

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.

Rex C. Howe is an active member of IRWA Beaver State Chapter 3. He is an independent fee appraiser for Professional Appraisal Research, Inc., West Linn, Oregon. He holds B.S. and M.S. degrees in business administration from Southern Oregon State College and is working toward an M.S. in taxation from Golden Gate University. He is a senior member of the National Association of Independent Fee Appraisers and has appeared as an expert witness in Oregon and Washington courts. He is a licensed real estate broker in Oregon and Washington. Mr. Howe has been a frequent contributor to *The Real Estate Appraiser and Analyst*, journal of The Society of Real Estate Appraisers. Mr. Howe has also contributed to *The Appraisal Journal*, journal of The American Institute of Real Estate Appraisers.

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 strat-

egy, 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

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It is inexcusable for an expert to base testimony on a decision or statutory provision only to learn during cross-examination that it was reversed or qualified by a later ruling or amendment.

cross-examination, "Why was a \$30 per square-foot adjustment used? Why not \$31 or, for that matter, \$28?"

To avoid this problem, I recommend that the appraiser use a form I developed that contains a detailed evaluation of the analysis. It includes information on utilities connected to the property, assessed valuation and taxes, condition of building and grounds, etc.⁴

The appraiser cannot be expected to know all current, pertinent opinions; statutory changes; and court rulings. Counsel must assume this responsibility. It is inexcusable for an expert to base testimony on a decision or statutory provision only to learn during cross-examination that it was reversed or qualified by a later ruling or amendment.⁵

At the Trial

Real estate appraisers are notorious for not basing their appraisals on verifiable facts. Like other humans, they go through life with built-in assumptions. For example, they *know* that the rate of capitalization is 10 percent. Everyone else, however, does not know that appraisers use that rate, so they must be able to justify it.

In addition to being subject to challenge by opposing counsel, the appraiser-witness runs the risk that information he introduces may be considered hearsay and disallowed or accorded little or no weight in the court's deliberations. Therefore, the team should take every step possible to present research findings that are admis-

sible and convincing. Often if the appraiser can use names and companies to identify who said what, his testimony will be more acceptable than if he claims that his sources must be kept confidential.

The witness should structure his research so that if a portion of it is ruled hearsay, the research may still lend considerable support to the conclusion.⁶

Direct Examination

The appraiser must not omit any material facts, especially if implications do not support the client's case. If the witness omits consideration of material facts, whether from incompetence or advocacy, his credibility with the court will be damaged.⁷

Cross-Examination

Tips for Appraisers. Appraiser-witnesses should —

- Review notes and supporting documents before testifying and be familiar with materials they take to the witness stand. Any documents they rely on must be supplied to the cross-examiner on request.

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- Review each question to be certain they understand it; if in doubt, they should ask that it be repeated.
- Consider the answer carefully before giving it.
- Direct answers to the judge and jury (if there is one), not the attorneys. They should not be concerned about the cross-examining attorney's facial expression. Rather, they should watch the judge or jury to see if they understand the answer.
- *Not* rely on counsel for signals or assurances.

Tips for Attorneys. Properties that are subjects of litigation have special problems that expose them to a wide range of values. For example, with "limited-market properties," attorneys should be aware that a discrediting cross-examination can be especially effective. A limited-market property is one for which there are relatively few potential buyers. Many have structures with unique designs, or have been built with special materials. They usually have limited conversion potential and, consequently, are often called "special purpose" or

appraised for a market value based on their current use or their most likely alternative use. The relatively small market for these properties and their long market exposure may result in little evidence to support a market-value estimate.

Because of all these considerations, the cross-examining attorney should recognize that one or perhaps all three traditional approaches to value — cost, market data (direct sales comparison), and income — are fertile ground for discrediting cross-examination.

The cross-examining attorney should also recognize that real-estate litigation is good for "corroborating cross" — eliciting favorable testimony from the opponent's expert to support one's own theory of the case. Working from a report, deposition, or previous testimony, the expert is forced to agree with points that favor the opposition's case. A recitation of those "good points" is an excellent starting point for cross-examination. It fulfills a major purpose of cross-examination — to "display" infor-

The appraiser-witness cannot be compelled to limit his answer to yes or no. He has the right to clarify the answer and should demand to do so to avoid giving an inaccurate impression.

- Keep answers short on cross-examination.⁸ If direct examination is properly handled, the appraiser-witness's answers will be short and to the point. When the appraiser-witness's answers are long and loosely constructed, he opens himself up to the opposition, who will take advantage in cross-examination of any vagueness in his testimony.

The opposing attorney may frame a complicated question designed to leave a certain impression, and then demand a yes or no answer. The appraiser-witness should have been informed that he cannot be compelled to limit his answer to yes or no if that is not appropriate. He has the right to clarify the answer and should demand to do so if he feels that failure would leave an inaccurate impression.

- Never guess at answers. If the appraiser does not know the answer or cannot remember what it is, he should say so.
- Never become emotional. Some cross-examiners attempt to excite the witness's emotions. Anger, fear, embarrassment, pride, or even amusement can cause a witness to think less clearly.⁹
- Anticipate points of attack and prepare surprise answers. An unanticipated, damaging answer will do to the cross-examiner what he is attempting to do to the witness.

"special design" properties. Examples include churches, museums, schools, public buildings, and clubhouses.

Limited market properties may be

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mation. It may not meet the jury's expectations for a dramatic confrontation with a witness, but it makes points crucial to the case and it has a higher "safety quotient" than a discrediting cross-examination.

Possible areas of corroboration include both what the witness *must* admit and what the witness *may* admit.

An expert must admit materials contained in writing prepared for litigation, such as an appraisal or answers given in a deposition. Exhibits or demonstrative evidence prepared by the expert are strong corroborative pieces. Other good supportive materials are "basic truths" or established concepts in the field. These carry little risk to the examiner. The point for cross-examiners here is that the appraisal contains many areas that may be agreed upon — e.g., address, legal description, owner's name, age and size of the improvements, current zoning (which is *not* necessarily highest and best use), and construction materials.

In his zeal to attack the adverse expert witness, the attorney often ignores favorable points that can be gained from cross-examination. One example is a partial taking in a condemnation trial. The adverse appraiser may concede that there has been a taking but disagree about the amount of damages. The cross-examiner may decide to elicit the

details of the taking — e.g., the amount of land taken and the loss of direct access — and then drop the questioning at the point of disputed damages.

The strategy is for the attorney to induce the adverse witness to confirm many of the points the attorney wishes to demonstrate that are favorable to his side. He can secure a string of affirmative answers that will impress the judge and jury. Then, at the point of dispute — the amount of damages — he can drop the line of questioning and wait to take it up later. In this manner, the attorney gains many favorable points during cross-examination instead of encouraging the jury to rivet its attention on the issue of damages.

What the expert may admit is determined by other testimony, common sense, logic, and probabilities. As indications for corroboration, these are not especially reliable.

Highest and Best Use. Every appraiser-witness dreads the moment when highest and best use comes under examination, particularly in cross-examination. Constantly nagging the appraiser is the question "Have I overlooked something in upcoming zoning changes?" Correct highest-and-best-use analysis is the linchpin of the whole appraisal. Analysis of the land as if vacant and of the property as improved is essential. Through highest-and-best-use analysis,


an appraiser identifies the use conclusion on which he based the final value estimate.

Three Approaches to Value. The valuation process is used to develop a well-supported estimate of value based on all pertinent data. To do this, an appraiser analyzes a property by applying procedures that reflect three distinct methods for analyzing data mathematically: cost analysis, sales comparison, and income capitalization. He uses one or more of these, depending on the type of property, the use of the appraisal, and the quality and quantity of data available.

The cross-examiner needs to be aware that although an appraisal which omits one or more approach is less creditable than one incorporating all three, insufficient data may make it necessary to omit the particular method of valuation and moreover an improper use of the omitted approach would temper the conclusion.

- **Cost Analysis.** This approach is based on the premise that the value of a property can be determined by the current cost to build a replacement minus the depreciation evident in the structure plus the value of the land and entrepreneurial profit. This approach is most valid when a property is new. Estimating depreciation for older properties is subject to wide variation in opinion. If a property is old and this approach has been heavily relied on, there is a strong likelihood of discrediting the cross-examination.
- **Sales Comparison.** This approach produces a value by comparing the property with similar ones. The sales prices of the most comparable properties tend to set a range into which the value of the subject property falls.


An appraiser estimates the degrees of similarity and difference between the subject property and comparable sales on the basis of six elements: conditions of sale, financing terms, market conditions (time), location, physical characteristics, and income characteristics. He then makes dollar or percentage positive adjustments for deficiencies in the comparable property relative to the subject property and negative adjustments for superior characteristics of the comparable property relative to the subject property.



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These adjustments reflect the appraiser's judgment. Quantified percentage judgments are also good areas for discrediting cross-examination. The cross-examiner should watch for large percentage adjustments (more than 20 percent) or a large number of adjustments (more than seven or eight). Large numbers of adjustments or adjustments that exceed 20 percent of the value of the subject property are not comparable to it.

This approach is most accurate when a number of properties of similar type have been sold recently or are currently for sale in the subject property's market. If the appraisal report includes sales that are more than a year old, this is another fertile area for cross-examination. Sales more than a year old can be challenged as no longer representative of the market.

- **Income Capitalization.** By using this approach, appraisers measure the present value of the future benefits of property ownership. Income streams and values of property resale (reversion) are capitalized (converted) into a present lump-sum value.

The income approach is most useful for valuing income properties because investors are buying an income stream when they buy commercial property. They buy residential properties for the amenities they provide and rarely for investment. Many appraisers, however, do use a Gross Rent Multiplier (GRM) to value residential property. The factor is derived from the market by finding sales of properties that are comparable to the subject and rented at the time of sale, then dividing the sale price, say \$76,000, by the amount the property is rented for say \$500 ($\$76,000 \div \$500 = 152$ GRM).

Good areas for cross-examination with this approach are whether the

appraiser has been alert to changes in investor requirements as revealed by evidence in the current market for investment properties and to changes in the more volatile money markets that may indicate forthcoming trend.

Assumptions the appraiser has made may relate to the gross income expectancy, the expected reduction in gross income from lack of full occupancy and collection loss, the expected annual operating expenses, the pattern and duration of the income stream, and the anticipated value of the resale or other real property interest reversions.¹⁰ (IRWA)

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Footnotes

- 1 *The Negotiated Settlement, Assessment Digest, 9 (1983)*
- 2 *The Principles of Appraisal Practice and Code of Ethics, §7.5 American Society of Appraisers, The Principles of Appraisal Practice & Code of Ethics.*
- 3 *A Short Course in Survival Techniques for Expert Witnesses, ASA Valuation, 14 (1981).*
- 4 *For a copy of the form, which is for a residential-property appraisal but can be adapted for commercial work, and a form showing how the report may be filled out for acceptable court testimony, send a stamped self-addressed envelope to Trial, 1050 31st Street, N.W., Washington, DC 20007.*
- 5 *Pre-Hearing Preparation for Valuation, Expert Witness — Some Points to Consider, Assessment Digest, July-Aug. 1983, at 4.*
- 6 *A Short Course in Survival Techniques for Expert Witnesses, supra, note 3, at 17.*
- 7 Pratt, *Valuing a Business, Court Testimony, Chapter 16 (1982).*
- 8 *Pre-Hearing Preparation for Valuation Expert witness — Some Points to Consider supra, note 5, at 6.*
- 9 Pratt, at Chapter 16.
- 10 *Pre-Hearing preparation for Valuation Expert Witness — Some Points to Consider supra, note 5, at 6.*

CORRECTION NOTICE

Please note that the 1986 IRWA Education Catalog misquoted the price of course materials for Course 701.

The correct prices are
Course 701 Student Manual — \$15.00
Course 701 Appendix — \$30.00

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