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From Appraisal Report to Witness Stand: A Practical Guide to Litigation for Real Estate Appraisers

November 5, 2026

Appraisal Institute™

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1. How an Appraiser Fits into a Lawsuit

How a dispute becomes a lawsuit

- The difference between a consulting expert, retained testifying expert, and treating or percipient appraiser
- When appraisers typically become involved
- What happens during written discovery, expert disclosure, deposition, motions, and trial
- Who makes which decisions: client, attorney, appraiser, judge, and jury
- Why the expert's role is to assist the decision-maker—not to win the case

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2. Diminution-in-Value Disputes in Title and Real Estate Cases

A. Common disputes involving diminution in value

Lack of legal or physical access

Easements and encroachments

Boundary and survey disputes

Restrictive covenants

Zoning, use, or development restrictions

2. Diminution-in-Value Disputes in Title and Real Estate Cases

Continued:

- Defects in title or ownership interests
- Undisclosed leases or occupancy rights
- Priority disputes and liens
- Environmental conditions
- Temporary versus permanent impairments

2. Diminution-in-Value Disputes in Title and Real Estate Cases

B. Defining the valuation problem

- What property interest is being valued?
- What is the correct valuation date?
- What is the alleged defect or impairment?
- Is the condition temporary, permanent, curable, or uncertain?

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2. Diminution-in-Value Disputes in Title and Real Estate Cases

Continued:

- What is the appropriate "before" condition?
- What is the appropriate "after" condition?
- Is the appraiser being asked to assume a legal conclusion?
- Does the measure of damages match the appraiser's assignment?

C. Working with disputed legal assumptions

The appraiser should not decide legal questions such as whether an easement exists, whether a restriction is enforceable, or whether title is defective. Instead, counsel may ask the appraiser to evaluate value under specified assumptions.

2. Diminution-in-Value Disputes in Title and Real Estate Cases

A useful approach may be to analyze alternative scenarios:

- Value if the claimed right or restriction exists
- Value if it does not exist
- Value if the condition is temporary or curable
- Value if the condition is permanent

2. Diminution-in-Value Disputes in Title and Real Estate Cases

D. Avoiding double counting

- Diminution in value versus cost to cure
- Temporary loss versus permanent impairment
- Lost income versus reduced capital value
- Whether separate damage components measure the same economic harm

3. Accepting and Defining a Litigation Assignment

A. Questions to ask at the outset

- Who is the client?
- Who are the parties and attorneys?
- Are there conflicts?
- What opinions are actually being requested?
- What is the effective date?

3. Accepting and Defining a Litigation Assignment

Continued:

- What property interest is at issue?
- What facts are disputed?
- What assumptions are being supplied by counsel?
- Will a written report, deposition, or trial testimony be required?
- Can the assignment be completed competently and on time?

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3. Accepting and Defining a Litigation Assignment

B. Engagement-letter considerations

- Scope of the assignment
- Applicable assumptions and hypothetical conditions
- Expected deliverables
- Deposition and trial availability

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3. Accepting and Defining a Litigation Assignment

Continued:

- Compensation and cancellation terms
- No contingent compensation
- File-retention obligations
- Responsibility for supplemental work

3. Accepting and Defining a Litigation Assignment

C. Controlling scope creep

- New theories introduced by counsel
- New documents received shortly before deposition
- Requests for opinions outside the appraiser's expertise
- Requests to make legal conclusions
- Informal opinions that later become part of the case

4. The Expert's File: What May Become Evidence

Materials that may be requested or examined include:

- Reports and prior versions
- Workfiles and notes
- Comparable searches
- Calculations and spreadsheets
- Photographs and inspection materials
- Emails and text messages

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4. The Expert's File: What May Become Evidence

Continued:

- Materials supplied by counsel
- Materials considered but not ultimately relied upon
- Invoices and time records
- Prior appraisals of the property
- Prior testimony and publications

4. The Expert's File: What May Become Evidence

Practical file-management rules:

- Assume that anything written may eventually be shown to opposing counsel.
- Preserve relevant material once litigation is pending or anticipated.
- Keep the workfile organized enough that another person can follow the analysis.
- Document why a material opinion or calculation changed.

4. The Expert's File: What May Become Evidence

Continued:

- Use professional language in emails and notes.
- Do not describe the assignment as an effort to reach a desired number.
- Understand that discovery protections differ between jurisdictions and between consulting and testifying experts.

5. What to Do When You Receive an Apparently Privileged Document

If an appraiser receives a document that appears inadvertently produced, confidential, or protected by attorney-client privilege:

1. Stop reviewing it beyond what is necessary to recognize the problem.

2. Do not forward, quote, annotate, or discuss it with others.

3. Preserve the document and the circumstances under which it was received.

4. Promptly notify retaining counsel.

5. What to Do When You Receive an Apparently Privileged Document

Continued:

5. Follow counsel's instructions concerning sequestration, return, deletion, or further use.

6. Do not independently decide that privilege has been waived.

7. Do not incorporate the information into an opinion unless counsel confirms it may properly be considered.

5. What to Do When You Receive an Apparently Privileged Document

Related practical problems:

- Documents marked "Privileged" or "Attorney Work Product"
- An opposing party's internal legal advice included in a production
- An email mistakenly sent to the expert
- A privileged document attached to another document
- Whether the expert's review itself may need to be disclosed

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6. Deposition: Where the Opinion Is Stress-Tested

A. What opposing counsel is trying to accomplish

- Understand and limit the expert's opinions
- Identify assumptions and missing information
- Obtain useful admissions
- Expose inconsistencies
- Develop grounds to exclude or restrict testimony
- Preserve testimony for trial
- Assess how the expert will appear before a judge or jury

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6. Deposition: Where the Opinion Is Stress-Tested

B. Preparation

- Re-read the report and complete workfile
- Recheck significant calculations
- Review supporting data and rejected comparables
- Identify assumptions supplied by counsel

6. Deposition: Where the Opinion Is Stress-Tested

Continued:

- Understand the principal attacks on the opinion
- Review prior appraisals and testimony that may be used
- Identify and address mistakes before questioning begins
- Be able to explain the analysis without relying exclusively on the report

6. Deposition: Where the Opinion Is Stress-Tested

C. Practical answering techniques

- Listen to the entire question.
- Pause before answering.
- Do not guess.
- Ask for clarification when needed.
- Do not accept an inaccurate premise.

6. Deposition: Where the Opinion Is Stress-Tested

Continued:

- Identify assumptions built into hypothetical questions.
- Answer the question asked and then stop.
- Explain when a yes-or-no answer would be incomplete or misleading.
- Correct mistakes promptly.
- Do not argue with the examining attorney.

6. Deposition: Where the Opinion Is Stress-Tested

D. Common traps

- "You would agree that..."
- Questions using "always" or "never"
- Compound questions
- Selective quotations from professional standards

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6. Deposition: Where the Opinion Is Stress-Tested

Continued:

- Incomplete hypotheticals
- Questions about data the expert did not examine
- Attacks based on omitted comparables
- Questions designed to characterize the expert as an advocate

7. How Judges and Juries Evaluate Experts

Judges and jurors are likely to consider more than technical qualifications. They will also assess:

- Whether the expert appears independent
- Whether the methodology makes sense
- Whether important facts were considered
- Whether the expert answers questions directly
- Whether the expert acknowledges reasonable limitations

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7. How Judges and Juries Evaluate Experts

- Whether the expert appears defensive or argumentative
- Whether the expert explains rather than lectures
- Whether compensation appears to influence the opinion
- Whether the expert's conclusions seem more precise than the available information permits

7. How Judges and Juries Evaluate Experts

Potential credibility problems:

- Acting as a member of the litigation team
- Refusing to make obvious concessions
- Using jargon to avoid a direct answer
- Exaggerating qualifications or certainty
- Criticizing the opposing expert personally
- Becoming visibly irritated during cross-examination
- Appearing unfamiliar with one's own report or workfile

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8. Using Graphics and Demonstratives to Explain an Appraisal Opinion

A. The importance of graphics and demonstratives

A judge or juror may hear days or weeks of evidence. The appraiser should make the valuation analysis understandable and memorable without oversimplifying it.

8. Using Graphics and Demonstratives to Explain an Appraisal Opinion

B. Useful demonstrative aids

- Aerial photographs
- Parcel and boundary maps
- Easement overlays
- Before-and-after photographs
- Comparable-property maps

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8. Using Graphics and Demonstratives to Explain an Appraisal Opinion

Continued:

- Timelines
- Adjustment grids simplified for presentation
- Side-by-side "before" and "after" conditions
- Diagrams showing access, visibility, or development limitations
- Charts showing how individual assumptions affect value

8. Using Graphics and Demonstratives to Explain an Appraisal Opinion

C. Principles for effective graphics

- One principal point per graphic
- Legible from across the courtroom
- Limited text and unnecessary detail
- Consistent terminology, colors, and property labels

8. Using Graphics and Demonstratives to Explain an Appraisal Opinion

Continued:

- Clear distinction between evidence and illustration
- Source information available
- Numbers consistent with the report
- No visual exaggeration of the claimed impairment

8. Using Graphics and Demonstratives to Explain an Appraisal Opinion

D. Evidentiary and practical concerns

- Show proposed graphics to counsel early
- Determine whether the graphic uses admitted evidence
- Preserve the underlying source material
- Be prepared to explain who created it
- Confirm every number and label
- Avoid creating a simplified graphic that contradicts the complete analysis

9. Top Ten Practical Rules for Appraisers in Litigation

1. Define the assignment before doing the work. Identify the property interest, valuation date, claimed impairment, assumptions, and requested opinions.

2. Understand your role. You are an independent expert assisting the decision-maker—not an advocate or an additional member of the legal team.

3. Do not decide disputed legal issues. Ask counsel to provide the necessary legal assumptions and, where appropriate, analyze alternative scenarios.

9. Top Ten Practical Rules for Appraisers in Litigation

4. Assume your file will be examined. Maintain an organized workfile and communicate professionally in every medium.

5. Stop when something looks privileged. Do not continue reading or distribute the document; contact retaining counsel immediately.

6. Be able to explain every significant choice. This includes the approaches used, comparables selected or rejected, adjustments made, and assumptions adopted.

9. Top Ten Practical Rules for Appraisers in Litigation

7. Document material changes. A revised opinion is not inherently problematic, but an unexplained change can seriously damage credibility.

8. Prepare for the attack, not merely the presentation. Before deposition, identify the weakest assumptions, missing information, contrary data, and prior inconsistent opinions.

9. Top Ten Practical Rules for Appraisers in Litigation

9. Teach with visuals and plain language. Make the analysis understandable without sacrificing professional rigor.

10. Protect credibility above the number. Be candid about limitations, make fair concessions, correct mistakes, and never overstate the certainty of the conclusion.

Question & Answer Session

Thank You

For questions or comments, please contact:

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