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ARTICLES

Land Mines with Expert Witnesses in Real Estate Valuation Matters

An expert's credibility is crucial to the client's chances for success.

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In real estate valuation litigation, a fair amount of evidence is presented through expert witnesses. Appraisers, engineers, planners, and other experts are employed to assist the fact finder in determining a property's utility and value. An expert's credibility is crucial to the client's chances for success, so the attorneys involved must ensure that their experts have prepared quality expert reports and are adequately prepared for both direct examination and cross-examination. The attorneys must also work with their experts in seeking and defending against discovery requests.

A purple banner for a Lenovo sale. On the left, white text reads 'Lenovo's Spring Clearance Sale!' followed by 'Save over 48% off select items' and '4/06/2020-4/26/2020'. In the center, a white truck icon is followed by 'Free Shipping' and 'While supplies last!'. On the right, there is an image of a desktop monitor and a laptop, both displaying colorful abstract graphics. The Lenovo logo is in the bottom right corner of the banner.

Expert Retention

Once counsel has identified the type of experts needed in the case and the candidates for that particular area of expertise, the next step is the retention of the expert. Care should be given regarding what information is shared with the potential expert witness. Whether or not the expert is one with whom you have previously worked, it is always important to determine whether the expert has taken any positions that may be in conflict with the issues that the expert is being asked to address.

Distinctions are made in most jurisdictions regarding what discovery can be taken concerning a testifying and a nontestifying expert. Careful consideration should be given at the outset of each expert relationship in deciding whether to retain the expert initially as a testifying or a nontestifying expert. A nontestifying expert can later be converted to a testifying expert witness, but the reverse is less likely. Additional considerations arise in jurisdictions where the expert fees and costs are reimbursable because some jurisdictions will only allow recovery of such fees and costs for testifying experts.

A determination must also be made as to whether the expert will be retained by the client or the lawyer. Experts are hired to determine the "truth" through an impartial analysis of the facts and an application of those facts to their area of expertise. Lawyers, on the other hand, advocate their client's position. Some lawyers believe that the expert should be hired by the client rather than the lawyer because when the client pays the expert, the expert is not being retained to advocate the attorney's position. Other lawyers hire the expert directly in order to safeguard against intrusive discovery requests.

Working Relationship Between Counsel and Experts

After the expert is retained, the lawyer and expert should work together at the outset of the relationship to determine what information will be provided to the expert by the lawyer and what information will be collected by the expert. In addition, there should be an initial understanding of what work product the expert will provide during the course of the case as well as the timeline for providing that work product.

Preparation of Expert Reports

Do not simply give the assignment to the expert and receive the final expert report. Instead, be involved. Visit the property with the expert and review the theme of the case and anticipated issues with the expert. If the expert realizes that you are knowledgeable in law and the facts, the expert will feel more comfortable working on the assignment. Counsel should make sure that the expert has independently verified any data relied upon in the report. Counsel should also review the data to ensure that it is accurate and reliable and supports the client's position.

Before a report is first drafted, you should conduct an oral review of the report, the estimated opinion, and the basis of the opinion. Next, carefully review a draft of the report. All communications regarding the report should be through counsel and not directly to the client or other experts. The client must, however, also be a part of the team throughout the process. You, the client, and the expert need to collaborate. There should be no surprises.

The final report should be accurate and comprehensive as it will likely control the parameters of the expert's testimony. It is harmful to subsequently change a final report and hard to "backfill" with additional bases for opinion after the expert opinion has been reached. You should review and verify the information set forth in every report. Never accept anything at face value. Also make sure that the report complies with the law of your state. Never assume that the expert is familiar and compliant with local rules and practice.

Discovery: Land Mines in Work Product

Each jurisdiction has its own rules concerning discovery from testifying and nontestifying experts. Great care must be given to what is provided to the expert because your work product may be subject to discovery, potentially setting off land mines concerning the expert's credibility. The issue arises as courts grapple with the common requirement that the expert report disclose all information "considered" by the expert.

Some courts have held that disclosure requirements mandate that *all* documents provided to an expert, even work product revealing the mental impressions of the attorney, be produced regardless of whether the expert relied upon that information in forming his or her opinion. *See, e.g., Synthes Spine Co. v. Walden*, 232 F.R.D. 460, 465 (E.D. Pa. 2005); *Am. Fid. Assurance Co. v. Boyer*, 225 F.R.D. 520, 522 (D.S.C. 2004); *TV-3, Inc. v. Royal Ins. Co.*, 194 F.R.D. 585 (S.D. Miss. 2000). Other courts protect opinion work product in the hands of the expert. *See, e.g., Ladd Furniture, Inc. v. Ernst & Young*, 1998 WL 1093901 (M.D.N.C. Aug. 27, 1998); *Chopper v. R.J. Reynolds Tobacco Co.*, 195 F.R.D. 648 (N.D. Iowa 2000). In New Jersey, applicable court rules and case law classify as protected work-product "communications between counsel and the expert constituting the collaborative process in preparation of the report, including all preliminary or draft reports." N.J. Court Rule 4:10-2(d)(1); *see Adler v. Shelton*, 343 N.J. Super. 511, 530, 778 A.2d 1181 (Law Div. 2001). Given the disparate and evolving law in this area, great care must be given to what an attorney decides to physically provide and/or otherwise communicate to the testifying expert.

Discovery: Land Mines in Prior Reports and Draft Reports

While expert reports that are not exchanged may not be discoverable, prior reports prepared by the expert are certainly available for use or impeachment. Draft reports can also be considered "prior" reports in some jurisdictions.

Experts typically send a draft of their report to counsel for prior review or comment before finalizing the report. This review can be extremely helpful to ascertain if there is something missing or inaccurate in the appraisal. However, you should be familiar with the law in your jurisdiction concerning the need for experts to preserve drafts of their reports and the discoverability of such documents. Particularly where there is a legal requirement to preserve all drafts, an instruction should be given to the expert, preferably in writing, to preserve such documents at the outset of the relationship. Remember that communications between the expert and the client are, in all likelihood, not subject to any privilege, while communications between the expert and the attorney may be considered attorney work product.

Prior reports can be a most effective tool to impeach an expert on cross-examination. Counsel should be aware of any specific industry rules for report retention. For example, the Uniform Standards of Professional Appraisal Practice (USPAP) require real estate appraisers to maintain a work file for each appraisal for at least five years after preparation or at least two years after final disposition of any related judicial proceeding, whichever period expires last. The work file must contain the name of the client and related information; true copies of any written reports, documented on any type of media; summaries of oral reports or testimony, or a transcript of testimony; and all other data, information, and documentation necessary to support the appraiser's opinions and conclusions. The failure to maintain copies of prior reports can violate the appraiser's ethics rule under the USPAP, which alone may result in substantial impeachment. *See, e.g., In re Vill. of Port Chester (Bologna)*, 27 Misc.3d 1203(A) (N.Y. Sup. Ct. Westchester Cty. 2010), *aff'd*, 95 AD.3d 895, 943 NYS.2d 575 (2d Dep't 2012) (sanctioning the condemner's appraiser and making a negative inference when the appraiser destroyed his prior drafts).

Discovery: Land Mines in Other Expert Witness Information

Prior reports and draft reports are not the only land mines that experts need to avoid. Bias can be equally damaging.

In New Jersey, a litigation expert's financial records are not subject to disclosure if the production would be overly burdensome or harassing. In *Gensollen v. Pareja*, 416 N.J. Super. 585, 7 A.3d 243 (N.J. Super. Ct. App. Div. 2010), a New Jersey personal injury case, the plaintiff sought discovery from the defendant's medical expert in an effort to document the percentage of his work that was defense related. The New Jersey court acknowledged that a litigant is entitled to discovery based on the potential for positional bias, but such discovery should stop "once the expert provides information that would permit the requesting party to argue to a fact-finder that the expert is a 'professional witness' or 'hired gun' who mostly offers opinions that largely seek to vindicate a particular position." *Id.* at 520. The court went on to find that there can be no bright-line rule, and each case must turn on the particular facts and circumstances.

Gensollen agreed with the Florida Supreme Court in *Elkins v. Syken*, 672 So. 2d 517, 522 (Fla. 1996), which noted that excessive discovery into an expert's finances or into other extraneous matters could have a chilling effect on the ability to obtain competent experts. The *Elkins* Court therefore held that "[t]he production of the expert's business records, files, and 1099s [sic] may be ordered produced upon the most unusual or compelling circumstances." *Id.* at 521 (emphasis added).

Elkins has been reviewed in other jurisdictions but has not been universally accepted. The Supreme Court of Kentucky was critical of *Elkins* in *Primm v. Isaac*, 127 S.W.3d 630 (Ky. 2004). In *Primm*, the court held that an expert could be compelled during discovery to produce his income tax records and other financial documents for examination by opposing counsel for possible impeachment at trial, in order to permit a party to discover and prove positional bias of the adverse party's expert witness. *Id.*

Pennsylvania also permits discovery of income information when testing potential positional bias of an expert witness. *See Cooper v. Schoffstall*, 905 A.2d 482 (Pa. 2006), where the Pennsylvania Supreme Court approved discovery of an expert to inquire as to

the approximate amount of compensation received and expected in the pending case; the character of the witnesses' litigation-related activities, and, in particular, the approximate percentage devoted to specific types of litigation and/or work on behalf of a particular litigant, class of litigant, attorney, and/or attorney organization; the number of examinations, investigations, or inquiries performed in a given year, for up to the past three years; the number of instances in which the witness has provided testimony within the same period; the approximate portion of the witness's overall professional work devoted to litigation-related services; and the approximate amount of income each year, for up to the past three years, garnered from the performance of such services.

Id. at 495.

As shown above, there is no uniform rule on positional bias discovery. Whether the expert's personal financial information is subject to discovery depends on the jurisdiction in which the expert is called to testify. How jurisdictions resolve this issue could impact real

estate valuation litigation because of the significance of expert opinions in proving a property's value. Counsel needs to be prepared to deal with the procedural aspects of seeking or opposing such bias discovery.

Conclusion

Expert witnesses are critical to real estate valuation litigation, so it is imperative that the experts be properly instructed as to (a) the applicable law relating to the experts' communications and reports and (b) what other information is potentially discoverable. By thoroughly vetting a potential expert's credentials and prior work (including publications, expert reports, and testimony) and ensuring that the expert fully comprehends the scope of the assignment, counsel can minimize the chance that a land mine will be discovered and detonated by the adverse party, which can result in the loss of the case and a client.

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