The Top Twelve Mistakes Appraisers Make in Court Preparation

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Often, appraisers are deposed or asked to testify in court proceedings. Mistakes are easy to make and to help us better prepare for these proceedings, we turned to Roger Durkin, J.D., M.S., FASA to get his thought on The Top Twelve Mistakes Appraisers Make in Court Preparation. Roger's extensive experience may be viewed at: http://www.durkinvaluation.com/index.php?link=about and http://www.durkinlawpc.com/.

Note: These mistakes are not in a any particular order

1. Not knowing the facts of the dispute. It is paramount that the appraiser understands the facts of the dispute at the time of testimony. This understanding of the facts is something the appraiser should have already done when accepting the assignment.

2. Failure to study the appraisal report prior to testimony or deposition. Often times the need for deposition or testimony occurs six to twelve or more months following the actual writing of the appraisal. That's why it is important for the appraiser to read and re-read the appraisal until he or she know it well. The report should be a persuasive narrative, one in which the appraiser meets the burden of proof – the burden of proof being the sufficiency of evidence to persuade the reader. Remember, 51% is your burden – tilt the scale just 51% "more likely true" which is the standard of proof in almost every civil case, litigation case or most arguments.

Our burden of proof in the appraisal business is 51%. If you are challenged in any civil court with a dispute, the person who brings in 51% more likely true than not true will result in the court accepting the argument. Evidence above 55% would be, of course, better than 51%. 51% is not a big burden. But appraisers often do not have any persuasive evidence in their report. The question usually asked by the court or in depositions is "what is your basis?" Meaning what is your evidence. How did you arrive at the number?" How did you get to that number? How do you know that's true?

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3. Failure to document experience properly. Under the rules of evidence you have to disclose your publications and past expert testimony. That's a Federal rule of Evidence. Often, an appraiser's resume doesn't have that information. The resume often lists basic education information and a listing of clients, but doesn't cite items, publications, cases in which the appraiser testified, specialized education or experience relative to the subject property. Under Federal Rules of Evidence, the appraiser must disclose publications and cases in which he or she testified. The appraiser's resume should include actual cases who, when, and where the appraiser testified.

4. The appraiser has negative demeanor. We use the fancy word demeanor. You and I, when we meet someone, we have a sense of them immediately - that we like them, that we don't like them, we don't want to get close to them, whatever positive or negative sense feelings. But demeanor in a deposition or court testimony is actual evidence. The lack of eye contact and certain kinds of body language telegraph positive and negative attitudes. Appraisers should have a professional presence. This information comes from jury research. Jurors, as well as judges, like eye contact as an indication of credibility. Negative actions like crossing ones legs, folded arms, and looking at the floor or the ceiling when answering, subtracts from the credibility.

5. Being occasionally rude, crude, or having an aggressive attitude. When you are cross-examined by opposing counsel, expect some hardball questions. His or her task is sometimes to destroy your credibility. Appraisers put their credibility on the table when they agree to testify. Some attorneys are masters at getting the witness to stumble. So expect it. Answer truthfully, be polite and be firm. Don't get angry, don't get upset, don't – debate. Opposing counsel is going to win some points. It's his/her job. Maintain your demeanor and credibility by not reacting negatively.

6. Not properly preparing the attorney. How this mistake happens is occasioned by the attorney who hired you not prepping you and or not proceeding carefully. Example, , you have been testifying over the years and now you're up against another appraiser who is not as well qualified. You demonstrate to the attorney who hired you that the opposing appraiser isn't qualified and specifically discuss the mistakes and other reasons why he isn't qualified

to testify. The attorney who hired you is not experienced using experts. The attorney on the other side, gets agreement from the attorney who hired you to skip the qualifying questions. He rises and opens the introduction of his expert saying, , "Your honor, to save the court time, we agree we are going to accept both experts testimony so that we don't have to go through that". All of a sudden, the appraiser who is not qualified and should have been challenged is testifying. He's accepted as an expert. Stopping the other expert from testifying was possible because there was sufficient evidence to disqualify him or her. An expert's testimony is evidence. Disqualifying the other expert is a common challenge because stopping you or the other expert from testifying results in that evidence not coming in. What the attorney on the other side did in the case described was to enable his expert to testify, even though he wasn't qualified. So you should provide your employee/attorney a statement of qualifications that answers why you are qualified and answers the court's expert qualification inquiry. "Can you tell us your education and specialized training?" You should provide the questions to your attorney and you should provide the answers in your statement of qualifications. Questions like, "What does it take to get a designation from the association you belong to?" Your task is to prep the attorney so that he asks the questions that the judge will decide is sufficient to allow you to testify.

The reason you testify is because you are providing the judge with information the judge doesn't have and wouldn't have in the normal course of his/her work. The judge doesn't need someone to tell him what he already knows. An expert could be dismissed as a witness because what you were about to testify about, the judge doesn't want to hear. He or she knows all that. Therefore go over your qualifications before trial with more information than just your name, rank and serial number. You provide the attorney who will introduce you with evidence of your formal and specialized training, your membership in a professional society, any teaching experience, any publications within the field of expertise and your expert witness testimony. Judges don't like to pre-qualify the expert. They want the attorney to qualify his or her expert.

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7. Being an advocate. Avoid advocacy or the appearance of advocacy. Let the lawyers play advocate. You're not part of the advocate team. There is a tendency for appraisers to get wrapped up in the case. Your credibility is at risk if you cross that line. USPAP once defined advocacy as "representing the cause or interest of another, even if that cause or interest does not necessarily coincide with your own." That's what lawyers do, they advocate. You must not advocate the cause or interest of the party. Do not lose your credibility as an independent expert.

When you are working in the field of dispute resolution there is a tendency to be on the side of the person who hired you. You have to avoid the image of advocacy. Judges are fully aware of an expert's demeanor, credibility and whether that expert witness is bending the truth.

8. Ipse dixit. This simply means there is a lack of evidence or credibility. The words mean, "I said so, therefore it is." Appraisers, particularly personal property appraisers, whether it's M&TS or antiques, tend to say "It is because I said so." Because I have been doing this work for x years. Avoid ipse dixit, by providing sufficient evidence to persuade the listener that your value opinion is valid.

9. Self-deception and routinely following dogma. Self-deception is convincing yourself that you are correct and believing it - crossing the line of certitude, "I know I am right." Dogma is a problem. In a recent review of a personal property appraisal of an ASA candidate, the appraiser wrote, "My conclusion of value is…" In another place he wrote, "The value conclusion is…" "I concluded the value to be…" In response to my question, he said he was taught to use that term in ASA courses. This candidate was the victim of dogma wherein some instructor said use the term "Conclusion of value" rather than opinion of value. This candidate completed 201, 202, 203, 204, 205 and USPAP. He didn't know that an appraisal is an opinion of value, not a conclusion of value. , An appraisal opinion is a professional opinion, like a legal opinion or financial opinion. It is not an estimate. It is not a conclusion of value.

10. Not being aware of Daubert Standard. Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993) was a lawsuit wherein the pharmaceutical company was accused of producing a medicine that caused birth defects. The experts testified without sufficient basis. Daubert lost the claim in the trial court. The case went to appeals court. Then it went to the United States Supreme court. In the process, the issue was whether the experts were qualified to testify. The Daubert standard is a set of five criteria that delineate the admissibility of expert testimony in Federal court. If you are in any Federal court, the attorney on the other side wants to prevent your expert testimony, thereby removing any evidence you might provide. That attorney might call for a Daubert Challenge where the court will allow a special hearing to argue whether or not you qualify under these Daubert principles. Daubert and other applicable

caselaw should be known to appraisers. You might ask, "What does that have to do with us?" In divorce work state laws define the value in a divorce as an equitable division among partners. Bankruptcy Code has thirty-four definitions of market value. Which one are you using? Daubert also asks, are there standards that govern what the expert does? You could say, yes, in appraisal the standards are USPAP. Another Daubert Critieria is; is this method you applied commonly utilized in the appraisal community?

11. Simply not understanding the basics of the dispute/resolution process. In modern civilization, instead of dueling pistols, we go to some arbitrator to resolve our disputes. It's either by negotiation, mediation, arbitration, or in front of a civil court judge. The appraiser should be reasonably knowledgeable about the regulations, statutes and the case law that affects the standard of value and admissibility of expert testimony in those forums. They are different. For example, Federal court rules of evidence and civil procedure are more clear cut than various state rules of evidence and rules of civil procedure. In arbitration, the hearing officer or the arbitrator, has the same power as the judge. Arbitration is established by federal statue. Mediation is not binding. The details of which dispute resolution method are not as important as the appraiser knowing what standards apply in that particular forum.

12. Not getting paid for depositions. The appraiser should be aware that most states, have adopted the federal rule 26(b)(4) which basically says that the person calling the expert has to pay his/her usual rate for preparation and attendance.