Using the Appraiser as an Expert Witness

presented by

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I. Introduction

This presentation on the use of a real estate appraiser as an expert witness is directed to the attorneys with beginner-to-intermediate level skills in litigation and in the familiarity they have with the appraisal profession. My apologies to all who find the material too basic, but even the basics are worth a refresher course periodically.

The practitioner who has used expert witnesses in other kinds of litigation will find many similarities working with real estate appraisers. Practitioners who have worked with appraisers in other kinds of transactions and are new to litigation, will find their knowledge and expertise with appraisal methodology extremely useful as they prepare their case.

Like with any professional, the experience of working with the real estate appraiser depends a lot on the qualifications, maturity and intelligence of the individual appraiser. These personal characteristics should weigh heavily in your consideration of whom you choose to work with. You have no choice of the appraiser that your opponent chooses, but a professional of quality can be relied upon to put your case on its best footing.

There is a voluminous literature in circulation on both the topic of trial techniques and on appraisal theory. There is even a considerable amount written on the use of the appraiser at trial. The Appraisal Institute is an excellent place to start your search to locate information on any conceivable aspect of the real estate appraisal profession.

If you have had a good experience with an appraiser concerning a particular kind of property or cause of action, but do not deem that person or his firm to be appropriate for your current matter, do not hesitate to ask for his recommendation of and referral to another appraiser. Even though nobody likes being passed over for an assignment, law

firms cannot risk appearing to favor a particular appraiser, and appraisers generally understand that it is their own credibility that is at stake. If you have a good appraiser, he or she knows a great deal about other appraisers, and often have solid professional judgments about which colleagues they respect.

II. Case Analysis

Real estate appraisers are retained as experts in the valuation of property and for their opinion testimony in a variety of causes of action, including such common cases as assessment appeals, eminent domain, estate taxation, business valuation, zoning, and the partition of real estate interests. They can be the sole expert at trial, or used in conjunction with the testimony of other experts, such as land planners, civil and structural engineers, and geologists. Their particular use in your case should be predicated on the following analysis:

1. **Cause of Action.** It might seem too elementary to even mention that an attorney ought to familiar with the type of litigation that will filed, but a thorough review of the elements and standard of proof for each cause of action is required. Also, review all applicable statutes and all current case law.

2. **Inspect the Property.** An inspection of the property by the attorney is not always feasible, but it is always informative, useful and advantageous. This will help you prepare for a deposition, or for the direct examination of your own appraiser and the cross-examination of your opponent's appraiser. If the owner is your client, discuss the history and uses of the property.

3. **Review Documentation.** Obtain and review available documents including (when appropriate) title report, survey, ground and aerial photographs, tax map, assessment data and recent tax bills.

4. **Theme.** The appraiser will be able to address a range of issues within the context of an appraisal report, but the kind of report that is ordered is determined by the nature of your case and the elements of proofs necessary to win. You should be prepared to discuss with the prospective appraiser the crux of the issue(s) to be presented at trial

(i.e., highest and best use, replacement cost, market value, etc.).

5. **How Many Experts?** If more experts than just an appraiser are hired, be sure that your appraiser has reviewed the reports and understands the opinions of these experts in other disciplines. Also, the appraiser may properly testify on related issues, such as to "the reasonable probability " of annexation or zoning changes based on various factors cited in Lombard Park District v. Chicago Title and Trust Co., 103 Ill.App.2d 1, 242 N.E.2d 440 (2d Dist. 1968) and Oak Brook Park District V. Oak Brook Development Co., 170 Ill.App. 3d 221, 524 N.E. 2d 213, 219 (2d Dist. 1988).

Once the attorney understands the issues involved in the suit and has reached informed conclusions, it is time to select an appraiser.

III. Retaining an Appraiser

Retaining an appraiser as an expert witness is similar to retaining any expert witness. As it generally falls to the attorney to make a recommendation to the client, you will be responsible for names that you propose. You might also be responsible for the ultimate selection, insofar as many clients will defer the final selection to counsel.

Do not just recommend your friends. The appraiser might be asked in the deposition about the number of assignments he has received from this particular attorney, or from his firm. Nevertheless, a good working relationship with an appraiser who is known to produce quality work and who is a persuasive witness, should not be excluded from consideration. Use your judgment. Assignments should be spread around a number of qualified appraisers based on their strengths and weaknesses as experts, whether that is based on demeanor, experience, kind of property or location.

1. Some Considerations

A. The nature of the cause of action, and its likelihood of going to trial, will determine the number and type of experts you want to retain. Paramount is the experience level of the particular appraiser with regard to the kind of property and legal issues at stake. For instance, an experienced appraiser of suburban shopping centers for *ad valorem* taxation cases might not be your first choice for a condemnation case of a downtown office building. He might be the best choice for any number of *other* reasons, but not because of his experience with that particular kind of case.

B. Reputation and qualifications can be difficult to judge, as a person with a good reputation can coast into a long decline and an up-and-coming appraiser might take years to establish a good name. That is one reason that

clients should hire attorneys who are experienced in particular disciplines, as they are in the best position to know the "informal" opinions about people in the industry (e.g., gossip). A good resume, of course is a fine place to start. Also, check for any disciplinary proceedings against the appraiser. Look for a good record of continuing education. You might consider contacting the Appraisal Institute for advice in locating an appraiser in your vicinity. Generally, you should hire either an MAI, the highest designation awarded by the Appraisal Institute; or, a SRA, the highest designation awarded by the Appraisal Institute for those qualified for residential practice. For farm valuations, consider contacting the American Society of Farm Managers and Rural Appraisers.

C. The advocacy skills of the appraiser are important if the case does go to trial. Regardless of how smart and right your appraiser might be, if he appears to be weak, timid or ineffectual in the presentation of his opinions, hire someone else.

D. Fees are a consideration whenever hiring an expert, but they become a greater concern with less valuable, or more speculative cases. The more that is at stake, the less sensitive to price the client should be (within reason, of course). The client will turn to his attorney for advice on appropriateness of the fee quote.

2. The Attorney and Appraiser Working Relationship

A. The attorney is standing in the shoes of the client and therefore the appraiser is, in an operational sense, working for the attorney. He is very often selected by you and he receives the parameters of the assignment from you. You will also probably be involved in the negotiation of fees, but by all means, have the client sign the retainer agreement. Making the assignment should involve a

candid discussion of concerns that the attorney has regarding the value of the property, deadlines and the type of written report that is required. Very often a limited, restricted appraisal report will be ordered first, with the decision to order a full, narrative report made later. There is no sense in going to the extra expense of a complete report if the preliminary report indicates that anticipated valuation of the property will come in outside the range of usefulness for your particular litigation. For instance, if the government entity that is condemning your property is offering you a million dollars, and your preliminary appraisal suggests a range of value between $950,000 and $1,050.000, there is not much to litigate.

B. As the attorney, it is your responsibility to obtain and provide to the appraiser the documents that are pertinent to the valuation of the real estate. The appraiser can assist you with a checklist of items. Generally, an appraisal will be made with certain assumptions, such as that there are no environmental hazards on site. If you know that the property is a Superfund environmental clean-up site, for instance, do not fail to disclose such relevant data.

C. Discuss legal issues with the appraiser and whether those issues impact value, (e.g., lots vs. acreage, likelihood of re-zoning, legal vs. non-conforming use, date of valuation, etc.).

D. Read the written report and do not hesitate to review the written report with the appraiser. Ask dumb questions now, instead of in front of the jury. You will have to understand your appraiser's thinking well; you may have to rehabilitate his testimony on re-direct examination after your opponent's blistering cross-examination.

E. It is the attorney's responsibility to prepare the appraiser for his deposition and for trial. Nobody should ever tell a witness what to say. You are

there to review his testimony with him and to advise him on general matters of use to all witnesses, such as, answering questions verbally, answering just the question asked, avoiding speculation, etc.

IV. Reviewing the Written Report

Appraisals come in various styles and formats, and have more or less "canned" information about the history, demographics and economic climate of the geographic vicinity around the subject property; but they all have certain elements that are required by USPAP and the laws of the relevant state. In Illinois, a complete, self-contained appraisal report will include the following:

1. Letter addressed to the client identifying the property by permanent index number(s), the scope of the assignment, identification of the property, date of valuation, opinion of value, and the signature and license number of the appraiser.

2. Several photographs of the subject property, front and back, inside and outside.

3. A summary of the physical characteristics of the property and the improvements thereon, including lot size, gross building area, address, zoning, etc. The description of the improvements should include its overall condition and deferred maintenance.

4. Scope of the appraisal assignment, interest valued, the highest and best use of the property, and its legal description.

5. Date of the latest inspection, date of appraisal report, and effective date of valuation.

6. A brief discussion of the "approaches" to value.

7. Valuation of the land, including recent comparable sales and an analysis of the those sales (with appropriate adjustments), and final land valuation.

8. The Cost Approach is based on the principle that an informed buyer would not pay more for the property than it would cost to replace it. That analysis is adjusted for age and for functional and external obsolescence.

9. The Income Capitalization Approach is based on the principle of the value of the property as a present worth of its prospective income stream. An analysis of recent leases of comparable properties is analyzed, as well as a discussion of *pro forma* income and expense data, and the derivation and application of a capitalization rate.

10. The Sale Comparison Approach is based on the principle that, in arms-length transactions, people will pay similar prices for similar properties within a reasonable vicinity and time frame.

11. The appraiser will then discuss his analysis and conclusions concerning these approaches, and present a final estimate of value.

12. The qualification of appraiser must be included, and pertinent data (leases, income and expense figures, environmental reports, etc.) in an addenda to the appraisal.

Appraisals for particular purposes, will have additional information. For instance, appraisals for assessment appeals will include a description of the prior and proposed assessments, and recent real estate taxes.

In reviewing the appraisal, the attorney might pay less than strict attention to a "canned"

description of the founding of Chicago as an outpost of fur traders, but focus on the assumptions that underlie issues like obsolescence, capitalization rates, and the adjustments made concerning comparable sales.

V. Legal Issues in Opinion Evidence

Although there is an enormous body of Illinois case law on the use of the "expert witness" (and more recently the "opinion witness"), the law changed substantively on July 1, 2002, the effective date of new Illinois Supreme Court Rule 213, superceding old Rule 213, as previously amended in 1997.

There are now three kinds of witnesses. The concept of "opinion witness" is not referenced (formerly defined in old Rule 213(g) as "...a person who will offer any opinion testimony"), nor is the concept of a "consulting expert" referenced (formerly defined in old Rule 220(a)(2) as "...a person who has be retained or specially employed in anticipation of litigation or preparation for trial but who is not to be called at trial". There is now a "consultant," who is a "person who has been retained or specially employed in anticipation of litigation or preparation for trial but who is not to be called at trial." Rule 201(b)(3).

There is no substitute for simply reviewing the exact language of the revised Rule itself:

Rule 213

(f) **Identity and Testimony of Witnesses.** Upon written interrogatory, a party must furnish the identities and addresses of witnesses who will testify at trial and must provide the following information:

(1) *Lay Witnesses.* A "lay witness" is a person giving only fact or lay opinion testimony. For each lay witness, the party must identify the subjects on which the witness will testify. An answer is

sufficient if it gives reasonable notice of the testimony, taking into account the limitations on the party's knowledge of the facts known by and opinions held by the witness.

(2) *Independent Expert Witnesses.* An "independent expert witness" is a person giving expert testimony who is not the party, the party's current employee, or the party's retained expert. For each independent expert witness, the party must identify the subjects on which the witness will testify and the opinions the party expects to elicit. An answer is sufficient if it gives reasonable notice of the testimony, taking into account the limitations on the party's knowledge of the facts known by and opinions held by the witness.

(3) *Controlled Expert Witnesses.* A "controlled expert witness" is a person giving expert testimony who is the party, the party's current employee, or the party's retained expert. For each controlled expert witness, the party must identify: (i) the subject matter on which the witness will testify; (ii) the conclusions and opinions of the witness and the bases therefore; (iii) the qualifications of the witness; and (iv) any reports prepared by the witness about the case.

(g) **Limitation on Testimony and Freedom to Cross-Examine.** The information disclosed in answer to a Rule 213(f) interrogatory, or at deposition, limits the testimony that can be given by a witness on direct examination. Information expressed in a deposition need not be later specifically identified in a Rule 213(f) answer, but, upon objection at trial, the burden is on the proponent of the witness to prove the information was provided in a Rule 213(f) answer or in the deposition.

> Without making disclosure under this rule, however, a cross-examining party can elicit information, including opinions, from the witness. This freedom to cross-examine is subject to a restriction that applies in actions that involve multiple parties and multiple representation. In such actions, the cross-examining party may not elicit undisclosed information, including opinions, from the witness on an issue on which its position is aligned with that of the party doing the direct examination.

The disclosure requirements for Controlled Witnesses remain the same: the disclosure of the subject matter upon which the witness will testify; conclusions and opinions and the bases thereof; the qualifications of the witness; and, any reports prepared by the witness about the case.

Perhaps most important of all, is new Rule 213(k), which states: "**Liberal Construction**. This rule is to be liberally construed to do substantial justice between or among the parties." The Official Comments to Rule 213(k) explains that "This rule is intended to be a shield to prevent unfair surprise but not a sword to prevent the admission of relevant evidence on the basis of technicalities."

The Federal System

Article VII of the Federal Rules of Evidence governs the admission of opinions and testimony of experts in litigation in Federal courts. Specifically, Rule 703 provides for the Bases of Opinion Testimony by Experts, and Rule 705 provides for the Disclosure of Facts or Data Underlying Expert Opinion.

There are several Federal cases that you should be familiar with, especially *Daubert* and the extension of *Daubert* in *Kumho.* The adoption in state courts of these cases should be ascertained by the practitioner.

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). The Supreme Court reviewed the standard for the admissibility of expert testimony from the landmark case, *Frye v. United States*, 293 F. 1013 (DC Cir. 1923), which established the "general acceptance test." The Court ruled that now the trial court is obliged under Rule 702, to serve as the "gatekeeper" in order to assess the reliability of the opinion of the expert, which must "have a reliable basis in the knowledge and experience of his discipline." *Daubert* at 592. The Court identified five non-exclusive factors to be considered: testing of the theory or technique; peer review; risk of error; and, generally accepted standards (the *Frye* test). *Id.* at 593-94.

Kuhmo Tire Co. v. Carmichael, 527 U.S. 137, 119 S.Ct. 1167 (1999). The Supreme Court ruled that *Daubert's* factors apply to all expert testimony, whether based in science, technology, skill or experience. *Id.* at 138. They held further that *Daubert's* factors were a non-exhaustive list to be considered by the trial judge, and that the trial judge had "considerable leeway" in assessing the reliability of an expert's opinion. *Kuhmo* at 151-152.

For a good pre-*Kuhmo* review of Illinois cases applying Rule 703 and 705 to appraisers, see Richard A. Redmond's Chapter 7, *Valuation of Property in Eminent Domain*, Illinois Eminent Domain Practice, Illinois Institute for Continuing Legal Education (1995). In particular, Federal Rules 703 and 705 were held by the Illinois Supreme Court to be applicable to real estate appraisers in condemnation suits in *City of Chicago v. Anthony*, 136 Ill.2d 169, 554 N.E.2d 1381 (1990).

As recently as 2002, the Illinois Supreme Court decided *Donaldson v. Central Illinois Public Service Company*, 199 Ill.2d 63, 767 N.E.2d 314, which held Illinois courts to an essentially "*Frye*-plus reliability" test, previously articulated by the Fourth Circuit in *Harris v. Cropmate Co.*, 302 Ill.App.3d 364, 706 N.E.2d 55 (1999).

The practitioner might also want to consult Freehan, *Life after Daubert and Kumho Tire,* 88 Ill.Bar. J. 134 (March 2000); and, Devine, *The Effective Use of Expert Witnesses in Eminent Domain Cases*, CLE International O-1 (2002).

VI. Discovery

The purpose of written discovery interrogatories, requests to produce documents and depositions, is to obtain all of the information the expert has in his possession, has relied upon to form judgments and the conclusions derived therefrom. Remember that the attorney desires to "discover" information at this stage, not to "use" it – not yet.

1. **Start at the Beginning**:

A. Serve Rule 213(f) interrogatories in *every case* and answer in detail Rule 213(f) interrogatories served upon your client.

B. Meet court imposed deadlines – the consequences of failure can be fatal.

C. Disclose all witnesses and their opinions, but specifically those of independent and controlled experts, and the bases and conclusions on which they intend to testify. At trial, there is no such thing as a good surprise.

D. Disclose rebuttal witnesses and the bases and conclusions of their opinion.

2. **The Appraiser's File is Yours for Review**:

A. Request the production of all data, including the initial contact with the attorney and assignment; notes on his investigations; all photographs; analysis; opinions and conclusions.

B. Request a copy of the appraiser's current Curriculum Vitae (his

qualifications should be included in the appraisal report).

C. Request a copy of the written appraisal report (and any prior reports done by the witness or other appraisal reports on the property in his possession.

3. **The Deposition**:

A. Mind your attitude – Cast aside any hint of the tough, smart lawyer demeanor and cloak yourself in the persona of the humble student.

B. Ask open ended questions. Leading questions are for cross-examination, You want the expert to reveal all, and to avoid short, brusque answers. So, ask questions like, "Did you consider recent sales?" and "Have you disclosed all comparable sales that you considered?".

C. Avoid displaying your knowledge. Trying to impress the appraiser can cause you to fail to ask simple "why" questions. Do not make assumptions about the appraiser's methodology. Ask what he did and why he did it.

D. Never argue with the deponent. (Duh?)

E. The Appraiser's Assumptions. Seldom will the appraiser's opinion of value – which presumably differs substantially from your own appraiser's valuation – be based on a flawed formula, incorrect math or mistaken data. (If it is, the deposition is not the place where you will want disclose the problem, since he will have time to recover with a plausible explanation at trial.) Rather, the appraiser's assumptions and methodology are the crux of the matter. Pin him down on what he thought, did and concluded, and whether he has completely

described everything.

F. Tipping your hand. Be alert to the fact that how you ask a question can reveal much about your own perceptions and strategies.

4. **Defending a deposition.**

Generally, defending the deposition of your appraiser can be considered an easy afternoon. However, be sure to meet with the appraiser beforehand to review his testimony – especially any potential trouble spots. Presumably, based on your prior analysis of the case, you have already made an educated calculation of the probability of the case going to trial, and selected an appraiser experienced in testifying. You might also brush up on the rules of evidence, as you will need to preserve your objections for trial by making them at the deposition. The deponent will still need to answer the question despite the objections (except in rare circumstances), but the objection must be made. Finally, you will generally have an opportunity at the end of the deposition of your appraiser to ask a few questions of your own. This is partly a courtesy, and also for the purpose of clarifying earlier testimony.

VII. At Trial: Direct and Cross-Examination

At trial, the attorney seeks to present his own appraiser before the court (or jury), as a credible person, a knowledgeable expert and a persuasive witness. He seeks to limit the impact of his opponent's appraiser by any number of stratagems. For instance, he might expose errors, contradictions, bias or dubious assumptions. To conduct a direct examination of your witness is a different skill than to conduct an effective cross-examination of your opponent's witness. Both tasks are certainly frequently done by the same attorney, but if the case is significant enough to warrant a trial team, then the attorneys should determine among themselves prior to trial who is best suited to each task. The style of the cross-examination is closely tied to the closing argument, while the style of the direct examination is more like that of an opening statement.

1. The Direct Examination

A. Systematically develop your appraiser's testimony. Like the discovery deposition of your opponent's appraiser, you should ask open – not leading - questions on direct examination. However, you do not want your witness to answer more than your question calls for. You must carefully guide the questions to cover all of the issues that must be addressed, and to do so in manner that evokes an image of the appraiser, and the way he did his job, as persuasive.

B. Qualify the Expert. Start by reviewing the appraiser's credentials. Dwell on the most impressive achievements. On the pretext of moving the trial along, your opponent might offer to stipulate that your appraiser is an expert at the valuation of property. Judge the circumstances for yourself, but short of a good reason, decline this offer. Your appraiser's credentials should be impressive, and impressing the trier of fact is exactly what you want to do. Do not "guild the

lily," however, by trumpeting his credentials with grandiosity.

C. Methodology. With clearly asked questions and answers free of jargon, the attorney and his appraiser should move like a team over all the pertinent issues of the valuation that are before the court. Focus on the crux of case from *your* perspective (e.g., highest and best use), but do not entirely avoid you weakest area (e.g., market sales). The more credible your appraiser is on non-controversial matters, and the more reasonable his approach to value seems, the more persuasive he will be on any dicey issues

D. Conclusion of Value. By the time the appraiser is thoughtfully reciting his conclusion of value, the court or jury will have learned of : i) the appraiser's substantial experience and expertise; ii) the physical characteristics of the property and its vicinity; iii) its highest and best use; iv) recent land sales and the cost of replacing the improvements (assuming it is not a land appraisal); v) an analysis of the value of its stabilized income stream; vi) review of recent market sales of comparable properties in the vicinity; and vii) an analysis reconciling these various approaches to arrive at a final conclusion of value. At this stage, you have not been opposed, other than by the occasional objection. If a jury is not eating out of your hand like a pet, you might be in for rough sledding with the cross-examination.

2. **The Cross-Examination**

A. Do not expect a "gotcha" moment, where the appraiser will be stunned and stumped by your questions, and will sheepishly admit that he was wrong all along. He will not admit that his judgment was erroneous or his opinion flawed, so do not expect him to.

B. A good appraiser has had considerable experience on the witness stand and will know how to handle an embarrassing question or parry a direct attack. Nevertheless, box him in and insist on direct answers to direct questions.

C. Everyone enjoys a spirited cross-examination – hence the popularity of courtroom dramas, but avoid the temptation to bully the witness or to grandstand. The purpose of the cross-examination is to inform and persuade the jury, and the principal means of achieving this is as flows:

i) Use your opponent to buttress the testimony of your appraiser in areas where they agree. He will, of course, disagree with your appraiser's conclusions, but they might agree on a surprising number of issues.

ii) Target elements of the appraiser's testimony where his exercise of good judgment is limited. For instance, emphasize if his access to or inspection of the property was limited by some factor (e.g., weather); lack of background or experience with comparable properties; or, a relationship that appears too "cozy" with the attorney or the owner (e.g., a particular appraiser is used too frequently on certain types of cases).

iii) Misjudgments are the crux of your case, although outright errors can be useful (e.g., mistaken or incomplete description of the subject property). Misjudgments might be the selection of sales that are too old or too remote from the subject, an inappropriate capitalization rate, or a questionable obsolescence factor. These are the false assumptions that erroneous conclusions are built upon.

iv) Capitalize on mistaken or confused testimony as it arises in the course of testimony. These are the opportunities that are seized upon by alert trial attorneys.

3. **Prepare and Prioritize, or Perish**

It should go without saying that preparation is the key to successful trial work. The form that preparation should take, however, is not the scripting of verbatim questions that you hope to read through at trial. Rather, an intimate knowledge of the opponent's appraisal report, as well as your own appraiser's report, and a thorough understanding of what must be proven, an by what standard of proof.

Select issues of significance. Impeaching the witness on a multitude of ancillary issues might confuse the jury or imply weakness on your main issues. It is not enough to just undercut the expert's credibility generally. You want the KO punch!