and ethical appraisers do not always agree.[1]

Another point that attorneys must recognize about real estate appraisers is that they must be objective; they may not be advocates. Pleading the cause of the client is the role of the attorney. The role of the witness is to present the facts and to use his expertise to interpret those facts to reach an objective conclusion.

Code of Ethics

The following is from "The Principles of Appraisal Practice and Code of Ethics," Section 7.5, the American Society of Appraisers:

> If an appraiser, in the writing of a report or in giving an exposition of it before third parties or in giving testimony in a court action, suppresses or minimizes any facts, data or opinions which if fully stated might militate against the accomplishment of his client's objective or, if he adds any irrelevant data, or unwarranted favorable opinions or places an improper emphasis on any relevant facts for the purpose of aiding his client in accomplishing his objective, he is, in the opinion of the Society an advocate. Advocacy, as here described, affects adversely the establishment and maintenance of trust and confidence in the results of professional appraisal practice and the Society declares that it is unethical and unprofessional.[2]

In working with an inexperienced appraiser, the attorney should take nothing for granted. The attorney and appraiser should discuss strategy early in the game.

The first thing the appraiser must decide is whether the attorney has a preconceived appraisal figure for the real estate in question. If the figure is one the appraiser knows is unreasonable, he probably should not take the case.[3]

In working with an appraiser, the attorney should say at the outset what he expects. The attorney should know

the appraiser's credentials, have a good idea of his professional strengths and weaknesses so he can protect him on the witness stand, and should help him to increase his knowledge in areas where he is weak. Such preparation may save the appraiser from the adversary's lance.

Compensation

Compensation for the appraiser-witness should be a flat fee, based on an hourly rate, or some combination thereof, regardless of the outcome of the case. Any agreement based on how the case comes out destroys the witness's independence. The attorney should advise the appraiser that the danger of doing the entire project for a flat fee is that the hours required for some obligatory duties, such as giving depositions and doing research, are beyond the witness's control. The attorney wants his expert witness to be comfortable and motivated. The appraiser is not going to feel that way if he is on a fixed fee and has under-estimated his compensation.

In early conferences the attorney should explain his strategy to the appraiser. The appraiser then will weigh that against his professional code. The ethical appraiser will never compromise his professional standards. Occasionally, however, an appraiser will feel pressured to go along with strategy that is questionable to get an assignment.

The attorney should tell the appraiser that once he completes a report and gives it to the lawyer, it is discoverable under the rules of most courts and that unless there is some unusual pretrial order, the opposing attorney cannot force the witness to complete the entire research and preparation of the testimony ahead of the trial date. Also, the attorney should explain that the appraiser has the right to check and recheck data. If the appraiser finds an error at any time between the deposition date and the court date, he should correct it. The attorney should warn him that if the opposing attorney tries to embarrass him in court over an inconsistency, the appraiser is justified in saying that his report was not complete at the time of deposition and that in the process of checking it, he found an error that he corrected.

The attorney should, of course, tell the appraiser if a basic appraisal is needed for negotiation.

Pretrial Tactics

When the attorney and the appraiser receive an appraisal from the other side, they should —

- Read the report and circle with red pencil every error — in grammar, spelling, typography, and especially figures.
- Read through the boilerplate put in the report to beef it up. (Generally, the term boilerplate refers to the demographics, the kind of police department and government of the county, and even which sanitation company serves the real estate in question, etc. About a third of the boilerplate is usually outdated. The attorney and appraiser should circle all of that in red.)
- Look at the comparable sales or factual data. The attorney and appraiser should find out why the opponent's appraiser used certain sales and not others. (Appraisers do not use all sales of properties comparable to the one in question. The attorney and appraiser can get a pretty good feel for the bias of the other appraiser when they know which sales have been ignored.)

At that point, the appraiser should visit the land-records office to try to find data that is incorrect and should examine the property the other appraiser has cited as a comparable sale. Perhaps the property is adjacent to a deteriorating building or neglected land parcel. The appraiser might also try to pinpoint sales the other appraiser did not use and try to decide why.

Then, the appraiser should work with the attorney to evaluate both the properties that were cited in the report and those that were ignored, to gather material for cross-examination.

Another way to find errors in the opposition's case is to obtain other appraisals produced by the opposition and question the language or descriptive phrases.

If the attorney needs a report, the appraiser should prepare it and discuss with the attorney how the report's data jibe with the attorney's strategy. By shaping the report to the attorney's strategy, the appraiser can produce a final product that is supportive as well as accurate and mistake-free — and perhaps beyond the opposition's red pencil.

The Appraisal Report

The report contains the methodology, the supporting data, and the comparable charts the appraiser uses to compare sales and assign percentages to them. I recommend the appraiser give this form to the attorney but with certain factors in mind.

Percentages can be tough for the appraiser to defend on a witness stand. Why is this object or piece of ground 10 percent less valuable than some other? Why not 12 percent? How about 15 percent? How does an appraiser justify an arbitrary assignment? The appraiser says, "That's my expert opinion, my value judgment." After the appraiser has been properly cross-examined, juries begin wondering about those percentages.

The same thing can happen with dollar adjustments. For example, the opposing attorney can ask the appraiser on