

AVERTING

PROFESSIONAL LIABILITY CLAIMS

Essential guidelines for appraisers serving as expert witnesses

BY PETER T. CHRISTENSEN



Imagine this: You are hired by the state as its appraisal expert to value Benson's Wild Animal Farm. The state needs the property for a proposed highway project. You appraise the land to be taken for approximately \$1 million. The property owner declines a pre-litigation offer based on that appraisal, and the state commences an eminent domain proceeding. At trial, you testify to the same value, while the property owner's appraiser testifies to a \$7 million value. The jury just "splits the baby," and the award to the property owner is approximately \$4 million. But the property owner is still not satisfied, and it's not over yet. The property owner now sues you, contending that your valuation was erroneously low and alleging various claims of negligence. The owner contends that the condemnation award would have been higher but for your low value and demands damages from you for the difference.



This was a real scenario for the defendant appraisers in a case ultimately heard by the New Hampshire Supreme Court (Provencher, 142 N.H. 848 (1998)). How did it turn out for the appraisal experts hired by the state? The trial court dismissed the property owner's claims against them, and New Hampshire's highest court upheld that dismissal. The basis for the appraiser's successful defense was something called "witness immunity," also referred to as the "litigation privilege" in other states.

Immunization from Lawsuits

Witness immunity generally protects witnesses from claims by unhappy parties in litigation. It immunizes them from civil lawsuits about their testimony, regardless of whether their testimony is right or wrong. As the New Hampshire Supreme Court wrote in its opinion: "The purpose of this privilege is to encourage witnesses to testify and to ensure that their testimony is not altered or distorted by the fear of potential liability." In most states, the doctrine protects a witness from claims not only based on actual testimony on the witness stand or in deposition but also based on communications or statements that are reasonably related to the litigation or potential litigation. The appropriate remedy for a litigant who attributes a negative outcome to what they consider improper testimony by a witness is to appeal, not sue the witness.

Given the same facts, courts in almost all states would reach the same result as New Hampshire's Supreme Court. Many courts would find an additional reason to dismiss such claims by an opposing party—namely that the expert hired by one side in a case does not owe a professional duty to the opposing party. Without the existence of such a duty, a professional negligence claim cannot be maintained.

Does this mean that appraisers who serve as experts in condemnation cases are free from the worry of professional liability claims? Unfortunately, no. According to our professional liability claims records, on a per-assignment basis, expert witness appraisal work is actually far more risky than lending work. Legally tenuous claims by opposing parties still get filed anyway. Beyond that, in most states, while an expert witness is fairly well protected from claims by an opposing party, an expert's potential liability to their own client is a different matter.

An Unhappy Client

An appraisal expert's liability to their client was a central issue in a California Court of Appeal's decision in *Lambert*, 158 Cal.App.4th 1120 (2008). In this case, an appraiser was hired as an expert by homeowners involved in arbitration with their fire insurance company. Their home had been destroyed by fire, and they were arbitrating the amount of the loss. The homeowners were not satisfied with the outcome of that arbitration and sued their appraiser expert for negligence for allegedly failing to render persuasive assistance. They also sued another appraiser who was serving as the arbitrator.

The California appellate court decided that the "litigation privilege does not apply to prevent a party from suing his own expert witness, even if that suit is based upon the expert's testimony." Thus, the appellate court held that the homeowner's case could go forward against their expert appraiser—but held it could not go forward against the arbitrator appraiser based on another similar doctrine referred to as arbitral immunity. Courts in many other states have reached similar conclusions. As an insurance provider to appraisers, it is not unusual to see unhappy clients pursue claims beyond motions to dismiss because they feel that their expert witness appraiser caused them harm in a condemnation case.

Avoiding the Courtroom

As seasoned appraisers are aware, the best way to avoid a claim is to produce carefully supported, error-checked and proofread appraisals. This is doubly true in the context of expert witness work where unsupported positions or errors are usually exposed by the adversarial process. However, even when the appraisal is well supported and justified, we have witnessed cases where an unhappy client proceeded to sue the appraiser.

How can you avoid becoming a defendant for expert witness work? In other words, how can you stay out of the courtroom unless you're being paid to be there? Based on actual claims handled in our program, we have established some important tips that can help appraisers avoid this situation.

Trust your instincts about clients and assignments. When considering a client in a condemnation case, trust your instincts about their propensity to be difficult. If the client is the property owner and they are counting on an unrealistic valuation or litigation result, then that's probably an assignment to back away from. You know already that the client probably won't be happy with the outcome. If the prospective client has used other appraisers or a series of lawyers and is bad-mouthing them, those are strong clues that the client may be impossible to satisfy. Besides making the work harder, these kinds of clients pose a higher risk of suing you. When reporting claims about litigation assignments, many appraisers start the call by telling us something like "I knew this guy was going to be a problem. I wish I hadn't taken the assignment." Don't be of one those appraisers who suffer with that regret.

Be upfront with disclosure when being hired. A common scenario for a client suing his own expert is when the appraiser fails to disclose something relevant to the client's decision to hire them. Perhaps, the appraiser did not disclose a pending disciplinary investigation and its existence came out in a very negative light during the appraiser's testimony, causing the client to settle the case for much less than anticipated. It would have been better for the appraiser to bring up the issue and explain it beforehand.

Let's say the litigation concerns a mobile home park but the appraiser fails to tell the client that they have never appraised such a property and is discredited on the stand because of that. Full disclosure of all information relevant to an expert engagement is a key to avoiding liability. You don't want the client or the client's attorney who hires you to be surprised by something you didn't mention.

Develop a good engagement agreement for expert work and get it signed. A well-tailored engagement agreement is an effective tool for preventing and minimizing legal claims by clients. For liability prevention purposes, here are the key points to nail down in a good agreement for expert witness services in condemnation:

- ▶ Clarify that your opinions and testimony are based on your independent, professional judgment and are in no way predetermined.
- ▶ State in the agreement that the client and their legal counsel (as opposed to the appraiser) are responsible for determining and providing the appropriate valuation date(s). The reason for this is that the date of value is usually a purely legal question.



It is not unusual for an unhappy client to take their appraiser to court when they believe they were harmed in a condemnation case.

It may vary by state or depend on the facts of a case, and the appraiser should not be responsible for making the legal determination. We have actually seen appraisers get sued because the dates of value used in their appraisals were incorrect.

- ▶ Spell out the timing and terms of payment clearly. Ideally, have the attorney retaining you, as well as the party they represent, obligated to pay you (but attorneys do resist this).
- ▶ State that you have the right to withdraw from the assignment as an expert immediately for non-payment and also in the event of an ethical or professional standards issue or disagreement.
- ▶ Consider including limitations of your potential liability—a subject covered in the March/April 2016 issue of Right of Way Magazine.

Be careful with identifying your client and intended users in your reports.

When working for the government on a condemnation matter, there is a risk that the property owner or court hearing a negligence claim filed against you will construe your appraisal work as being on the owner's behalf and for their use and reliance. This opens the door for the court to find that you owed the property owner a legal duty for purposes of a professional negligence claim. As compared to other types of work, such as appraisal work performed for lenders, the line of responsibility is somewhat fuzzier in eminent domain because acquisition offers are based on—and often accompanied by—the appraisals. In reports for government entities, appraisers can lower this risk by specifying exactly who the client is as well as the intended user. You are safer from a professional liability claim by an unhappy property owner if you can identify that the government agency

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was the only intended user of your report. When the property owner is identified as an intended user, the door is more easily opened for their potential claim.

Be prudent in collecting your fees.

You deserve to be paid for your time and service as an expert regardless of the outcome of a case. After all, your compensation can't ethically or legally be based on the outcome. The trouble is that when a case doesn't go the way a client hoped, they might be less inclined to pay. Because of this tendency, it is important to invoice litigation clients throughout a case, rather than allowing a large receivable to accumulate for collection at the end. This is important not only for financial management purposes, but also because when appraisers are forced into having to threaten to file a collection action or actually suing a client to collect a fee, such a client is more likely to sue or file a counterclaim contending the reason for non-payment is alleged negligence by the appraiser. We have seen this happen frequently. In one case, the appraisers sued to collect a sizable fee at the end of a long, complex case that did not end the way the client wanted, and the appraisers were sued back for several million dollars in alleged damages.

The Ultimate Decision

When circumstances have put you in a position where you begin thinking about suing a client, there are some important factors to weigh before heading down to the courthouse.

We recommend that you realistically assess the following:

- Q:** Will the time, effort and cost of suing be worth the recovery?
- Q:** Were there any genuine problems with your work in the case that the client can hold against you?
- Q:** Did a judge reject your appraisal work as not credible and have negative comments about its quality?
- Q:** Are the unpaid fees worth the risk of having the client sue you back for professional negligence?

The unfortunate reality is that in today's world, tenuous claims are filed against appraisers who serve as expert witnesses. And while they may be protected from claims by an opposing party, the appraiser's potential liability for negligence to their own client may be a different matter. Taking a few preventative steps can go a long way in avoiding such expert witness-related claims. ☛



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