

www.ambar.org/rpte

PROBATE

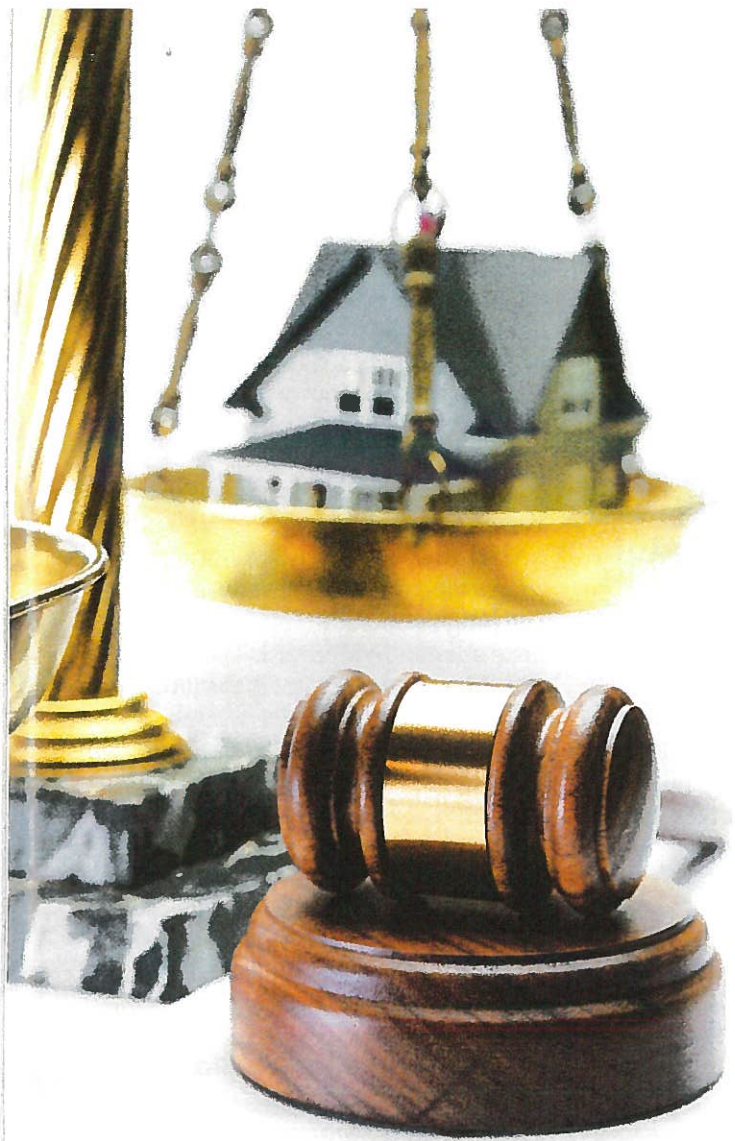
September/October 2016 Vol. 30 No. 5

PROPERTY

A Publication of the Real Property, Trust and Estate Law Section  American Bar Association



Enhanced
Partnership
Tax Audit Rules



12 TIPS FOR THE EXPERT WITNESS APPRAISER

By Michael Rikon

It is surprising how many really qualified appraisers do not know how to testify in court. They may have exceptional qualifications and professional designations. On paper, an appraiser may be incredibly impressive. But is that enough for one to prevail in a case focused on valuation?

Providing expert testimony certainly requires expert knowledge of the subject, but it also requires knowledge of the fundamental rules that should be observed when on the witness stand. The rules will vary from jurisdiction to jurisdiction. An expert must be familiar with what is expected when called as a witness in a particular court. An attorney should

carefully explain the issues and what needs to be proven so that there are no surprises. Following are suggested guidelines that should be reviewed with any appraiser who will testify as an expert witness.

1. The Appraiser Should Have a Clear Understanding of the Assignment

It is extremely important that the appraiser meet with the attorney who is retaining him as a valuation expert witness so that the witness has a clear understanding of the case. Before retention, care must be taken to ensure the witness is able to perform professional services. In other words, do not retain someone not qualified to undertake the assignment. Make sure no conflicts preclude the assignment.

There also should be a clear

written agreement about the payment for services. If payment is to be made in stages, the stages should be fixed and identified. The agreement should spell out fees for preparing an appraisal, or a report, and the additional sums for conferences and testimony. There should be a clear understanding to avoid subsequent problems. If the fee for court testimony is a flat, per diem amount, it should be clear that the expert will be paid for a full day even if testimony lasts only a half day. If overdue sums will require an interest payment on balances, this too should be set forth specifically in the agreement.

2. The Appraisal Format

If the appraiser is writing an appraisal for court testimony, make sure the appraisal is in compliance with local court rules. Does the report

Michael Rikon is president and a shareholder of Goldstein, Rikon, Rikon & Houghton, P.C., in New York, New York.

require photographs of comparable sales? Does it require deed recording information and the names of the parties? Is the appraiser required to provide detailed information regarding comparable rentals? If the appraisal is for trade fixtures, is the appraiser required to list the sources used for valuation? As the attorney on the case, it is your responsibility to make sure the report complies with statutory and court rules.

3. The Appraisal

The expert is going to be cross-examined. It will not be an easy or pleasant experience. Make sure the witness has personally verified the information to be provided. Too many experts rely on an assistant. They should personally inspect and photograph every comparable. Although commercial real estate reporting services are helpful, an appraiser should not rely on a service without verification. If possible, the appraiser should confirm the details of the transaction directly with a party to the transaction. The witness should be prepared to discuss the area of the sale or lease. For example, personal investigation of important valuation criteria should enable the expert to know exactly what the zoning is. Attention to details is critical. What school district is the property in? Where is the property in relation to the train station? The appraiser should have copies of the deeds in his file. A good witness will make notes of inspections and keep them in the workfile.

4. Make Sure the Curriculum Vitae Is Up-to-Date

Some jurisdictions require a curriculum vitae for an expert. The expert should carefully set forth his qualifications, including education, professional designations, licenses, and memberships in professional organizations. There should be an explanation of work experience in various employment periods. If the expert teaches, that is something a judge and jury will want to know. The same is true if the witness is a volunteer for civic organizations or charities. Finally, the curriculum vitae



**Credibility is vital
and can be damaged
by failure to show
respect and candor.**

should list clients and cases for which the appraiser has performed services (with their permission). It also should list every court that has accepted the appraiser as an expert witness qualified to give an opinion.

5. The Witness Should Look Like an Expert

Instruct the expert to come early to court. An expert witness should dress conservatively. Flashy accessories should be avoided. The witness should not wear a sports jacket or blazer to give testimony. Everyone will be looking at the witness, and a jury considers many things when judging credibility, so the witness should look like a professional. A witness must understand that he should not talk to the attorney or client while under cross-examination.

6. Know the Rules

The attorney must explain the format of a trial. It also should be explained that if there is an objection during examination (direct or cross), the witness must wait for the court to rule. Explain that if the objection is sustained, the witness may not answer the question. If it is overruled, it may be answered. It should also be explained that if the attorneys make a legal argument, the appraiser should understand he may be excused

and asked to leave the courtroom to prevent the answer from being suggested.

Ask your witness to project his voice so that he is clearly heard. Tell him to avoid talking in a monotone. It is important to keep everyone's interest by having the witness change his pitch and tone of voice. An expert that cannot be heard by a jury is worthless.

7. Show the Court Respect

It is very important that the expert knows that respect for the court is mandatory. When a judge enters the courtroom, the witness should rise. The judge's and court staff's directions should be followed. The expert should understand that if the judge asks a question while the witness is giving his testimony, it should be answered directly and fully. The appraiser must address the court as "Your Honor." Instruct your witness to never talk over a judge or avoid making a direct response to a question posed by the court. Credibility is vital and can be damaged by failure to show respect and candor.

8. Cross-Examination

First, no matter how difficult, the expert must show respect for the cross-examining attorney. The witness must be polite. Some experts have short fuses. This is dangerous. The witness must answer questions with simple language and avoid jargon. Instruct your witness to answer only the question asked. Incredibly, some experts want to help their cross-examiners. Do not assist a cross-examiner who is having difficulty presenting a question. Make sure your witness never makes negative or self-deprecating comments about his work product, but if an obvious error is presented, it should be admitted to and the witness should move on. The witness should understand that he should never offer to help. He should answer the question and no more. Instruct your witness not to express frustration if limited on cross-examination to a "yes" or "no" answer. Hopefully, counsel will ask the expert to expand on the answer on re-direct.

9. Avoid Verbal Discussions with the Cross-Examiner

Some attorneys have perfected a cross-examination style intended to make the witness angry. Most judges will not tolerate such conduct, but others will not intervene. The witness must stay cool. The nastier it gets, the more polite the witness should become. Talk to your witness while preparing for trial and instruct him not to raise his voice or engage in an angry discussion. This may be exactly the response counsel's rudeness is designed to elicit. An expert should try to answer questions but should not guess; nor should an expert attempt to answer a question he is not qualified to answer. If counsel is limiting a response to "yes" or "no," the witness should not hesitate to respond, if appropriate, that the question cannot be answered "yes" or "no." An expert witness should be instructed not to look at counsel during examination. The witness should need no help answering questions and will be perceived as weak and needing help if looking at the retaining counsel during cross-examination.

10. Try to Answer the Question

When a witness exhibits a lack of comprehension, it does not inspire trust. On the other hand, if an expert does not understand the question, he should request that it be rephrased. Experts are not required to guess or provide inaccurate testimony. A witness should answer one question at a time. Counsel should object to compound questions, but a witness can ask for clarification. Instruct the witness to take his time responding. No appraiser should let an attorney prod him into rapid responses that invite errors.

11. The File Will Be Subpoenaed

The Uniform Standards of Professional Appraisal Practice (USPAP) require an appraiser to maintain a workfile for at least five years, or two years after the litigation is complete. USPAP Ethics Rule U-9 (2016–2017). Be aware that it will be reviewed by opposing counsel. Counsel should review this with the appraiser, and

the appraiser should consider this as he prepares the appraisal. When served with a subpoena, the witness should advise the retaining attorney and provide him with a copy of the subpoena. The witness should comply with the subpoena but not produce more than is requested in the subpoena. The witness should never volunteer to bring more or to suggest that other documents may be in his office.

12. Be Aware That If the Witness Delivers a Report to a Client, It Must Be Part of the File

Under USPAP's Record Keeping Rule, an appraiser must maintain a workfile for each appraisal. The workfile must include true copies of all written reports, documented on any type of media. (A true copy is a replica of the report transmitted to the client. A photocopy or an electronic copy of the entire report transmitted to the client satisfies the requirement of a true copy.)

It should be made clear that any report an appraiser delivers to a client must be part of the workfile. It doesn't matter what it was labeled.

If the report is transmitted to a client, it must be part of the appraiser's workfile.

The law of most states provides that once it has been determined that a prior opinion of value exists it must be produced for use on cross-examination. It doesn't matter what label has been put on the prior report: "draft," "attorney's work product," "confidential," and so on. If prepared by the witness, it qualifies as a prior appraisal.

On cross-examination, the rules of evidence allow a party to impeach the credibility of his adversary's witness through the use of prior inconsistent statements.

Conclusion

When an attorney hires a qualified appraiser to provide expert testimony in real estate litigation, it is critical that the appraiser has sufficient expertise in the subject matter as well as an understanding of what to expect on the witness stand. Effective witness preparation—using some of the tips provided in this article—helps ensure that the appraiser's testimony is perceived as competent, credible, and persuasive. ■

The witness should need no help answering questions and will be perceived as weak and needing help if looking at the retaining counsel during cross-examination.

