



# How To Choose and Use Appraisers for Litigation

Bradley R. Carter

Always get the right person for the right job.

**W**HEN LITIGATING A CASE, you must often retain and work with a variety of expert witnesses. Real estate appraisers are often called on to offer opinions on value and value-related topics such as highest and best use, feasibility, and the effect that development could have on the

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values of surrounding property.

The first and most important step in ensuring effective testimony is to select an effective witness. This article is a practical guide to help you select an appraiser who will suit your needs. Related topics discussed include working with your witness, and the appraiser's limitations.

**CREDENTIALS** • Identifiable credentials that a judge and jury will understand and recognize are essential. Both the real estate and legal communities generally recognize designations awarded by the Appraisal Institute as signifying that an appraiser is qualified in the field.

The Member, Appraisal Institute ("MAI") designation is awarded by the Appraisal Institute to commercial appraisers who have:

- Met a series of educational standards;
- Have documented their experience in appraising a variety of property types;
- Successfully completed a demonstration narrative appraisal; and
- Passed a nine-hour comprehensive examination.

The Senior Residential Appraiser ("SRA") designation is awarded to residential appraisers who have met similar requirements. Testimony given by an appraiser without such a designation may be viewed as less credible.

Other credentials could include additional professional designations, honors awarded, or teaching experience. Although not as widely known, the Counselor of Real Estate ("CRE") designation is also highly respected.

#### **Ask About Disciplinary Actions**

It is also prudent to inquire about disciplinary actions. One or more disciplinary actions taken against an appraiser could offset even the most impressive credentials. Another consideration is that the appraiser retained should be certified in the appropriate state.

**EXPERIENCE** • Although the appropriate designation may mean that an appraiser is qualified to value most properties, it may not be sufficient for the specific needs of a given

case. In selecting a potential witness, experience is also an important consideration.

#### **Experience with the Specific Property Type**

Don't make assumptions about a potential witness's background, regardless of how long the witness has been in the business. Inquire about the appraiser's experience with the specific property type in question. There are many competent and respected appraisers who are regarded as experts in valuing office buildings and shopping centers; some of these same appraisers, however, have never attempted to value a golf course or hotel.

#### **Experience in Geographic Area**

Also relevant is whether the appraiser has experience in the geographic area of the property being litigated. Since the appraiser will be called on to offer opinions concerning the microeconomic conditions of the market, it is essential that the appraiser be knowledgeable about the area. To ensure credibility, the appraiser should also be comfortable answering questions about past trends in the area, and formulating opinions about the future.

#### **Level of Competence**

The appraiser's code of professional ethics mandates that appraisers disclose a lack of competence to handle a particular assignment. AP-

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PRAISAL INSTITUTE, STANDARDS OF PROFESSIONAL APPRAISAL PRACTICE OF THE APPRAISAL INSTITUTE S.R. 5 (January 1995). This offers little comfort—there are many different levels of competence. The appraiser you are accustomed to using in litigating vacant land may be capable enough to handle a more complex assignment—but that does not mean that that appraiser should necessarily be your first choice.

#### **Testimonial Experience**

Testimonial experience is another important consideration. Most appraisers spend much more time writing than speaking, and may be uncomfortable in a courtroom setting. If possible, discuss the appraiser's performance with attorneys with whom the appraiser has worked in the past.

Experience as a real estate developer is also helpful, since the witness can supplement academic knowledge with first-hand examples.

**REVIEW A SAMPLE REPORT** • Before retaining any appraiser for the first time, I strongly recommend that you ask for and review one or more sample appraisal reports. Ideally, you should review one report that is in the same geographic area as the property being litigated, and another report that is similar in property type.

In reviewing the report, check for factually incorrect or outdated information that could indicate careless work habits. Easily understood, easily defensible, and market-oriented valuation techniques are preferred.

#### **Complex Methods of Valuation**

Sophisticated methods of valuation are often difficult to explain to a jury, and difficult to defend on cross-examination. An example of this is discounted cash flow analyses that forecast income and expenses several years into the future, estimating the property's value at the end of the investment (usually 10 years), and converting all this into a value estimate. Although such an analysis may be reasonable, it may prove to be too confusing for some judges and many juries. Moreover, this type of analysis is more likely to contain both theoretical and mathematical errors. Robert

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Plattner, PhD, *Income Capitalization Problems*, 60 THE APPRAISAL JOURNAL 549 (January 1992).

Similarly, examine the method of adjusting comparable sale prices. Some appraisers use quantitative adjustments, while others rely on qualitative adjustments. Both techniques are acceptable; however, it is the author's opinion that quantitative adjustments are far more difficult to support. Adjusting a sale price by five per cent for one consideration and 10 per cent for another implies a level of precision that simply does not exist.

**INTERVIEW PROCESS** • After you have reviewed the sample reports, discuss your thoughts with the appraiser in a face-to-face interview. This will give you the opportunity to evaluate the appraiser's ability to articulate her views convincingly. Ask difficult questions, and see how well

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she maintains her composure—this is a test your adversary will almost certainly give her.

After discussing the sample reports you've read, probe his preliminary thoughts on the valuation techniques he would use for the assignment for which he is being considered. Again, be cautious if the response you hear is overly complicated. This discussion will also give the appraiser another opportunity to demonstrate his powers of persuasion.

**WHOM HAVE YOU HIRED?** • Although you may have been diligent in selecting the right firm, it's an individual that will testify. Be certain that you know who will testify, and assess her qualifications; do not assume that the person(s) representing the firm to potential clients will be involved in the assignment.

Similarly, it is common for more than one person to work on an assignment. Therefore, the appraiser who

testifies may be relying in part on the work of others. Clarify the role of your witness in the appraisal process. Will your witness inspect the subject property? How about the properties used as comparables?

#### *Timing and Scope*

Both you and the appraiser should clearly understand the timing and scope of the assignment. Communicate this information before making the final selection; it is essential that this be done before the appraiser's beginning work.

This issue is particularly relevant when more than merely an estimate of value is required, such as in zoning cases. Appraisers are commonly employed in zoning cases to determine if a property's current zoning represents an economic hardship for the owner. In most cases, however, several other issues may be relevant, which could include:

- Rendering highest and best use opinions;
- Evaluating the effect on value of surrounding properties; and
- Making a determination of whether or not a property is within the range of values indicated by similarly zoned properties.

#### **State Every Purpose of the Appraisal**

Clearly define each purpose of the appraisal, and present this information to the appraiser in writing before work begins. If simply commissioned

to appraise a property, it is possible that the appraiser will not be ready to testify to anything other than the value of the property.

In addition to communicating what needs to be done, make sure that the appraiser is comfortable with your requirements. Impact studies, feasibility studies, or other analyses you may require may be outside the appraiser's area of expertise. If the appraiser you hire is not qualified to perform any component of the assignment, this fact will surely be revealed during cross-examination.

#### **Set Deadlines**

Closely related to the scope of the assignment is the timing of the assignment. Similarly, this should also be clearly understood by both parties. Although short deadlines cannot always be avoided, avoid them when possible. It may be possible for an appraiser to complete a project in less time, but that is not always preferable. A shorter deadline could result in less research.

Even if the appraiser assures you this will not happen, it may not be in his control. The appraisal process requires speaking with many different people. If one or more of these persons are unavailable during the allotted time, it will probably result in less information being gathered.

**F**EES • Fees for appraisal services can vary greatly, as can the quality of the service provided. If you select

an appraiser based solely on the fee, you may be making a very costly mistake for your client. Compensation for the witness should either be a flat fee (that does not vary with the outcome of the case), or on an hourly basis.

#### **Contingency Arrangements Are Not Advisable**

Relating the fee to the outcome would seriously jeopardize the credibility of the witness in the view of the court. Moreover, accepting an assignment on such a basis would constitute a breach of professional ethics for the appraiser. Be cautious about relying on an appraiser that requests or would accept such an arrangement.

**U**SING EXPERTS EFFECTIVELY • An appraisal assignment formally begins with a letter of engagement. In addition to outlining the timing and scope of the assignment, this letter should also include identification of the property, the property rights to be appraised (fee simple, leased fee, etc.), the type of value sought (market value, insurable value, etc.), and the date of valuation.

#### **Coordinate the Experts' Efforts**

Coordinate the efforts of all experts involved. A list of experts being used should be circulated as early as possible, and each should be encouraged to communicate with the others.

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#### **Have Team Meetings**

As the case approaches trial, hold one or more meetings of all the experts. An obvious advantage of this is that the exchange of information will reduce conflicting testimony. Also, the appraiser will have greater knowledge about the property, which will enhance her credibility. The more information the appraiser has about engineering considerations, traffic studies, environmental issues, and the like, the more credible the appraisal. This will evidence itself during examination and cross-examination, since more credible appraisals are more defensible.

**KNOW THE WITNESS'S LIMITS** • Although appraisers can be an excellent resource to advance your claims about many issues, recognize their limitations as well. One limitation is that they need questions that allow them to state opinions and offer support for your case. Without proper questions, even a well-prepared witness will not be effective.

#### **Appraisers Can't Be Advocates**

Another limitation is that appraisers cannot be advocates. Although this is rarely a problem if the appraiser you hire agrees with the argument you will be making, it is important to learn of a conflict as early as possible.

#### **Areas Beyond Their Expertise**

Finally, most appraisers can't render expert opinions about many value-related areas such as soil and sub-soil conditions, structural integrity, and environmental issues. This further evidences the importance of coordinating all experts effectively, so each has the benefit of the others' knowledge.

**CONCLUSION** • In summary, you should bear in mind a few important considerations when hiring and working with a real estate appraiser as an expert witness.

Witnesses with identifiable and recognized qualifications such as professional designations and appropriate experience are usually regarded with the most credibility.

A well-prepared, qualified witness who understands the definition of the assignment and the scope of the work to be performed can help inform and educate a judge or jury in the area of her expertise. Given in a professional and credible manner, her testimony can be a key element in the effective presentation of a case.