



Towards a More Credible Appraisal: An Attorney's Perspective

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Abstract: A litigated valuation dispute is won or lost on the basis of the appraisal evidence presented. In order for an appraisal to be effective in this context, it follows that it must be credible. The credibility of an appraisal can be enhanced at every phase of the appraisal process. This article examines the attributes of credible appraisals and provides examples of how to enhance credibility and, more importantly, what to avoid. While some examples are specific to real property appraisals, experts in any appraisal discipline can benefit from this article.



Valuation disputes are frequently resolved through litigation, which is an adversarial process. Each party is trying to persuade the fact finder that their value estimate is more correct than their

opponent's. Appraisers testify as expert witnesses and offer their opinions of value supported by written appraisal reports. It goes without saying that the more credible of two competing appraisals ends up being the one that carries the day.

Credible appraisals are not the result of an accident – to the contrary, they are the product of careful preparation and deliberate execution. Because the appraisal process necessarily involves judgment, it is not pure science—there is no single “right” answer. However, judgment supported by facts leads to credibility and, thus, persuasion.

A credible appraisal is best described as one that: (1) is made by a qualified appraiser (i.e., competency); (2) adheres to professionally accepted appraisal practices which are correctly employed; (3) is consistent with standards unique to the jurisdiction; (4) is devoid of factual errors; and (5) supported by well researched data and reasoned logic.

In litigation, every aspect of the appraisal process, from start to finish, will be under the microscope and subject to intense scrutiny. In addition to his or her appraisal

expert, opposing counsel is likely to employ a review appraiser to evaluate your opinion/report in preparation for trial. The focus of cross-examination ranges from the “knockout punch” to “death by 1,000 cuts.” Regardless of the mode of attack, there are a number of things that can be done to minimize errors that detract from credibility.

The Engagement

The best place to start is usually at the beginning. For an appraisal assignment, this means the engagement. Typically, you will be contacted by an attorney representing a party in the case, seeking to employ you as an expert on behalf of the client. Even if you've worked with that attorney before, it's still a good idea to verify his or her expectations for this assignment. Do not underestimate the degree of thoroughness required by the assignment. Discuss the attorney's expectations up front and then charge accordingly. Hopefully, you will be expected to gather information (e.g., deeds, contracts, closing statements, etc.) for sales transactions beyond what is published on commercial data services. Also, determine whether you will be expected to verify each sale considered or used with a principal to the transaction. The same goes for inspecting and photographing comparable sales. You do not want to quote a fee until you understand exactly what is to be expected of you. Confirm the valuation date, the interest being appraised and the standard of value to be applied. There are several different value definitions for real estate

and tangible personal property, including jurisdictional definitions. It is preferable to receive written instructions from the attorney on these points. Needless to say, your appraisal will be dead on arrival if you mistakenly use an incorrect standard of value for the assignment.

Jurisdictional Exceptions

We all know that the Uniform Standards of Professional Appraisal Practice (USPAP) recognizes jurisdictional exceptions to the appraisal process.² Ask your attorney whether any jurisdictional exception potentially applies to your assignment. If so, request the lawyer provide you with language to insert into the report, invoking the jurisdictional exception. Otherwise, you will be left to fend for yourself in deposition or at trial as to why you invoked a jurisdictional exception.

Prior Assignments or Testimony

It's also a good idea upfront to reveal prior assignments or testimony involving similar properties that could be used against you later at trial for impeachment. The internet is an amazing thing. It's conceivable that prior appraisal reports you have prepared are available on the net, particularly if you have made appraisals for governmental agencies. Attorneys appreciate candor and if you're not selected for this engagement, chances are they will be calling you for the next one.

Data Collection

Appraisals, like the subject of any expert testimony, must be predicated upon an underlying set of facts or data.³ Not only are the underlying facts subject to

discovery prior to trial, but production of the information at trial could be demanded by the opposing party. Always strive to obtain documentation for your work file, particularly where it concerns sales or leases. If you are differentiating a location between the subject and a sale property on the basis of traffic flow, then by all means obtain traffic counts from the appropriate governmental source to support your adjustment. Tangible and intangible personal property frequently transfer along with real estate. It is imperative that you document the value contribution of each, when appraising just the real estate itself.⁴ This means gathering bills of sale, assignments of contracts, IRS Forms 8594, and so on.

Whenever possible, avoid the use of confidential data in your appraisal, as this leads to discovery disputes down the road. When in doubt, seek help and guidance from the attorney. Most jurisdictions have rules that prohibit a party from prosecuting or defending a claim on the basis of confidential data, which is not disclosed to the opponent in discovery. Understand that if you use confidential information as the basis for your opinion, it will in most cases be subject to disclosure.

Valuation Methodology

All three approaches—cost, income and sales comparison—have theoretical application to any given appraisal assignment. Moreover, there are variations within each approach to be considered. For example, the income approach may be developed using direct capitalization of income or a discounted cash flow analysis. Similarly, the cost approach

² Jurisdictional Exception Rule, USPAP

³ Federal Rule of Evidence 705.

⁴ *Walker v. Trump*, 549 So. 2d 1098, 1101 (Fla. 4th DCA 1989) (opinion lacking in credibility because appraiser had no documentation for the assignment of \$3 million in value to furnishings, which sold along with the house, for a total price of \$7 million).

could be based on either reproduction or replacement cost new. Determine up front with your attorney whether the jurisdiction in which the property is located legally prescribes or proscribes a particular methodology that you are considering using for the assignment. A Florida statute, for example, specifically states that the replacement cost, not reproduction cost, is to be considered for purposes of ad valorem assessments.⁵ There is also case law characterizing the discounted sell out and discounted cash flow analyses as speculative.⁶ It's better to understand those things up front than to have your appraisal later stricken at trial because you employed a prohibited methodology. Another aspect of the income approach, which ties back to the interest being appraised, is whether or not your jurisdiction is a market rent (fee simple) or contract rent (leased fee) state.

Sales Comparison Approach

The sales comparison approach necessarily involves the process of making adjustments to the sale properties in order to account for differences (e.g., physical, economic, and so on) between them and the property being appraised. The difference in price within a set of sales cannot be adequately reconciled by simply taking the mathematical average.⁷ A preliminary culling of sales data is advisable for credibility purposes, because similar properties often trade at significantly different prices/units of value.⁸

⁵ See, § 193.011(5), Fla. Stat.

⁶ *Mastroianni v. Barnett Banks, Inc.*, 664 So. 2d 284 (Fla. 1st DCA 1995); *Muckenfuss v. Miller*, 421 So. 2d 170 (Fla. 5th DCA 1982).

⁷ *Latham Holding Co. v. State*, 209 N.E. 2d 542 (NY Ct. App. 1965).

⁸ See, *GTE Florida, Inc. v. Todora*, 854 So. 2d 731, 735 (Fla. 2nd DCA 2003) (telephone exchanges); and *Florida East Coast Railway Co. v. Department of Revenue*, 620 So. 2d 1051 (Fla. 1st DCA 1993) (operating railroads).

Generally, two techniques are recognized for adjustments to sales—quantitative adjustments and qualitative adjustments.⁹

Quantitative Adjustments

Quantitative adjustments are expressed either as a percentage or in a whole dollar amount. Quantitative adjustments are typically supported using a paired sales analysis, such as an adjustment for a change in market conditions. They are usually considered more persuasive due to their nature of being the product of a calculation, based on ascertainable facts. However, there are limits to quantitative adjustments. For example, where the percentage used (110%) cannot be explained, the opinion is worthy of no weight.¹⁰ To be considered comparable, the properties need to have a degree of similarity from the standpoint of size, location, use and zoning.¹¹ Comparing properties with dissimilarities requiring substantial adjustments (50%) is not credible. As one court explained “apples may not be compared to oranges, even when an expert evaluates the botanical distinctions between them.”¹²

Qualitative Adjustments

In contrast, qualitative adjustments are expressed as superior, inferior or similar. For qualitative adjustments to be persuasive, the appraiser must be able to articulate in detail those attributes or characteristics relied upon as a basis for the adjustment. Otherwise, the

⁹ *The Appraisal of Real Estate*, 14th Ed., Appraisal Institute (2013), p. 398.

¹⁰ *Walters v. State Road Department*, 239 So. 2d 878 (Fla. 1st DCA 1970).

¹¹ *Carabelle Properties Limited v. Pendleton*, 10 So. 3d 1118 (Fla. 1st DCA 2009) (different land use restrictions).

¹² *Division of Administration, State Department of Transportation v. Samter*, 393 So. 2d 1142, 1146 (Fla. 3rd DCA 1981).

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credibility of the adjustment and the value conclusion, will be substantially weakened by an argument that the basis was in the appraiser's head. There must be a basis in fact, as opposed to a mere surmise on the part of the appraiser. In one Florida condemnation case, the state's appraiser made a downward adjustment to a comparable sale for condition, because the subject property, a former gas station, had once been contaminated, although subsequently remediated at the time of the expropriation. The appraiser's opinion was rejected because the adjustment was not based on any fact, such as a market transaction.¹³

Cost Approach

The cost approach is appropriately used where the property is relatively new, the market is in equilibrium, and all forms of depreciation can be accurately estimated. Where the property type and circumstances support the use of a cost approach in the assignment, the estimates of cost new and depreciation are critical. Many appraisers simply defer to published cost manuals for this information. Don't. Who developed the cost and depreciation estimates and when? What data was used in the process? How was the accuracy checked? Other than a claim that "everyone uses it," I have yet to meet an appraiser who can answer these questions convincingly. More problematic, however, is the fact that this information cannot be cross-examined at trial and is hearsay, for which no exception to the hearsay rule exists.¹⁴ An expert may not serve as a conduit for hearsay. When an expert adopts the opinion of someone as his or her own, then the expert is impermissibly acting as a conduit.

¹³ *Finkelstein v. Department of Transportation*, 656 So. 2d 921 (Fla. 1995).

¹⁴ Federal Rules of Evidence 803.

Instead of relying on a cost manual, consider employing a sub-consultant, like a building contractor, to provide an estimate of replacement cost new for building improvements. A predicate expert, who is available to testify at trial, will enable you to prepare a far more credible and persuasive value opinion under the cost approach than your opponent, who merely used a published manual. Use of the professionally accepted methodologies for estimating depreciation, such as age life, and determine your own depreciated value of the property. Something that you have developed yourself—and can explain and support with corroborating material (e.g., photographs, building inspection reports, repair estimates, and so on)—is more credible than the opinion of someone else that you have simply adopted as your own, yet cannot explain.

Income Approach

When the income approach is applicable, support your estimates of revenue and expenses with multiple years of actual operating statements, making sure you have investigated all anomalous changes to individual line items on a year over year basis. When extracting capitalization rates, strive to obtain evidence of actual net-operating income at the time the comparison property sold and avoid reliance on commercial data services. In addition, take care to ensure that your calculation of NOI includes all the same revenue and expense considerations as the sale property's NOI for which you are extracting a rate. This apples to apples analysis produces a more credible result.

Don't Make Unforced Errors

Knowing upfront that opposing counsel will go through your report with a fine—

toothed comb searching for errors, it is advisable to have another set of eyes proofread the narrative for grammatical, punctuation, spelling and other mistakes. This person should also use a calculator to check all mathematical computations within the report to ensure they're correct. Build the cost of hiring a proofreader into your appraisal quotation. There is nothing more embarrassing than being confronted with a mistake of this nature. The lawyer will argue to the fact finder that if you can't get the little things right, how can you be relied upon for the bigger things, such as the conclusion of value?

In this day and age of document production via computers, the reality is that a former narrative report template will almost always be used to write the current assignment report. Be aware, however, that this often leads to content error, which is why the proofreader is advisable. I recall one instance where an appraiser was valuing a golf resort on Florida's west coast and his appraisal report described the subject's location as being 6 miles from the Atlantic Ocean! The poor appraiser had carelessly used the template from his last appraisal of a Jacksonville golf course without carefully editing out the obviously irrelevant content. Again, when the focus is on credibility, these types of mistakes can be lethal.

Conclusion

Because appraisals made for litigation are subject to enhanced scrutiny, it is strongly advisable to undertake the assignment with sufficient resources necessary to produce a credible result that will persuade the fact finder. Credibility results from a clear understanding of the assignment parameters, thorough data collection and correct application of appraisal methodology. There are opportunities at every stage of the appraisal process—from engagement to data collection and development of value indications—for the appraiser to avoid pitfalls and develop an appraisal opinion with enhanced credibility.

About the Author

[Rob Kelley's](#) practice with Hill Ward Henderson is principally devoted to litigating the value of property throughout Florida. Rob has made professional presentations to members of the Appraisal Institute, the Institute for Professionals in Taxation, the American Society of Appraisers, the International Right-of-Way Association, The Annual Wichita Program on Taxation of Communication, Energy and Transportation Properties, Lorman Education Services and The Florida Bar. Rob has also served as a member of several legislative task forces on property tax issues.