

# Working RE

Real Estate Appraisers & Inspectors

Spring 2011, Volume 27

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# Appraiser as Expert Witness

By Phil Spool, ASA and Jason W. Holtz, Attorney at Law

**Editor's Note:** *One area of diversification is forensic appraisal, i.e. providing attorneys expert appraisal advice and testimony for litigation purposes.*

**W**hile many appraisers are still struggling along doing appraisals for lenders and AMCs, some are branching out into other areas within the appraisal field, such as reviewing appraisals for lenders and appraising for estate purposes and divorces. Notably, one area that has not been widely explored is forensic appraisal, i.e. providing attorneys expert appraisal advice and testimony for litigation purposes.

Several types of legal actions focus on the appraised value of property, the credibility of an appraisal and compliance with the Uniform Standards of Professional Appraisal Practice (USPAP), including condemnations, foreclosure related deficiency actions and professional liability claims. This article discusses forensic appraisal and the skills and preparation necessary for effective forensic appraisal practice.

## Deficiency Judgments

The volume of residential and commercial foreclosures is a recurring topic in print, radio and television journalism. However, there is a related topic that has been largely unreported: *deficiency judgment actions*. A deficiency judgment is the difference between the amount owed on a mortgage and what the fair market value of the property at the time of foreclosure or short sale. This amount may be strictly the balance of the mortgage but more than likely will include any late fees and attorney fees. Those who are affected are

primarily the borrower (mortgagor) and sometimes the appraiser, if the original appraised value was considered unsupported. Appraisers who have errors and omissions insurance are fortunate to be covered for the financial loss of the lender. But they still need representation. The E&O insurance company typically picks the attorney or law firm to represent them. But many times the attorney or law firm does not have an expert in the appraisal field to act on their behalf representing the accused.

## Engagement Letter

Prior to seeking assignments with attorneys or banks, consider preparing a generic engagement letter in advance. The engagement letter should spell out your hourly or flat rate and explain what the fee represents (see *Doing It Right: Engagement Letters* at *Working RE.com*, Library, Issue 24). Remember, if your assignment is to prepare an appraisal and perhaps testify later, give a quote for the appraisal report and another quote for the expert witness portion. If you prefer, you can prepare a generic engagement letter to present with your qualifications (curriculum vitae or CV). When your client decides to engage your services, you can convert that generic engagement letter and specify your client and other intended users. Make sure that the engagement letter is signed and dated by you and your client. Don't perform services until it is signed and either the original or copy of the engagement letter

is in your possession. Do not prepare the engagement letter as an email with your electronic signature. If time is of the essence, scan the engagement letter you signed and send it as a PDF to your potential client with the expectation that the client will sign, date and return it as a PDF. Also request either the original or a copy of the engagement letter to be sent back to you in the mail. If a retainer is requested, wait until the retainer is received and deposited into the bank account before starting your work assignment.

Your client can either be the plaintiff (lender suing the appraiser) or the defendant (either the E&O insurance company or the appraiser). Find out who will be paying for your expertise. Will it be your client, the E&O insurance company or the appraiser?

## Reviews

Prior to accepting any appraisal review assignment, read the 2010 USPAP Standards Rule 3 very carefully. Standards Rule 3 was rewritten significantly and reflects the form and content of the other standards. Basically, Standards Rule 3 was divided into two sections: development and reporting requirements. **Role as a Review Appraiser:** when your client or one of the intended users is the lender, your role will likely be as a review appraiser. As a review appraiser, knowledge of the types of appraisals you plan on reviewing (residential or commercial) is essential along with understanding the different appraisal forms and addendums. As a review appraiser, you are more interested in whether the choice of comparable sales is appropriate. Knowledge of USPAP is essential as you will be using one of the appraisal review forms that ask for comments if each section of the appraisal report was completed properly. Knowledge of Fannie Mae guidelines are preferred but remember they are just guidelines.

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Find out what the lender's guidelines are. While USPAP and Fannie Mae do not require the comparable sales to be within the past three months of the effective date of appraisal and within a certain radius to the subject property, the lender may have their own guidelines. (Many appraisers are of the erroneous belief that Fannie Mae requires the comparable sales be within a one mile radius of the subject property—it does not.) You need to know their guidelines and differentiate between the lender's requirements and those of USPAP and Fannie Mae. Fees for reviews are usually a set amount and not as generous as those for expert witness work.

### Role as Expert Witness

There are two situations where an appraiser can be effective as an expert witness. One involves performing an appraisal for the client (eminent domain, estate planning, divorce, mitigation, etc.) and then testifying about the appraisal

you perform. The other is as an expert witness when your client or intended user is either an attorney representing an insurance company in a lawsuit against an appraiser, and you are hired to defend the appraisal report, or just the opposite; you are hired by an attorney representing their client (possibly a lender) in testifying why the appraiser was wrong in his/her value conclusion. In the latter case, your role will be considered as an expert witness testifying on someone else's appraisal report. As an expert witness, knowledge of all aspects of appraisal theory, USPAP and Fannie Mae guidelines are essential. While the chances of settlement are greater than going to trial, in either case, you have to be prepared and preparation means not only being familiar with the subject property and the comparables but also having the ability to effectively explain your reasoning as to why the appraised value, methods and techniques were correct or wrong, depending on whose side you are on.

### Qualifying as Expert Witness

There may be times when opposing counsel requests that you be accepted as an expert witness without your having to state your qualifications. You want to make sure that your attorney is allowed to ask you about your background as an expert witness so that the judge knows exactly your qualifications, especially if you are very familiar with appraisal theory and USPAP. Your credibility must be established through your testimony and for that reason it is important to thoroughly state your training, education and work experience.

### Educating Counsel

It is important that you and the attorney or the client's attorney you are representing have a good understanding of your testimony. Keep in focus the scope of work in your engagement letter. If you are going to testify on a value you concluded or discuss the value

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Designed by John Armstrong, MAI

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conclusion of the opponent's expert witness, you have to be self assured and not waiver in your testimony. This is where you and the attorney need to be on the same page. If you are asked to be an advocate for your client, you have to clarify what that means. Being an advocate for your value conclusion is what is expected. Being an advocate for your client, such as hitting a number to make a deal work, is totally wrong and violates USPAP. This has to be spelled out in the very beginning of your relationship with your client and attorney.

### **Educating Judge and Jury**

When you are testifying on the witness stand, it is your responsibility to make sure that the jury (jury trial) and/or judge (bench trial) have a general understanding of what you are trying to get across to them. Remember, they are not fellow appraisers and you cannot talk over their heads. Try to explain the appraisal process, the three typical approaches to value, which one(s) you select and why and which one(s) you believe are not reliable indicators of value. If your property has functional or external obsolescence, don't lose them in understanding what you are trying to say. Keep it simple yet come across as believable and an expert in your field.

### **Preparing Your Attorney with Questions**

Whether your attorney is going to depose the opposing side's expert witness or you are going to be on the witness stand, it is important that you help your attorney by preparing questions. You can be of tremendous help to the attorney, especially if they are not familiar with appraisal terminology, by preparing questions to ask the opposing counsel's appraiser or questions to ask you as the appraiser expert witness. Some of the questions your attorney should ask the opposing counsel's appraiser (the appraiser either defending his/her appraisal or as the expert witness for the opposing

counsel), include but are not limited to their qualifications, any complaints filed against them, how long they have been a certified appraiser and number of appraisals performed in the immediate neighborhood of the appraisal in question (geographic competency).

*It is critical to understand your attorney's case theory and strategy in order to help the attorney in preparing questions for your expert testimony on the witness stand. While it is assumed that any testimony you give will be truthful, an expert witness should focus his or her responses on the themes that develop the overall legal theory, and consistently highlight these concepts. In order to do this effectively, the appraiser must have a thorough understanding of the case's theme. A forensic appraiser should also practice both direct and cross examination in advance of trial or deposition testimony. This will enable the appraiser to testify simply, directly and confidently and will enhance the credibility of the evidence making the appraiser a more compelling witness. Without adequate preparation, a skilled cross examining attorney will identify equivocations and inconsistencies and focus on these weaknesses to undermine the expert's opinion.*

It is important to understand that the hallmark of an expert witness is the ability to testify to an opinion regarding a specific subject. Therefore, the credibility of that opinion is paramount to the effectiveness of the expert. Furthermore, expert witnesses cannot bolster their opinions through the use of books or other collateral resources. The weight that a judge or jury gives an expert's testimony must be established through the testimony itself. For this reason, confidence and consistency are indispensable qualities of an expert. As a last point regarding credibility, every case has a weakness and an expert appraiser must acknowledge these weaknesses with candor and then articulate the accuracy of their opinion in spite of the issue. One of the easiest ways to discredit any witness,

including an expert, is to make them appear unreasonable or not credible for failing to acknowledge a clear point.

Discuss the basis for your opinions and conclusions and make reference to the specific data and analysis that helped form your opinion. Be certain to address the points that were identified as significant in your pre-testimony preparation. Your attorney/client wants to create a factual record from which to argue, so respond to the questions in a way that highlights your opinion and develops the case strategy. If at all possible, avoid responding to your attorney/client's question by saying, "I don't understand your question." This will make it appear that the attorney's case lacks clarity and credibility. Instead, if you do not understand a question, respond as best as possible, and say, "Does this completely answer your question?" This will open the door for follow up if any is required.

The most important tool is preparation. A shared understanding of the appraiser's professional conclusion and the attorney's case theory will create persuasive testimony and a successful presentation of the evidence. This will make every court appearance as professional and effective as possible, and maximize the contribution of the forensic appraiser.

In conclusion, your role as an expert witness is very important and can also be financially beneficial. Consider contacting local attorney organizations to see if you can speak to their group on the role of the appraiser as an expert witness. Bring USPAP with you and occasionally hold it up to them, indicating that this is the appraiser's guidelines that we must abide by. Have business cards ready to hand out. Also contemplate joining a business group that refers business to its members. You might want to consider contacting forensic accountants so that you can be of service to them. There are many ways to get your foot in the door but it won't happen until you take the first step. **WRE**