

Using non-appraiser expert witnesses in condemnation trials

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Abstract (Article Summary)

Disagreements between opposing appraisers in condemnation trials usually center on some physical or regulatory aspect of the property that related to the property's highest and best use. Consequently, non-appraiser expert testimony is often needed. A non-appraiser witness will be used for 3 purposes: 1. to lay a foundation for the appraiser's testimony, 2. to educate the trial team and jury, and 3. to shield the appraiser from damaging testimony. The attorney and the appraiser should choose the non-appraiser expert jointly. After selecting the non-appraiser expert, the attorney should integrate the expert into the trial team as quickly as possible.

Full Text (3771 words)

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WHEN TWO OR MORE APPRAISERS appraise the same piece of property but produce appraisals that differ by substantial amounts, the disagreement over value usually centers on some physical or regulatory aspect of the property that bears upon its highest and best use. Condemnation cases are seldom tried over mere differences in appraisal techniques.

Contaminated property is an obvious example. Questions concerning the nature and degree of the contamination, the appropriate remediation, and how much the remediation will cost are issues that the appraisers are often not fully qualified to resolve without assistance from other experts. The appraiser dare not take the witness stand and claim to rely on the appraiser's "own background and experience" on how the property's value is affected unless the appraiser can claim expertise as an environmental scientist. Since few appraisers can make such a claim, the appraiser must be prepared to admit reliance, in principal part, on data and opinions supplied by such an expert.

In consequence, there will be non-appraiser expert testimony at trial and, in some cases, the resolution of conflicting expert testimony on these foundational issues can have a greater effect on the verdict than the valuation testimony itself. Therefore, the success of the lawyer and the appraiser in orchestrating the testimony of the non-appraiser exert witness is usually a critical aspect of success in condemnation and valuation trials. Both the lawyer facilitating the testimony and the appraiser who will rely on it must work together to obtain the necessary foundational testimony and to incorporate it into the appraisal.

THE NON-APPRAISER EXPERT HAS THREE VITAL ROLES ON THE LITIGATION TEAM * The non-appraiser expert is part of the litigation team for three critical reasons.

Lay a Foundation for the Appraiser's Testimony

First and foremost is the absolute need to lay an accurate foundation for the appraiser's testimony. An appraiser who has rendered an opinion based on wetland information supplied by the property owner or the lawyer is in serious trouble when that information is refuted by a wetland biologist put on the stand by the opposition. Such an appraiser is faced with a Hobson's choice. The appraiser must either acknowledge the mistaken information and backpedal with respect to the effect of that information on value, or stand by the information and attempt to withstand cross examination on whether his or her wetland "credentials" stack up to the wetland biologist who testified for the opposition. The former course is problematic and the latter may lead to disaster.

Thus, when value-critical issues like wetlands and contamination are involved, the litigation team simply must include an expert who can ensure that the critical information upon which the appraiser is relying is correct in the first place, and who can defend that information if challenged by an expert for the opponents.

Educate the Trial Team and Jury

The expert must not only supply correct foundational data to the appraiser, but must also assume a second role as educator for the trial team and the jury. Both the lawyer and the appraiser, and perhaps other witnesses as well, need to be schooled in the nuances of the technical issue in dispute. The expert will assist the lawyer in deposing and preparing cross examination for the opposition's expert. The expert will assist the appraiser in understanding the technical variables that underlay the valuation question, so the appraiser knows where the key points are in the technical testimony. Armed with this knowledge, the appraiser is therefore prepared to emphasize or deemphasize those issues in the valuation testimony, depending upon how the technical testimony went.

Moreover, this interplay between the non-appraiser expert and the rest of the team often will enable the appraiser to develop new insights on how to approach the value issue. For example, advice from a wetland biologist indicating that a substantial portion of the subject property will be required to be restored and enhanced as a wetland may cause the appraiser to conclude that the highest and best use must be changed from an office use to something such a restaurant that could use the wetland as a visual amenity.

Educate the Jury on Technical Matters

In addition to educating the trial team, the non-appraiser expert also must educate the jury. To the degree that the appraiser's theory of value requires an understanding of technical matters such as contamination, land regulation, or other special matters, the jury will be able to trust the appraiser only if the appraiser's technical assumptions are explained in a complete and understandable way.

Although the appraiser may understand the technical assumptions and even be capable of explaining them, the appraiser is usually not the best choice for the task of educating the jury. The non-appraiser expert usually will have a deeper and broader grasp of the subject area. Therefore, the expert is in a better position to provide detailed explanations and is less likely than the appraiser to get trapped on unfamiliar ground during cross examination.

Moreover, the appraiser is usually the team's last and most important witness and therefore his or her testimony must be tight and crisp. Long technical explanations of matters not directly related to the calculations of value detract from the force of the appraiser's testimony. Accordingly, the team's experts are used to educate the jurors regarding everything they need to know to clearly understand the bottom line, that is, the appraiser's theory of value.

Education Includes Persuasion

The task of educating the jury often involves as much persuasion as education. After all, if appraisers for both sides have conceded that the principal difference in their opinions of value center, for example, on the size of a wetland, and both have said that they relied upon their team's wetland biologist for that information, the jury's verdict is likely to turn on which biologist's testimony was the most persuasive. In these circumstances, the non-appraiser expert can make or break the appraiser's theory of value.

Persuasive Expert Can Bolster Appraiser's Testimony

Even if the size of the wetland is not a critical element of value, a persuasive expert can do much to bolster the appraiser's credibility. After all, if the appraiser is forced to concede his or her reliance on an expert who has been discredited before the jury, the appraiser's judgment in choosing his or her sources is called into question. The appraisal's conclusions may therefore fall under suspicion as well, no matter how hard the appraiser tries to distance the appraisal from the work of the expert. On the other hand, an appraiser whose testimony regularly refers to an expert who was particularly impressive on the witness stand will bolster the appraiser's own credibility.

Insulate the Appraiser

The third role of the expert is that of insulator. This role is a defensive one. Since the battles over technical issues in condemnation trials have as many losers as winners, the litigation team needs to be prepared for those instances when the team's expert loses such a battle. When a non-appraiser expert does falter on the stand, all is not necessarily lost. If the team's losing gladiator is the non-appraiser expert rather than the appraiser, there is still a chance to salvage the theory of value when the appraiser takes the stand. If the lawyer and the trial team analyze in advance those issues that could go poorly, the appraiser can offer alternative justifications for the value conclusions that are not hopelessly tied to the position taken on the technical issue by the now discredited non-appraiser expert.

The insulation that the expert provides for the appraiser can sometimes prevent disaster. Consider the example of a land-planning expert who testified that the subject property could be used for offices, only to see the judge agree with the

opposing expert that office construction at the site was limited to 10 per cent of the building footprint. Based on advice from the land planner, the appraiser had based his primary theory of value upon office space as the highest and best use of the property. Fortunately, the team knew in advance that the issue was hotly contested and the appraiser was prepared with an alternative set of comparable sales reflecting the judge's ruling that the zoning on the property made it suitable solely for industrial uses.

CHOOSING THE EXPERT * Whenever possible, the lawyer and the appraiser should select the non-appraiser experts jointly. Lawyers and appraisers tend to emphasize slightly different qualities in their view of what makes a good non-appraiser expert, but the basics are beyond dispute. Naturally, the expert should have good credentials. Unless the expert is an icon in the relevant field, however, credentials usually only become significant if they are absent. Since cross examination regarding an expert's credentials often merely provides the expert with a second opportunity to tout significant accomplishments, you are usually safe in checking to see that the expert is not wholly without credentials and then moving on to the more important qualifications.

Does Expert's Opinion Support the Appraiser?

The threshold qualification, of course, is whether the expert's opinion supports the preliminary theory of value that the appraiser has developed. This is an aspect of the selection process for which the appraiser's participation is vital. The appraiser provides the potential expert with the basic premises that require the expert's support and determine if such support is likely. If not, another expert's point of view is sought, or the theory of value is adjusted.

Once the appraiser is satisfied that the approach of the potential expert is consistent with the theory of value, or vice versa, the search for the right expert shifts to the concerns of the trial lawyer. Beyond question, the key attribute the lawyer looks for is the potential expert's ability to communicate. It is of little value to the team if the expert has the correct point of view about the controversy, but is unable to successfully convince the jury of its correctness.

Will the Expert Make a Good Witness?

A witness' effectiveness in communicating from the witness stand turns on several factors. The best experts are those who clearly relish the opportunity to answer questions about their area of expertise without appearing to seize the opportunity to lecture a captive audience.

Accuracy and Self-Confidence

The best experts have the self-confidence to have their points of view questioned and perhaps even demeaned by the opposition without becoming defensive, yet be sufficiently humble and down to earth so they do not appear arrogant and out of touch to the jury. A sense of humor in response to unwarranted or provocative cross examination questions will always be more effective than a huffy rejoinder. Similarly, an effective expert will be able to answer questions with confidence and finality, wherever possible, rather than constantly relying on disclaimers and qualifiers.

In most instances, these abilities have little to do with the expert's substantive knowledge, but rather reflect the expert's personality and self-confidence. Experienced counsel can determine early in the expert's interview whether or not these essential attributes are present. The lawyer's job is to find an expert who is confident about certain conclusions pertaining to the case and then to work with the appraiser to modify the theory of value, if necessary, to allow the non-appraiser expert to testify regarding only those conclusions about which he or she can speak with confidence and certainty.

Reliability

In addition to accuracy and confidence, another vital attribute of the right expert is reliability. Reliability is much more difficult to assess in an interview, but is of critical importance to both the lawyer and the appraiser. Good experts meet deadlines. The expert must realize that the expert's work is a key building block to the appraisal itself and, correspondingly, to the appraiser's trial testimony. Although the appraiser will form a preliminary theory of value early on, most of the work on the theory of value will be done only after the non-appraiser expert has provided the necessary technical data and foundation, such that delays in preparing and presenting that information to the team undermine the entire effort. If there is a delay, for example, in determining the size of a wetland or the extent of contamination, the appraisal cannot be advanced beyond the preliminary stage. The nature of properties used as comparable sales cannot be determined until the technical matters are resolved with respect to the subject property. In jurisdictions where the exchange of appraisal information is mandated by the court pursuant to a scheduled date, such a delay could force the appraiser to commit to a theory of value that later could be weakened by subsequent data and opinions developed by the team's own non-appraiser expert.

Check References

The best way to ensure that the expert can be counted upon is to inquire of the expert's references. Other trial attorneys and appraisers who have worked with the expert can provide the necessary assurances or warn of problem areas.

Simple and Understandable Presentations

Similarly, top quality experts demonstrate an ability and a willingness to be thorough in their research and preparation. Moreover, they are able to create simple but understandable presentations that illustrates their research and preparation. Some experts are content to rely upon their own extensive experience in the field. This kind of short cut to preparing a foundation for an opinion is no match for the expert who can refer to extensive research and analysis to support his or her opinion.

Team Players

Finally, the best experts are team players. The confidence and self-assurance that are essential in a good expert can be deadly to the team's effort if the expert's ego compels the expert to attempt to usurp roles reserved for the appraiser. It is certainly quite common, for example, for experts in fields related to real estate to have ideas about things such as the highest and best use of the subject property, or the demand or supply of certain types of land, or even of the value of the land itself.

Some otherwise highly talented experts simply cannot resist observing on the witness stand that they, too, have an opinion about some of the issues that the appraiser will list as the basis for the valuation conclusion. These observations open the door for inquiries from the opposition that can confuse and even undermine the appraiser's opinion of value.

BRING THE EXPERT ON BOARD AS SOON AS POSSIBLE * After the expert has been selected, the next task is to integrate the expert into the trial team. This includes spending the time to carefully define the expert's tasks and his or her role in the preparation and presentation of the necessary testimony, as well as the educational and informational tasks mentioned earlier. The attorney, the experts and the appraiser should discuss and reach a clear understanding about the objectives of each element of each expert's testimony.

It is important, for example, that the expert be completely aware of the ramifications of the expert's testimony on the appraiser's theory of value. The wetland biologist must understand, for example, that a variation in the size of the necessary wetland buffers may mean more than a loss of a few square feet of land at so much per foot. It may mean that the property is simply not big enough for a particular use, thereby unwinding the appraiser's theory of highest and best use. This is not a problem that one wants to discover during the final stages of trial preparation.

Coordination and Scheduling of Efforts

Experts, like lawyers and appraisers, often have competing demands on their available preparation time. Thus, although earlier expert involvement frequently means more expert expense, early establishment of reasonable timeframes, so research can be carefully conducted, yields the best results time and time again. The earlier the experts become involved and develop preliminary conclusions, the earlier the team can assess the strengths and weaknesses of the valuation theory. This coordination between the lawyer, the appraiser, and the expert is more than an efficiency issue. If the appraiser is a member of a recognized professional appraisal organization, such as the Appraisal Institute, the appraiser must abide by the Uniform Standards of Professional Appraisal Practice. This means the appraiser is bound by the ethics of the profession to obtain the expert's written report, carefully review it, and adopt it as a part of the analysis of value.

In essence, the appraiser signs-off on the expert's work. Thus, it is as important that the appraiser understand the expert's work as it is that the expert understand the effect of his or her work on the appraisal. Therefore, the assumptions the expert has made in performing research, the manner in which the research was conducted, and the conclusions that the expert developed, must be thoroughly and carefully communicated to the appraiser as preparation for the appraiser's cross examination.

Hold Frequent Huddles

Early in the preparation of the case, the attorney, the appraiser, and the expert need to develop a communication loop, so changes in any one aspect of the overall value problem or theory, or discoveries about the underlying technical data pertaining to the property can be quickly communicated and discussed by the entire team. Any delays in keeping everyone informed can cause resources to be wasted on theories or research that are no longer relevant. Many litigators recommend frequent team meetings, at which each team member delivers a status report that includes current conclusions, problems encountered, and tasks in progress. The lawyer and appraiser will agree upon deadlines for each task assigned to a team member and monitor progress to ensure that the preparation does not get behind schedule.

PRESENTING THE NON-APPRAISER EXPERT TESTIMONY * Typically, the expert will precede the appraiser on the stand. The appraiser should attend and observe the expert's testimony and cross examination and carefully focus upon the substance of the testimony. After all, the jury has not read the expert's deposition, or heard the expert opine at length in team meetings. The jury has only heard what was actually said by the expert on the witness stand. That, and that alone, will have to be the foundation with which the appraiser may work.

Similarly, the points made by the opposition during the expert's cross examination will be the basis for the cross examination that the appraiser can expect. Thus, the lawyer, the expert, and the appraiser must meet after the expert's testimony and decide whether or not the appraiser can continue to rely solely upon the assumptions and information provided by the expert.

If the expert's testimony went rather well, the team can discuss the strengths and weaknesses and the appraiser can be prepared to tout the former and rehabilitate the latter.

If things went poorly, the appraiser and the attorney, with assistance from the expert, should already have an alternative strategy prepared. Perhaps the value theory can be grounded upon the appraiser's own independent judgment, rather than the expert's opinion, or perhaps an alternative theory of use can be advanced that will allow the appraiser to salvage his or her opinion of value. Although plausible alternative strategies are not always available, pretrial identification of potential weak spots will give the team a better chance of surviving the destruction of an expert's opinion at trial.

Similarly, no one is likely to be better equipped than the team's experts to identify weaknesses in the presentation of the opponent's experts. The experts are also vital resource for the overall planning of the trial presentation, including opening statement and closing argument. They are probably the team members most suited, for example, to design and produce the demonstrative exhibits that will be needed for trial. Once again, these decisions must be coordinated with the appraiser who will usually want to use the same exhibits, thereby providing continuity for the jury.

Do a Dry Run of Testimony

Conduct a dry run of the testimony of the expert and the appraiser, with both present, not only so each can be perfectly clear on the content of the testimony that each is supposed to compliment, but also so inconsistencies can be addressed in advance. The trial team does not want to hear the expert testify that he or she relied on the appraiser for a particular piece of data only to hear the appraiser testify shortly thereafter that he or she relied upon the expert on that same point.

When a trial team has properly performed the coordination recommended above, you should take advantage of the resulting synergies. You can tell the jury during the opening statement precisely how the expert's testimony fits with and provides the foundation for the appraiser's opinion regarding value.

When questioning the appraiser during direct, you can repeatedly refer to the expert by name and provide the opportunity for the appraiser to build his or her credibility on the shoulders of the expert.

During closing argument, you can once again illustrate explicitly how the appraiser's testimony rests upon the sound conclusions presented by the expert. Use this technique with caution. The degree to which the lawyer will want to bind the appraiser to the expert depends upon the confidence the team has in the jury's acceptance of the expert's conclusions. When possible, you should also remind the jury during closing that the appraiser indicated that he or she had considered the valuation question independently of the expert's data and opinions and nevertheless reached the same conclusion with respect to value.

CONCLUSION * In using non-appraiser experts in condemnation proceedings, remember the following four points:

*The expert is the team's foundation-maker, educator, and insulator.

*Choose the right experts. Look for communication skills and team players.

*Include the expert on the trial team as early as possible. Clearly define the expert's role and communicate early and often how that role interfaces with the appraiser's opinion of value.

*Be prepared to emphasize or de-emphasize the appraiser's reliance on the expert based upon the success of the expert's testimony.

Condemnation and valuation trials always boil down to the testimony of the appraiser. Nevertheless, the degree to which the appraiser and the lawyer are able to bolster the appraisal testimony with solid expert testimony in the areas that are beyond the appraiser's direct expertise will often dictate whether the trial is a success or a failure. The above suggestions should be useful in tipping the scales in favor of success.

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