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Real Estate Appraisers & Inspectors

Winter 2011, Volume 26

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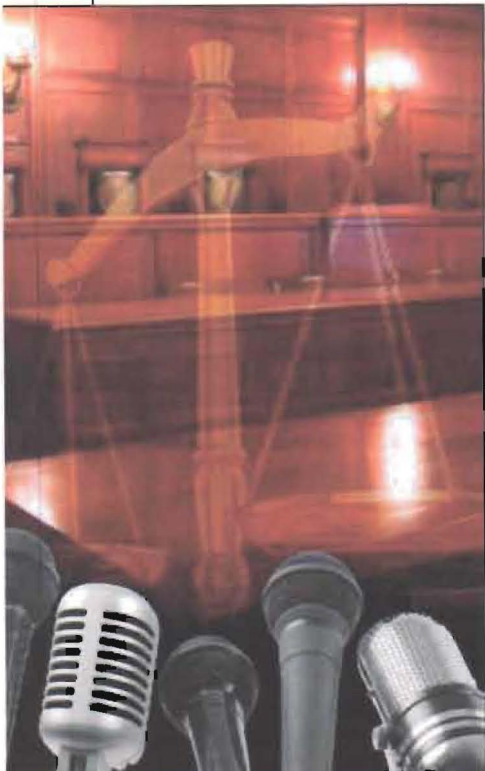
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Understanding  
depositions and court  
testimony is essential for  
today's appraiser.

# Depositions and Court Testimony

By Phil Spool, ASA

**Editor's Note:** *Many appraisers are diversifying into expert witness work, many others need polished courtroom skills in order to defend their own reports. In either case, understanding depositions and court testimony is essential for today's appraiser.*

**W**hether testifying as an expert witness on someone's behalf or in defense of your own appraisal before a state licensing board or judge, your keys for success are the same.

## Depositions

Testimony in a deposition is recorded by a court reporter and is part of the official transcript. It is, therefore, as important as testimony at trial. Although a judge is not present at a deposition, your testimony may be read back at trial, especially if the two versions are not consistent. In cases involving your own work, opposing counsel is generally trying to determine what you know about the issues or what you did. This is known as "discovery." They also are trying to establish "benchmark" testimony, hoping to find inconsistencies between your statements in deposition and at trial, in order to discredit you as a witness.

## Court Testimony

The courtroom is the place where decisions are made. This is also where the attorney who hires you will be asking you questions. If you are hired as an expert witness, the first set of questions will probably be from your attorney to get you approved as an expert. Your attorney is trying to demonstrate your knowledge and

expertise. He or she will ask your name, the type of licenses you have, how long you have been appraising, your education, specialized training/expertise, any disciplinary actions or complaints against you, membership in any professional organizations and whether you testified before in a court proceeding.

There are basically two types of courtroom trials: (1) a jury trial and (2) a bench trial. In a jury trial, the jury determines the outcome of the case. In a bench trial, the judge makes the final determination and there is no jury. The players in court are the *Trier of Fact* (can be a jury or judge), the plaintiff's attorney, defendant's attorney, plaintiff, defendant and expert witnesses.

## Expert Witness

As an expert witness, you need to be objective and not biased toward your client. Not everyone is capable of being an expert witness. You will be called to testify about your knowledge, skills and experience in the subject matter. Sometimes opposing counsel will ask you under oath if you are being paid for your testimony. A proper reply is, "No, I am being paid for my time, education and expertise."

## Defendant

As an expert witness you are getting paid. Obviously, when defending your own appraisal you are not. In either case you must be prepared prior to the deposition and especially before trial. Being prepared includes understanding your property

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fairly well, including going out to the subject and comparable sales just prior to the deposition and/or trial to refresh your memory. Being called as an expert witness to provide court testimony might be the result of a divorce involving ex-clients: you may be called to establish the value of the divorcing couple's home at the date of purchase.

You can be sued for any number of reasons. Today appraisers are sued by lenders as a result of a borrower defaulting on their loan. Appraisers also are sued by the buyer of a property whose value has plummeted due to a declining market. The first step, of course, is to make sure that your report is good enough to defend in court. If you have errors and omissions (E&O) insurance, then you will have the benefit of having your legal representation paid for. Remember, if you plan on dropping your E&O insurance ask your agent about *prior acts* coverage. Attorney's fees are not cheap. One attorney who represents residential appraisers indicated to me that the average legal fee representing either an appraiser or the insurance company in a lawsuit from beginning to end is around \$75,000 and considerably more for a commercial appraisal.

In part two of this series, *What's in Your Workfile* (*WorkingRE.com*, Library, Issue 25), I stressed the importance of arranging your workfile in an orderly fashion and keeping all your support information in the file. Multiple Listing Service (MLS) documentation should also include a copy of the interior photo pages of the comparable sales, either printed in color or black and white. One attorney told me, "Paper is cheap; defending yourself is not." He said that when he once asked a defendant why he did not maintain interior photos of the comparable sales, in order to support his conclusion about the physical condition of the comparable sales, the defendant replied, "It would be too costly to make copies for all my files."

### **Dos and Don'ts of Deposition and Testimony**

The list of dos and don'ts regarding testifying is endless. However, I find the following are the most valuable:

**Prior to Trial:** Assist and prepare your attorney with appropriate questions to ask you. Be prepared. Look over your workfile and, if time permits, revisit the subject and comparable properties. Make sure that the report you submit to your attorney is the one admitted or used as evidence in the case.

**At Trial:** Tell the truth. Don't make up an answer if you don't know how to respond. As an expert witness, objective and truthful testimony is expected. Answer questions you know personally. Evidence based on the report of others, rather than the personal knowledge of a witness, is referred to as *hearsay* and is generally not admissible as testimony. You can overcome this by forming your own conclusions based on information you obtain. For example, if asked how you arrived at an adjustment for the swimming pool, your answer should not be that it is based on discussions with Realtors who specialize in the area, but that it is based on *your* opinion after discussions with Realtors who specialize in the area.

Take your time answering the questions. Listen carefully to what is being asked, pause before answering (your attorney might object to the question) and answer with authority. If your attorney makes an objection, wait until the objection is resolved before answering the question.

At a jury or bench trial, occasionally look at the jury or judge when answering questions. They are the ones deciding your credibility and the outcome. I was involved in a case where the appraiser/expert witness on the opposing side made a statement that raised the eyebrows of the judge and caused a surprised facial expression. This should have been a clue

to the expert witness that the judge did not believe his statement. Look at the jury to see if they seem to understand and agree with you rather than looking bored or confused. Be polite and courteous to the opposing counsel but don't be intimidated either. Dress neatly and look like the professional that you are.

### **Trial Don'ts**

Don't provide an answer that you cannot back up. If asked a question by opposing counsel, proper answers besides "yes" or "no" might include: "I don't recall (or remember)" or "I don't know" (if true statements). Don't expand your answers to impress anyone. Be concise and to the point. Don't volunteer information. Don't continue talking when you've finished your answer, if the opposing attorney does not speak up right away. Don't raise your voice or argue with the attorney asking the question. Don't act as an advocate, unless you are defending or advocating the correctness of the opinion of value to the jury or judge.

Lastly, don't be thin-skinned. The opposing counsel's objective is to win the case. This includes trying to discredit you, catch you making a mistake and admitting to it and making you feel that you are not qualified to do your job. If you make a mistake during testimony, it is your attorney's responsibility to repair any damage done in redirect examination. You will be able to correct your testimony or explain why your mistake may or may not have made a difference in your opinion.

### **Exhibits**

Consider using exhibits to get your points across. Exhibits may include graphics, enlarged photos of the subject, comparable sales, neighborhood maps, photos of deferred maintenance and external (locational) obsolescence. Exhibits should be discussed with your attorney for approval. Make sure that the appraisal report to be submitted as

an exhibit has clear color photographs of the subject property, both exterior and interior. I had a case where the subject property backed up to a shopping center. I made sure my appraisal report with the color photographs was admitted into evidence. The opposing counsel had a copy of my report with black and white photographs. When he was questioning me about the external obsolescence I observed (that it backed up to the shopping center), the attorney asked me if I believed the "retainer wall" shown in my photograph was sufficient enough to block the view of the shopping center. I kindly told him that the copy of the appraisal report he had in his possession was not the report that was submitted into evidence and that if he looked at the proper report, he would realize that the "retainer wall" was actually the back wall of the shopping center. After the attorney looked at the photograph, he indicated that he had no further questions.

### Think Before Speaking

During my experience as an expert witness, I have come across some interesting statements made by defendants and expert witnesses. The following are some made under oath and taken from transcripts that have left me questioning the credibility and knowledge of the appraiser. Example: Starting off a sentence with: "To be honest with you," or "To tell you the truth."

Attorney: "What about the support for the \$25 per square foot adjustment that we heard the calculations for—can you describe your calculations in reaching that amount?" Defendant: "My calculation is that you just press (the key) and the figure pops up."

Expert witness: "He reported what he saw. Did he have a requirement to tell the lender the difference between what he saw and what different retrieval services said? No."

When an expert witness was questioned about the difference between one multifamily zoning versus another, regarding how many units can be built on the site, the expert witness stated: "Actually it's density. It has to do with density, medium density to high density. That usually means how many people live within a square mile. They usually don't describe it as number of units but more in density of use of the property. It's a zoning classification but it has to do with density of probably the population of how many people can live within a mile, or on a particular lot, if you will. That's my understanding of it."

Statements like the above can only diminish your credibility. If you don't know the answer, say so. Don't make something up or say something like any of the above statements thinking that the jury or judge would find you believable.

Gary R. Trugman, ASA, CPA, author of several business valuation books and a seasoned expert witness, sums it up: "Truth and justice have little to do with the outcome of a case. The reason is because the court system is designed to end disputes, not to right every wrong. However, the system does try to work toward fair results and the truth is the best foundation for reaching that goal."

It should be obvious by now why all three elements in this series are vital to mitigating risk: the engagement letter (*Doing It Right: Engagement Letters*, WorkingRE.com, Library, Issue 24) sets the stage for a good appraisal; a well-documented workfile provides a solid defense when needed (*What's in Your Workfile?*, WorkingRE.com, Library, Issue 25), and whether you are diversifying your practice or defending your license, learning the dos and don'ts of depositions and court testimony are essential to eluding trouble. **WRE**

### RELATED STORIES ONLINE

access may require subscription

*Depositions and Court Testimony* is third of a three-part series by author Phil Spool. You can find *Doing It Right: Engagement Letters* and *What's in Your Workfile?* at WorkingRE.com, Library.

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