
**A REAL ESTATE ATTORNEY'S SURVIVAL GUIDE
WHAT YOU NEED TO KNOW ABOUT REAL PROPERTY
VALUATION AND APPRAISALS**

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NOTE: Robert Strachota, an appraiser with Shenhon Company, Minneapolis, contributed to an earlier version of this outline which was presented in a prior CLE course and the authors wish to acknowledge his prior contribution.

I. THE ATTORNEY'S PERSPECTIVE.

A. In order to represent the client effectively and select the best appraiser for the task, and to work effectively with the appraiser, the attorney needs, at a minimum, a working knowledge of the three traditional approaches to value in the appraisal process and also the development cost approach to value.

1. Cost Approach to value.
2. Market Approach to value.
3. Income Approach to value.
4. Development Cost Approach to value. (Subdivision Development Analysis)

A summary of the above approaches to value is found in Appendix.

B. In addition, it is essential that the attorney know the law applicable to the use of these approaches in the relevant jurisdiction. For litigation cases especially, the attorney needs a more in-depth knowledge of the appraisal process and the limitations imposed by the courts in that jurisdiction relating to the type of appraisal testimony that may be offered.

1. Determine what the courts have said as to relevant legal principles impacting valuation for the specific type of litigation involved.
2. Read the Appraisal of Real Estate (12th ed.) and Real Estate Valuation in Litigation (2nd ed.) published by the Appraisal Institute, 875 North Michigan Avenue, Chicago, Illinois 60611-1980. Other specialized texts published the Appraisal Institute may also be relevant.
3. Discussions with appraiser selected as to the difficult issues in the subject case.
4. Articles on valuation of specialized properties if subject property is a specialized property.
5. Articles on emerging appraisal issues.

C. Where to find a list of potential appraisers to be retained.

1. Other attorneys who practice in that area of law and area of the state where property is located.

2. Approved list from financial institution who may lend the money to your client.
 3. MAI membership list for Minnesota (or other state in which you are working) and other appraiser associations. See Appraisal Institute web site (www.appraisalinstitute.org) as an information source for publications, research, etc.
 4. Yellow pages (caveat: sometimes the biggest ads are by the least experienced appraisers).
 5. Real estate brokers in that area of the state where property is located (caveat: brokers are not appraisers).
 6. Financial institutions in that area of the state where property is located.
 7. Your client.
 8. If you have a working relationship with a local appraiser, ask that appraiser to help you find the right appraiser in other locations.
- D. What does the attorney look for generally in an appraiser when interviewing a prospective appraiser?
1. No conflict of interest from attorney's perspective: discuss property, parties, and attorneys involved. Appraisers generally do not believe they have a conflict of interest because the opinion of value should always be the same regardless of what parties are involved.
 2. General experience with specific type of property involved in that geographical area (e.g. industrial, commercial, multifamily, single family residential, vacant or developed property as to each of these). Ask for specific examples and names of clients or attorneys involved. Call and confirm experience.
 3. Specific experience as to specialized property if relevant (e.g. sand and gravel pits, parking lots and ramps, gas stations, car dealerships, etc.).
 4. Ability to write a well reasoned and thorough appraisal report. Obtain and read examples from appraiser as to specific type of property involved.
 5. Make sure the appraiser is licensed to perform the type of appraisal requested and the license is current for the state in which the appraisal is to be used.

6. Any ethics charges ever filed against appraiser; what were they and results thereof. Any pending charges? Check the Department of Commerce for the State of Minnesota (or other state involved).
7. Ability of appraiser to complete assignment on schedule.
 - a. Preliminary value letter.
 - b. Draft appraisal for your review to see if any factual or legal errors.
 - c. Final appraisal.
 - d. Availability for consultation, hearings and trial, etc.
8. List of references.
9. Extent of support staff and resources available to appraiser in his/her office. Does the appraiser have less expensive support staff who can do much of the "leg work" at a lower cost?
10. Is affiliation necessary for this appraiser with another appraiser (not in same office) in order to complete the assignment?
11. Cost of services.
 - a. Hourly (for each person involved, what is average hourly rate for assignment of this type?).
 - b. Set fee for each major step of appraisal process.
 - c. Combination of set fee and hourly rates.
 - d. Payment date: when task completed, or after loan closed or case over, etc.
 - e. Obtain and read a proposed retainer agreement and the proposed conditions of appraisal (disclaimers) so no surprises later. Is it acceptable to you?
 - f. Best to have written retainer agreement between appraiser and the client so attorney is not liable for the bill. The attorney should, however, work to ensure that the bill is paid by the client so the client does not refuse to pay a valid bill and the attorney later will have a hard time employing that appraiser in the future.

12. What non appraiser experts must be hired to provide information or opinions on which the appraiser must rely in order to complete the assignment?
- E. Additional questions to appraiser relating to loans from a lending institution.
1. Experience with specific lending institution.
 2. Is appraiser on any required approved appraisal list used by the lending institution? Obtain list from lending institution. Discuss acceptability of potential appraiser with the lending institution. Does the lending institution approve or use that appraiser?
 3. Who will be the review appraiser, if any, for the lending institution?
 4. In the case of Federally regulated lending institutions, the lending institution chooses appraiser, hires appraiser and is the recipient of the appraisal. The appraiser may not share the appraisal with the applicant for the loan without approval by the lending institution.
- F. Additional questions to appraiser relating to litigation cases and cases which may be litigated.
1. Prior litigation experience. What cases? What results? Attorneys involved. Talk to the attorneys to make sure appraiser can do the job.
 2. Ability to effectively educate a jury, judge or arbitrators as to the appraisal process used and ability to persuade.
 3. Ability to respond adequately to cross-examination.
 4. Willingness to understand any special legal or factual issues involved and use same in the appraisal and testimony.
 5. Willingness to review opponent's appraisal, assist in preparation of discovery and cross-examination, and possibly testify in rebuttal case as to flaws in opponent's appraisal.
 6. Will appraiser be a strong advocate for his/her opinion of value or damages at hearing or trial or before arbitrators?
 7. Consistency of subject appraisal with prior appraisals on similar properties or issues and any articles which the appraiser may have written in the past, prior speeches, prior depositions or court transcripts.
 8. Opposing attorney's likely assessment of ability of your appraiser and resulting impact on settlement.

9. Importance of being from the area where case will be venued (e.g. Minneapolis appraiser in a rural community?). Ask local attorneys. Are there local experienced appraisers available? Possible use of a local appraiser or realtor in addition to non local appraiser.
 10. Hire the best qualified and experienced appraiser, almost regardless of cost. Make sure that the client will pay for in depth analysis. Inexpensive appraisals are usually weak appraisals. The need for an experienced appraiser is especially true if the attorney is not experienced in valuation matters.
- G. Litigation/Arbitration generally--once appraiser is selected.
1. Attorney should inspect the property and neighborhood with client and review material from client as to property.
 2. Meet with appraiser and client to review all relevant facts as to subject property.
 - a. Provide as much information as possible.
 - b. Much of the information may be available from prior appraisals.
 - c. Discuss any relevant legal issues impacting valuation.
 - d. Find out what information the appraiser needs (will other experts be necessary?) and determine who is to obtain same.
 - e. Date of valuation.
 3. Client and attorney should inspect property with appraiser.
 4. Discuss appraiser's preliminary non-written opinion of range of values.
 5. If appraiser's oral preliminary range of value appears to be reasonable, have appraiser proceed to complete an unsigned draft written valuation analysis addressed to attorney. If client and attorney disagree with range of value, try and find out if client, attorney or appraiser is mistaken as to relevant facts and/or relevant legal principles. If client believes appraiser is not capable of understanding true value of property, consider selecting another appraiser. In some cases, the attorney may decide not to represent the client further. In choosing an appraiser as your selected arbitrator on a panel, you should discuss these issues before selecting the appraiser as your arbitrator.

6. Review draft of appraisal with client to see if any: mistakes of fact; mistakes of law; mathematical errors; lack of clarity; adequacy of supportive documentation; reasonableness of stated appraisal assumptions.
7. Attorney should then review those areas of concerns with the appraiser. Attorney and client should inspect comparables used, if any, with appraiser to determine how relevant they are, appropriateness of adjustments made by appraiser as to comparables.
8. The appraiser is and must be an independent expert. However, attorney and client have right (and also an obligation) to educate appraiser and make sure appraiser understands what mistakes or weaknesses the client or attorney sees in the draft appraisal.
9. Determine the date by which final appraisal should be completed. Delays in completion of appraisal may be warranted for numerous reasons such as results of discovery by your opponent as to your case and results of your discovery as to opponent's case.
10. Discuss with appraiser, when appropriate, what information the appraiser believes is relevant to be sought through interrogatories, request for admissions, depositions (formal discovery not available in condemnation case until after appeal of commissioners' award).
11. Prepare appraiser for direct examination and cross-examination as appropriate.

H. Additional considerations in condemnation cases.

1. Try not to finalize choice of appraiser until commissioners appointed by the court.
2. Once commissioners are known, learn their background from:
 - a. Discussions with commissioners when they take the oath of office and at viewing of property.
 - b. Discussions with prospective appraiser as to his/her specific experience with each of the commissioners.
 - c. Discussions with other attorneys in the area who have appeared before each of the commissioners, who was appraiser, how effective was the prospective appraiser if involved.
 - d. Who is opponent's appraiser?

3. Is appraiser working for any other property owners in the area? If so, for whom, what type of property, when scheduled for hearings, etc.? There are advantages and disadvantages of using an appraiser who is already working on other cases in the area. Some of the advantages are:
 - a. Greater knowledge of comparables and area.
 - b. Possible savings in cost of appraisal work.
 - c. Familiarity with commissioners.
 - d. If appraiser has already testified, attorney can find out strengths and weaknesses of opponent's case if similar type property.
 - e. If commissioners already made an award, attorney can determine how effective appraiser was.

Some of the disadvantages are:

- a. If similar type property, appraiser must follow most of prior analysis of value.
 - b. If commissioners did not agree with appraiser's prior analysis, they are not likely to agree in your case.
 - c. Opposing party will know what comparables and other data your appraiser is likely to use and be able to conduct a more effective cross-examination.
4. An appraiser who works for condemning authorities and property owners frequently has more credibility as an impartial witness.

I. Additional considerations in land use cases.

1. An appraiser is frequently used by the property owner to show to the government:
 - a. Why the property should be rezoned due to market conditions.
 - b. Why the current zoning is not reasonable given market conditions.
 - c. The increase in value and, therefore, tax base if the zoning approvals sought are approved.
 - d. The diminution in value to the property (thus supporting a claim for damages) if the government refuses to:

- i. Rezone as requested.
 - ii. Grant the variance, conditional use permit or other zoning approval as requested.
 - iii. Abandon a proposed down-zoning of the property.
 - iv. Amend its ordinances as requested.
 - e. Lack of adverse impact on surrounding property values if the zoning approvals sought are approved.
2. An appraiser is sometimes used by the opposing neighborhood group and/or the government to rebut the above appraisal testimony.
3. Most land use decisions on appeal to the District Court are decided by the Judge based upon a review of the record before the local unit of government. Swanson v. City of Bloomington, 421 N.W.2d 307 (Minn. 1988). Therefore, if an appraiser is to be used, be sure that the appraisal is part of the record before the local unit of government and in most cases that the appraiser is available to testify before the local unit of government.
4. In some regulatory takings cases (inverse condemnation), the court may allow testimony by an appraiser at trial, but until such time as Swanson is clarified as to this issue, it is safer to present the appraisal evidence during the review process of the local unit of government.

J. Tax court cases.

1. Prefer appraiser who has worked for landowners and taxing authorities:
 - a. Adds credibility.
 - b. Appraiser can usually do a better job in cross-examination.
 - c. Appraiser can better assist landowner's attorney in preparing the case.
2. Appraiser's experience with specific Tax Court Judges.
3. Appraiser's understanding of general rules of valuation the Tax Court has been using in recent cases generally and for the specific type of property involved.

II. THE APPRAISER'S PERSPECTIVE

A. Comments as to the attorney's perspective.

1. When retaining an appraiser, have a clear idea about the purpose of the appraisal.
 - a. What valuation principles apply? Is this a "value in use" or "value in exchange" appraisal? What standard of valuation applies? Is it "fair market value" or "fair value"?
 - (1) Valuation is a fascinating subject because, like beauty, value is in the perception of the beholder. Despite the subjectivity surrounding the issue of valuation, we continually strive to measure value precisely and objectively. Anyone approaching the subject of valuation should be aware of certain truisms as a frame of reference. They are:
 - (a) Each valuation assignment is unique. Although guidance can be obtained from earlier valuation cases, each case is unique. One case is rarely on point with another, and a significant differentiation of the facts can usually be made.
 - (b) In valuation, there are no absolutes. There are general guidelines to which individual judgments must be applied.
 - (c) There is no irrefutable "right" answer.
 - (d) Experts will and do differ.
 - (e) There are available methods which are generally recognized and accepted by the appraisal profession and the courts.
 - b. What valuation format is needed and what can the appraiser do according to the law (i.e., financing engagements versus litigation assignments)?
 - c. Who ultimately needs the appraisal (i.e., the bank, the court, the city council, arbitrators, etc.)? This affects how the opinion is presented by the experienced appraiser.
2. In litigation assignments, there are a few general principles that apply.
 - a. If an attorney has reviewed an appraisal report and does not have questions or comments, it is a bad sign. It usually means that he or she did not understand the appraisal report in the first place, or the report was, in fact, not read at all.

- b. If the direct testimony occurs smoothly, the attorney probably understands the appraisal as well as the appraiser. On the other hand, if the direct testimony is choppy, it is likely that the attorney is reviewing the appraisal report for the first time while conducting the direct examination. (Sometimes direct examination is worse than cross-examination if the attorney has not understood his or her own witness' report.)
 - c. The toughest cross-examination comes from a knowledgeable attorney who understands the appraisal as well as the appraiser. Usually, the opposing attorney will avoid asking open-ended questions and resist posing a last summary question. Summary questions often provide an appraiser with a welcome opportunity to elaborate, and to possibly close the door on the attorney's strategy. Often, wise attorneys finish their arguments in briefs or closing arguments, as opposed to trying to accomplish them in cross-examination.
3. Ideas for attorneys to keep abreast of the appraisal industry.
- a. Consider taking basic appraisal courses from the Appraisal Institute or from other reputable appraisal associations. Locally, the University of St. Thomas regularly offers appraisal courses.
 - b. Consider obtaining subscriptions to the Appraisal Foundation newsletter.
 - c. Consider receiving "The Appraisal Journal", published by the Appraisal Institute for information on current appraisal issues.
 - d. Consult with an attorney who specializes in valuation.
 - e. Consider subscribing to USPAP for information on appraisal standards.
6. Utilize the Appraisal Institute web site (www.appraisalinstitute.org) as an information source for publications, research, etc.
- B. Is the appraiser licensed to do the appraisal assignment? What are the rules the appraiser must abide by?
- 1. The Appraiser Qualifications Board, which is a division of the Appraisal Foundation which was created by Congress, has established two different appraiser classifications. The Appraisal Foundation is a group of recognized appraisal organizations operating in the United States.

