



# IN DEFENSE OF **AN OPINION**

When serving as an expert witness, credibility is front and center



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One might think that two professional appraisers who are given the same parameters for appraising a property would conclude similar values, or at least agree on the values upon which a settlement could be based. But this is often not the case.

### Competing Opinions

When acquiring property rights under Uniform Act guidelines, reasonable parties will usually be able to agree to a negotiated settlement. However, in some instances, the landowner's opinion of the value of the rights being acquired are beyond the limits of what the acquiring authority can justify as being fiscally responsible to the taxpayer.

When a settlement is not possible, a certificate of take is filed in the public records and the landowner often resorts to hiring legal counsel. If further negotiations fail, an appraiser will usually be hired by the landowner's attorney to render an opinion of value. If the appraiser concludes a value that is substantially different from that of the original appraisal on which the offer was based, then it is left up to the court to decide just compensation. This is when the battle of the opinions occurs.

### Establishing Reliability

The U.S. Supreme Court decision has established four considerations for determining the reliability of expert testimony. These include testing, peer review, error rates and acceptability in the relevant scientific community.

In most condemnation cases, a key expert witness is the real property appraiser. They possess specialized training and experience in the valuation of property that is being acquired in whole or in part. For the appraiser to have credibility in a deposition or condemnation trial, they need to be

well versed in such issues as before and after value, damages to the remainder, larger parcel, loss of reasonable access, uneconomic remnant and easement valuation. In some states, it is unlawful for anyone other than the landowner or a licensed real estate appraiser to testify for compensation regarding the value of real property.

For some who have worked with eminent domain cases, there is a perception that certain appraisers are more favorable either as valuation providers for the acquiring authority or for the landowner. As with attorneys who typically represent one side or the other in an eminent domain proceeding, appraisers involved in this specialty tend to be hired almost exclusively by the acquiring authority or the landowner's attorney. As such, the notion that appraisers tend to assume the role of advocacy for their client is not an unreasonable supposition.

Regardless of who they are hired by, the role of the appraiser is always the same: to render an objective opinion of value based upon factual evidence and, if applicable, reasonable assumptions and/or conditions. As stated under the Conduct section of the Ethics Rule of the Uniform Standards of Professional Appraisal Practice (USPAP), "An appraiser must perform assignments with impartiality, objectivity, and independence, and without accommodation of personal interests."

Among other standards of practice, the appraiser must not advocate the cause or interest of any party or issue, nor accept an assignment that includes the reporting of predetermined opinions and conclusions. In addition, they must not communicate assignment results with the intent to mislead or to defraud. If any of these requirements are even perceived as not being adhered to, the credibility of an appraiser's opinion can be significantly diminished.

## Addressing Opinion Influencers

When hired by clients who respect their opinions and value their effectiveness on the witness stand, appraisers become part of a team whose collective goal is to serve the client's best interest. But serving as an advocate for the client can at times conflict with the role of the appraiser, which is to be an advocate for their opinion. In convincing the triers of fact that their opinion is both credible and more suitable than the other appraiser's value, there are some common opinion influencers with which the appraiser is confronted. These include extraordinary assumptions, hypothetical conditions and jurisdictional exceptions.

USPAP defines "extraordinary assumption" as "an assumption directly related to a specific assignment, as of the effective date of the assignment results, which if found to be false, could alter the appraiser's opinions or conclusions." An appraiser must be cautious when presented with an assumption by legal counsel or the client, and ensure that such assumption is reasonable and not an attempt to influence a value conclusion in favor of the client.

A "hypothetical condition" is defined by USPAP as "a condition, directly related to a specific assignment, which is contrary to what is known by the appraiser to exist on the effective date of the assignment results, but it is used for the purpose of analysis." Any time the appraiser essentially denies the existence of a condition that is obviously true, the stated assumption of such condition will likely be perceived as an attempt to conclude a value favorable to their client, especially when the use of such assumption cannot be clearly explained and understood by triers of fact who typically are not well-versed in appraisal terminology.

A "jurisdictional exception" is defined by USPAP as "an assignment condition established by applicable law or regulation, which precludes an appraiser from complying with a part of USPAP." It is not uncommon in eminent domain

appraisals to encounter requirements in the federal or state codes that may conflict with USPAP requirements. It therefore becomes imperative for the appraiser to consult with the attorney when such exceptions are applicable, and to rely upon the attorney's legal opinion as a basis for the inclusion of a jurisdictional exception in the appraisal report.

Aside from these issues, there are some instances where more plausible and defensible causes of valuation variances occur. These are typically the result of different legal instructions, dissimilar appraisal methodology (such as when a larger parcel is involved), diverse highest and best use conclusions,

and experience. If it can be shown that the appraiser has performed valuation services for both acquiring authorities and landowners, this will likely enhance the credibility of their testimony. While the appraiser on the other side will probably have similar credentials, this will equalize the appraisers relative to their capabilities.

The appraiser will be asked to describe the valuation process for the work undertaken in the subject property. This includes how and when the appraiser was engaged, when the property was viewed, who was present during the viewing, what market data was used and how the comparable properties were collected. The appraiser will be

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and assumptions and hypothetical conditions under which the appraiser is instructed to reach a value conclusion. While these issues may be the cause of differing value opinions, the appraiser may need to explain how their interpretation is supported by the law and/or sound appraisal theory.

### On the Witness Stand

As the appraiser prepares for the witness stand, knowing what to expect will help them to appear competent, knowledgeable and prepared to defend their opinion. Under direct examination, the appraiser will be asked to state their qualifications and credentials including education, license status, professional designations

expected to describe the property and its surrounding neighborhood or market area. While every detail need not be shared, it is always crucial to be prepared to answer questions that might be asked under cross-examination, whether you consider them relevant or not.

The appraiser's conclusion of the property's highest and best use always plays a critical role. It is arguably the most important part of the appraisal in that it establishes what type of market data was analyzed in valuing the property. In fact, I believe that determining the highest and best use is the leading cause of divergence in market value estimates between appraisers in eminent domain cases. If the appraisers differ in their conclusions, the one who is most

convincing can effectively negate the other appraiser's testimony because the comparable sales, rentals and capitalization rate used would essentially render their estimated value for an inappropriate use.

### Conventional Methodologies

It is typical for the appraiser to be asked about the three conventional approaches to value, including the Cost Approach, Sales Comparison Approach and Income Approach. For each method used, they will need to describe the process, explain the market data selected and provide the value indicated for the the subject property. If any of the approaches were not used, an explanation as to why it was omitted will be expected.

Since there are weaknesses in each approach that can be effectively challenged by the opposing counsel, the appraiser should be prepared to address them. For example, in the cost approach, the measure of depreciation is difficult to support based on market-derived data, especially if the age of the improvements is high. In the income approach, a slight variation in the capitalization rate can greatly distort value and explaining this in layman's terms might be a challenge. In the sales comparison approach, the use of adjustments, whether quantitative or qualitative, is often subjective and difficult to support from market-derived data.

In those situations where partial acquisitions are involved, the appraiser will be asked to summarize their estimate of the total value before the acquisition, the remainder value before the acquisition, the remainder value after the acquisition and the value of damages or enhancement, if applicable. The divergence in values between appraisers typically results from either the unit value concluded for the land and/or improvements and/or the degree of damages, if any, to the remainder. These differences are reflected in

the value in the acquisition, which is based on the concluded value before the acquisition, and/or if damages are incurred to the remainder, in the value after the acquisition. The appraiser must be able to explain in detail how and why damages accrue to the remainder if such is concluded. Additionally, since a conclusion of no damages would not typically be addressed under direct examination, the appraiser should be able to refute the other appraiser's damage conclusion under redirect examination.

### Challenging Credibility

While credentials and experience play a crucial role, the areas most often challenged on the witness stand center around the appraiser's judgment in selecting the comparable sales, rentals and /or capitalization rates and how the impact of the acquisition of the remainder was assessed.

It is the goal of opposing counsel to destroy the testimony of the expert witness for the opposing side. This can be done in several ways. They might try discrediting the credentials of the appraiser or emphasizing that their clientele is too focused exclusively for acquiring authorities or landowners only, and is therefore biased.

Depending on the personality and style of the cross-examiner, the opposing attorney might attempt to humiliate or ridicule the appraiser to the point that they become so defensive, angry, or confused that their credibility comes into question. Or they might uncover an insignificant error in the appraiser's report, and even though it may be irrelevant to the value conclusion, it can still create the perception that the entire appraisal is wrong. Appraisers who have been questioned by the same opposing counsel are usually prepared for which technique will likely be employed to diminish their testimony. For those who are facing a new adversary in the courtroom, some preparatory research can be invaluable.

### The Final Word

As those who have testified in a courtroom have found, the opinion of the appraiser is not always the final word. One trial in which I served as an expert witness involved the valuation of the larger parcel, a term that may be unfamiliar to general appraisers, much less jurors at a condemnation trial. As a result, I spent considerable time explaining the theory to the jury, including textbook references and graphical presentations. Having sufficiently explained the valuation process and how I had arrived at the final conclusions, I felt confident that my value explanation was well understood. This seemed to be further validated by the nodding of heads by some of the jurors. To my surprise, the following morning my client's counsel informed me that the judge completely disagreed with my textbook theories and had disqualified my testimony. Lesson learned: the judge's opinion always supersedes that of the appraiser.

Regardless of an appraiser's skills, background and experience, their opinion of value may still be challenged by an opposing party. The appraiser who can provide an opinion as an expert witness—and defend it confidently in a court of law—is a highly-valued asset in the world of eminent domain. ☼



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