

DEALING WITH APPRAISERS AND OTHER EXPERTS:

Challenges In Professionalism, Ethics and Related Issues

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INTRODUCTION

In every condemnation case expert witnesses provide the opinions, testimony and exhibits that form the basis for the determination of just and adequate compensation. Typical experts include real estate appraisers, business appraisers, accountants, engineers, land planners and other professionals. To be effective, the experts' testimony must be persuasive, it must be accurate, and it must be admissible. It is the duty of the attorney to ensure that the opinions and evidence of the expert witnesses meet the ethical, professional and admissibility standards of law and of the experts profession.

Many of the Georgia Rules of Professional Conduct are relevant to the lawyer's relationship with the expert witnesses and to the presentation of evidence in a condemnation case. These include:

Rule 3.1 – Meritorious Claims and Contentions

- (b) knowingly advance a claim or defense that is unwarranted under existing law, except that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification or reversal of existing law.

Rule 3.3 – Candor Toward the Tribunal

- (4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.
- (c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

Rule 3.4 – Fairness to Opposing Party and Counsel

A lawyer shall not:

- (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
- (b)
 - (1) falsify evidence;
 - (2) counsel or assist a witness to testify falsely;
 - (3) pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of the testimony or the outcome of the case. But a lawyer may advance, guarantee, or acquiesce in the payment of:
 - (i) expenses reasonably incurred by a witness in preparation, attending or testifying;
 - (ii) reasonable compensation to a witness for the loss of time in preparing, attending or testifying;
 - (iii) a reasonable fee for the professional services of an expert witness;
- (f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:
 - (1) the person is a relative or an employee or other agent of a client; or
 - (2) the information is subject to the assertion of a privilege by the client; and
 - (3) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information and the request is not otherwise prohibited by law.

Rule 4.1 – Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly;

- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Rule 5.4 – Professional Independence of a Lawyer

- (a) A lawyer or law firm shall not share legal fees with a non-lawyer . . .
- (c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

For real estate and business appraisals, specific ethical and professional standards are contained in the Uniform Standards of Professional Appraisal Practice (“USPAP”). These standards cover competency rules, appraisal report requirements,

appraisal procedures, and the basic requirement that the appraiser must reach an unbiased opinion of value. A copy of the USPAP contents is attached, indicating the scope of the ethical and professional standards. The attorney must understand the professional and ethical standards that the appraiser is bound to follow to be sure that the appraiser has not violated a standard that could effect the persuasiveness or admissibility of his testimony and to be sure that the attorney does nothing that would compromise the appraiser's unbiased opinion. Attorneys should keep a current copy of the USPAP and discuss the standards with the appraiser during the appraisal assignment and process.

SELECTION OF THE EXPERT WITNESS

Each expert witness must have the basic qualifications of education and experience necessary for the particular part of the condemnation case. This includes sufficient qualifications for the testimony to be admissible and persuasive. A lawyer's presentation of an expert witness who does not have the technical qualifications or the knowledge and experience to present competent and adequate evidence raises serious ethical and professionalism issues.

As a matter of admissibility, expert witnesses must have the necessary licenses or certificates to qualify in their particular profession. For real estate appraisers, certification by the State of Georgia is necessary, and other certifications or registrations may be necessary for engineers, accountants, real estate brokers, surveyors, or other experts. Professional designations such as the MAI designation for real estate appraisers

may add to the creditability of a witness, but they are not necessary for admissibility purposes.

In addition to the issue of admissibility, the attorney must address the expert witness's competence to reach an accurate opinion and his experience to present persuasive evidence to a fact finder. USPAP requires that appraisers must have the knowledge and experience for a particular appraisal assignment or else must disclose the lack of knowledge to the client and take the steps necessary to complete the appraisal competently.

The attorney must go beyond an expert witness's experience in the general area of expertise and determine the expert's exact qualifications for this particular assignment. For example: has the expert had experience in condemnation cases; has the expert testified in condemnation cases with issues similar to this; has the expert had experience with similar type properties; has the expert testified primarily for condemners or condemnees; or has the expert been qualified as an expert witness in various courts in Georgia. The attorney must be sure that the expert witness has the qualifications to reach a correct opinion and to provide adequate and persuasive evidence.

IDENTIFYING THE EXPERT WITNESS'S ASSIGNMENT

The attorney, in consultation with the client, must explain to each expert witness the scope and nature of the witness's assignment and provide the information and documents necessary for the expert to undertake the assignment. The expert witness must reach an unbiased and uncoerced opinion, and the attorney and client must not demand a particular result.

Throughout the expert witness's assignment, the attorney should remain in close contact to respond to particular questions, provide additional information or provide guidance as to legal standards that should be applied to the assignment. It is the attorney's duty to be sure that the expert witness's procedure and conclusions comply with Georgia condemnation law.

REVIEWING THE EXPERT WITNESS'S REPORT

The attorney should review with the appraiser, the draft report before it is put in final form. The purpose of the review is to ensure that the report is factually and legally correct, but not to influence or change the expert's opinion. For example, it is the attorney's duty to be sure that a real estate appraiser has the correct date of taking, the correct description of the property, the correct description of the property interests and rights taken in the condemnation case, a correct copy of any deeds, leases or other documents relating to the property, correct information regarding any sales of comparable properties that were considered, and whether the appraiser followed the five step process of appraisal. It is not, however, proper for the attorney to disagree with the appraiser's opinion of compensation and attempt to substitute the attorney's opinion for that of the appraiser.

THE DISCOVERY PROCESS

The attorney has an ethical and legal obligation to participate in the discovery process in good faith. This includes the disclosure of expert witness information as required by law and submitting expert witnesses for depositions. At the discovery stage

of the case, the attorney once again should ensure that all responses regarding the expert witness information is factually and legally correct. Prior to depositions, the attorney again should meet with the expert witness, review the report and background information and ensure that the expert witness is prepared to give factually and legally correct information. In some instances erroneous information may come to light following disclosure of the expert's information in the discovery process. Any errors should be brought to the attention of the expert immediately and his analysis should be revised in light of the correct information. The correct information and the expert witness's consideration of that information in his opinion should be disclosed to the opposing party at the earliest possible time.

In summary, attorneys and professionals who may appear as expert witnesses all have ethical and professional standards that come into play in a condemnation case. It is the attorney's duty to work with the expert witnesses to ensure that the testimony not only is persuasive for the client's benefit, but that it is ethical, professional and accurate in all respects.

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