

Considerations for Deposition and Trial Testimony

(10 Ways to Lose a Case)

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Spring Symposium

10 Ways to Lose a Case

- ⦿ All kinds of matters – fraud, title defect, condemnation, taxation, breach of contract, etc.
- ⦿ Comments start with first contact and end with the trial
- ⦿ Not necessarily in order of importance!

But First...Quick Overview

- First Phone Call
- Determine Scope of Work
- Assemble Expert Team
- Interact with Attorney and Team
- Opinions and Reports
- Depo Prep and Depo Testimony
- Trial Prep and Trial Testimony

Item 1 – The Expert Team

- ◎ Don't ask for other experts.
 - > land planning
 - > civil engineering
 - > hydrology
 - > traffic engineering
 - > architecture
 - > biology
 - > structural engineering
 - > cost estimating
 - > noise and vibration impacts
 - > other specialties

Item 1 – The Expert Team

- ◉ It is tempting for experts to profess expertise in many areas. However, most appraisers are not truly experts in these specialized fields.
- ◉ You lose credibility when you step outside your true area of expertise
- ◉ Appraiser helps tie the case together and reflect the impacts on value

Item 2 – Your Files

- ◉ There is no need to keep track of what is in your files (magic word?).
 - > “draft” reports
 - > notes should be readable and reflect the conclusions you draw from them.
 - > keep or discard unused data?
 - > manage the file as the assignment progresses
 - > manage ALL of your files the same way
 - > follow USPAP’s record-keeping requirements

Item 3 – Methodology & Data

- Don't check to make certain that the methodologies and market data you use are admissible.
 - > Some appraisal methodologies are acceptable; some are not
 - > Understand which sales are vulnerable to exclusion
 - > Be ready to explain why you did what you did...are more approaches better?

Item 4 - Preparation

- ◎ Don't bother preparing for the case
 - > Even experienced trial attorneys may have limited experience with appraisers
 - > Date of value
 - > Definition of value
 - > Benefit of the bargain vs. out of pocket
 - > Cost to Cure versus Value Impact?
 - > Definition of the Project

Item 4 – Preparation

- ◉ Don't bother preparing for the case
 - > Appellate and supreme court (both CA and Federal) cases.
 - > Evidence Code (read it)
 - > Understand the attorney's style, opportunities to get up and move, etc.
 - > How much scripting of the testimony?
 - > Communications during the trial

Item 5 – Other Experts

- ◉ There is no need to coordinate with other experts in the case.
 - > Opinions evolve and change; new information comes to light
 - > Cost estimates change
 - > “Would it surprise you to learn that Ms. XYZ testified that. . .?”
 - > Appraiser’s opinion that rezoning was “a done deal” and “fait accompli” was stricken after the planning expert said there was a 70% probability

Item 6 – Deposition Preparation

- ◉ Don't waste any of your time or the client's money preparing for your deposition
 - > You cannot win the case at a deposition, but you can surely lose it
 - > Inconsistent deposition testimony can be used effectively, particularly if it's on videotape

Item 6 – Deposition Preparation

- ◉ Don't waste any of your time or the client's money preparing for your deposition
 - > Know the contents of your file, and have it organized in a professional manner.
 - > Inspect the subject property and all data on which you rely
 - > Be “trial-ready” at depo!

Item 7 - Exhibits

- ◎ Don't worry about preparing exhibits.
 - > “A picture is worth a thousand words”
 - > Some folks are visual learners
 - > We need to respect all styles of learners
 - > Graphs are better than tables . . .
 - > Photos are great (aerials & ground-level)
 - > Trial Director (video, split screen, real-time highlighting, etc.)

Item 8 - Bias

- ◎ Make sure that the jury understands that your client is righteous, and that the other side is incompetent and is not acting in good faith.
 - > The jury and the court may suspect that you are “bought and paid for”
 - > Attorneys are advocates for their clients
 - > You are NOT an advocate for your client.
 - > Your client is not “good” or “bad”
 - > Let the jury decide who is right and who is wrong.

Item 9 – Terminology, etc.

- ◎ Use complex terminology and methodologies so that you sound like an expert.
 - > A juror is unlikely to believe someone they don't understand, or who "talks down" to them.
 - > Learn to explain methodologies and analyses using understandable language, but don't be condescending.

Item 9 – Terminology, etc.

- Use complex terminology and methodologies so that you sound like an expert.
 - Make sure that you REALLY understand and can explain in easy terms
 - market value
 - highest and best use
 - price versus value
 - appraisal methodologies (what is a “comp”?)

Item 10 - Arrogance

- Tell the jury that the property is worth \$1,000,000 because you say so and you have 25 years of experience.
 - The jury's job is to "appraise" the property
 - Expert witnesses may testify because they help the jury decide questions of fact
 - Give the jury the tools they need to do their job
 - The jury may not adopt a value just because you say that's what it's worth

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