Cross-Examining Appraisers: Taking Apart the Key Witness

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CROSS-EXAMINATION of the other side’s appraiser or expert in a condemnation case may be the most important part of your case. It is by cross-examination that you can establish the fundamental flaws of the other appraiser’s valuation theory, or their out and out bad faith.

Condemnation cases are tried in New York before a judge and not before a jury. Most states provide for jury trials in eminent domain matters, so many experiences and suggestions related herein should be tempered by that fact. But whether your trial is before a judge or jury, one thing is certain, no one likes dishonesty. Show that the other side’s appraiser is not telling the truth and the appraiser will not be believed. The converse is true. Your appraiser should always tell the truth. An experienced expert witness will admit to an error which will in fact increase the witness’s credibility.

In his book, Expert Witness in the Legal System: A Scientist’s Search for Justice, Morris S. Zedek wrote that in 2001, the Committee on Criminal Advocacy of the Association of the Bar of the City of New York surveyed judges about the prevalence of perjury in the New York metropolitan area. In regard to expert witnesses, of the 30 judges who responded, 50 percent said they encountered occasional perjury.

This is not surprising to a trial lawyer. In condemnation cases, most reputable appraisers do not commit perjury. They may tend to direct the valuation by more subtle ways. Key valuation factors include the selection of the highest and best use of the property, selection of comparable sales, or what capitalization rate should be applied. All of these critical elements of valuation should be sup-
ported by data contained within the report. But the selection of these yardsticks is often a matter of appraiser’s opinion. The correctness of this opinion is subject to cross-examination.

The problem is that appraisers are often not independent experts. Rather, they are controlled and directed by the party who has retained them. In many condemnations, we have observed the wholesale transfer of control from small municipalities to developers. Every aspect of the eminent domain process is controlled by the project developer.

In some instances, the appraisers who valued the property for a pre-vesting offer and advance payment are replaced with a more obsequious appraiser who reduces the valuation.

The Big Picture
Consider everything you do before you take action. If you think you have discovered a major flaw in the other side’s appraisal, do not rush to file a motion in limine. The most probable result will be a ruling that the defect goes to its weight, not admissibility. But, now you have tipped off your adversary who can prepare the appraiser before trial on how to deal with the challenge. It might be better to save the defect for cross-examination.

Another matter to consider is disclosing the mistake or faulty appraisal issue during settlement discussions. As much as you may be tempted to do so, don’t. You will be giving advance notice of an important subject for your cross-examination. Hold key issues in reserve for the trial.

The Prior Appraisal
Appraisers typically send a draft of their appraisal report to attorneys or other real estate professionals for prior review or comment before finalizing their reports. There are several good reasons to do so. This review can be extremely helpful to ascertain if something is missing or inaccurate in the appraisal in terms of the comparable sales or comparable leases used by the appraiser. In addition, the law may require a certain formula for the assessment of damages that the lawyer should check. New York law, for example, requires a two-step appraisal of partial takings, the before and after method, which involves two calculations made by identical methods. *Diocese of Buffalo v State of New York*, 248 NE2d 155 (N.Y. 1969). Many appraisers, incorrectly, will simply calculate direct damages and subtract them to determine the remainder. A review also may reveal that factual information is inaccurate or incomplete. The appraiser may not be aware that the property should be valued as part of a larger holding. Furthermore, consequential damages to the remainder may have resulted from the use to which the taken property had been devoted; for example a high-voltage power line. A change in access to the highway may have created severance damages if it changed the highest and best use of the remainder property. It is appropriate to ascertain if the appraisal complies with local court rules which may for example require detailed information for each comparable sale and photograph of same.

Although an attorney’s review of the appraisal is valuable, the downside to such process is that draft appraisals create written “prior appraisals” and a paper trail of changes. The danger is that the reviewer may totally revise the report and, in doing so, put the appraiser’s credibility in question. It becomes increasingly difficult for any expert to continue to provide meaningful, reliable testimony when it is shown that the appraiser drastically changes his or her opinion of value after the submission of a draft appraisal. Woe to the obsequious appraiser who increases or reduces value without reason.

USPAP Standards
The extent of risk of impeachment from “prior appraisals” is directly related to the scope of materials discoverable. The Appraisal Foundation has adopted requirements regarding appraisal report
retention. The Appraisal Foundation is an independent organization established in 1987 by the appraisal profession and authorized by Congress as the source of appraisal standards and appraiser qualifications. The Appraisal Standards Board of the Foundation has established requirements for appraisers by adopting Uniform Standards of Professional Appraiser Practice (USPAP) to promote and maintain a high level of public trust in appraisal practice. USPAP addresses the ethical and performance obligations of appraisers through definitions, rules, standards, and statements. The Appraisal Standards Board also provides a process for the issuance of advisory opinions.

USPAP requires an appraiser to maintain a work file for each appraisal. The work file must contain the name of the client and related information; true copies of any written reports, documented on any type of media; summaries of oral reports or testimony; or a transcript of testimony; and all other data, information, and documentation necessary to support the appraiser’s opinions and conclusions. Uniform Standards of Prof’l Appraisal Practice Ethics Rule – Recordkeeping (Appraisal Standards Bd.).

The appraiser must retain the work file for a period of at least five years after preparation or at least two years after final disposition of any judicial proceeding in which the appraiser provided testimony related to the assignment, whichever period expires last. Id. This is a mandatory part of USPAP’s ethics rule. Thus, the failure to maintain copies of prior reports may violate the appraiser’s ethics, which alone may result in substantial impeachment.

Impeachment by a Prior Appraisal

Once it has been determined that a prior opinion of value exists, such opinion must be produced for use on cross-examination. It does not matter what label has been put on the prior report—“draft,” “attorney’s work product,” “confidential,” or any other notation. If prepared by the witness, it qualifies as a prior appraisal. Allowing a prior appraisal to be produced provides opposing counsel with a fair opportunity for effective cross-examination, consistent with a party’s constitutional right of confrontation.

The rules of evidence allow a party to impeach the credibility of the adversarial witness on cross-examination through the use of prior inconsistent statements. “Once a proper foundation is laid, a party may show that an adversary’s witness has, on another occasion, made oral and written statements which are inconsistent with some material part of the testimony, for the purpose of impeaching the credibility and thereby discrediting the testimony of the witness.” Prince Richardson on Evidence § 6-411 (11th ed.) (citing People v Duncan, 385 NE2d 572 (N.Y. 1978)).

In New York, it is well established that a prior appraisal prepared by an expert witness testifying at trial may be introduced into evidence to impeach the credibility of the expert’s testimony. See Gerosa, Inc. v State of New York, 580 NYS2d 280 (App. Div. 1992); Hicksville Props., Inc. v Bd. of Assessors, 498 NYS2d 24, 25 (App. Div. 1986) (citing Swartout v State of New York, 354 NYS 2d 254 (App. Div. 1974) (“where an unfiled appraisal report was prepared by a party’s trial expert and is inconsistent with his trial testimony, the unfiled report may be introduced into evidence for impeachment purposes and used to cross-examine the witness”).

When it is shown that an appraiser has violated the Record Keeping provision, or has otherwise destroyed documents that could be used for impeachment, counsel should at a minimum ask for sanctions and that a negative inference be made.

In Matter of Village of Port Chester (Bologna), 27 Misc3d 1203(A) (Sup. Ct. West. Co. 2010), the Court sanctioned an appraiser and made an adverse inference with regard to the destruction of prior draft appraisals. On appeal, the Second Department upheld the sanction, noting: