EXPERT WITNESS OR FACT WITNESS?

Understanding an appraiser's role

BY CLAUDIA GAGLIONE

We have recently received several inquiries from appraisers that raise concerns. In general, the appraisers do not understand the difference between being a "fact" witness and being an "expert" witness. They are unsure of who the client is, what they might be obligated to do or who will pay them for their services. Here are some key difference between the two types:

FACT WITNESS

- Compelled to testify by subpoena (must appear).
- May be paid fee (not guaranteed).
- Is the appraiser who completed the appraisal involved in the case.
- Has personal knowledge of the property involved in case.
- Is asked factual questions (who, why, what, etc.).

EXPERT WITNESS

- Hired to testify for a fee.
- Did not perform the appraisal involved in the case.
- Has no previous knowledge of the property involved in case.
- Provides their opinion on topic in dispute.
- Cannot be forced to be an expert witness.

Just the Facts

A fact witness testifies about first-hand and personal knowledge: what they did, heard, said or saw. An appraiser would be called in as a fact witness because an appraisal he or she prepared might be relevant in a pending case. Questions for the appraiser may include:

- Who retained them?
- What instructions were they given in connection with the assignment?
- Whom did they speak to about the property?
- What were they were given or told about during the inspection?
- What fee were they paid to complete the assignment?
- What did they observe or not observe during the inspection?
- If a copy of the appraisal is shown to them, is it a true and correct copy of the report they prepared and submitted to their client?

Fact witnesses are typically not paid for their time. They may be obligated (subpoena) to testify because they have personal knowledge that could be relevant to issues in a case.

Depending on the amount of time that has passed between the appraisal and the testimony, a fact witness might have to say he or she does not recall certain facts or details. Testimony must be given under oath. As long as the answer to any question is a truthful answer, there is no such thing as a good or a bad response. In most cases, a fact witness should not be asked for their opinions.

For example, the appraiser acting as a fact witness might be asked if he recalls observing any evidence of a roof leak or evidence of a prior leak during the inspection. Did he recall seeing anything like a water spot on any ceilings? Is it his custom and practice to inspect every room in a home? Does he have any reason to think he did not inspect every room of the subject dwelling? These are all examples of appropriate questions to be asked of a fact witness.

A fact witness should not be asked to respond to a hypothetical question. An example would be: "What if you were told that the buyer received an estimate of $20,000 to repair significant roof damage... would that have impacted your value opinion? In what way?"

Those are not questions a fact witness could answer. It goes beyond his or her "personal" knowledge. It would require the witness to perform additional research and investigation. Simply put, it is not the kind of question a witness could answer based on actions, observations or recollections.

An appraiser might be forced to testify due to a subpoena, which is like a court order. Appraisers are sometimes angry about subpoenas. They argue that producing documents or attending depositions takes too much time and it is not fair that they do not get paid a reasonable rate for that time. The complaints might be valid, but that does not change the fact that subpoenas are a part of doing business and the appraiser might face consequences if he or she does not comply with the terms of a subpoena.

Tell Tale Claims

The following is a tale of an unprepared appraiser and his experience as a fact witness.

An appraiser in New Jersey was hired to appraise a commercial property in what turned out to be a nasty dispute between two heirs; a brother and sister were arguing about how to dispose of the family business after their father's death. The

appraiser had prepared a few appraisals of commercial properties, but mostly did residential work and had never prepared an appraisal in connection with this sort of dispute. The appraiser's client was the brother who was being sued by his sister. They were both supposed to get appraisals to see if they could resolve their differences.

The insured appraiser was instructed by his client (the brother) that his appraisal had to reflect a property value as of the date the lawsuit was filed. The appraiser was still not really clear about what he was supposed to do, but the client agreed to a fee of $5,000, so the appraiser supposed the assignment was too good to refuse.

The appraisal was completed and sent to the brother's attorney. The appraised value, as of the date the lawsuit was filed, was $8 million. The lawyer said that the client was a bit disappointed. He had hoped the appraiser would come in with a value of at least $10 million. The appraiser learned that the sister was offering to buy out the brother so that she could continue to run the business. The sister claimed the property was only worth about $6 million and that was at the heart of the dispute.

Almost a year later, the appraiser was asked to testify at a deposition. He met with the lawyer prior to the deposition and tried to find out what had transpired over the course of the past year. He said the lawyer seemed rushed and that he was not able to answer many of the appraiser's questions.

The appraiser asked if he could look over the sister's appraisal and the lawyer said he had not seen it yet. The deposition was over in a few hours and the appraiser was a little surprised that he had not really been challenged about anything in his report.

A few months later, the appraiser received a demand from counsel for the lawyer, who had been sued for negligence by his client, the brother. The appraiser learned that counsel for the sister had filed a motion for summary judgement, which was granted. The motion argued that the only relevant value in the case was the value "as of the date of death." The sister had submitted her appraisal as of that date, which reflected a value of $6 million.

The brother had no evidence to challenge the sister's value. His appraisal reflected value it was as of the date the lawsuit was filed and that was irrelevant. The judge agreed. Since the only proper evidence of value was the value in the sister's appraisal, he ruled for the sister and said the brother had to accept $3 million for his share of the property.

The brother sued his lawyer for negligence. He said the lawyer should have known that the appraisal he had was worthless because it did not reflect the value as of the date of death. He said the lawyer's negligence cost him at least $1 million, since the brother had expected that his sister would have to pay him $4 million. The lawyer's counsel sent the demand letter to the appraiser saying he was equally at fault for not realizing that his report should have reflected value as of the date of death.

The appraiser admitted that he really was not qualified to take on the assignment. He had never done any work involving estate and inheritance issues. He knew the attorney was not giving him much guidance, but he told himself that it really didn't matter. He was upset, embarrassed and did not want to be sued.

The insurance carrier hired an expert appraiser who agreed that the value of the property, as of the date of death, was about $6 million. The brother really had no damages. He was paid $3 million, which is what he would have been paid if the insured's appraisal was correct. His only damages were the fees he had paid to litigate against his sister. If he had known that $6 million was a reasonable value estimate and that $3 million was the most he would be paid, he probably would not have spent almost $100,000 in attorney's fees to fight.

The E&O carrier for the lawyer settled with the brother and the appraiser was never sued after all. ✪

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