Select the Out-of-Town Appraiser: New Social Science Research on Real Estate Expert Witness Selection

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Abstract

This paper adds to the literature on the selection of the real property appraisal expert witness. The existing appraisal expert witness selection literature indicates that when the out-of-town expert witness overshadows the knowledge and experience of the local expert, the out-of-town expert is the clear choice yet most lawyers base their appraiser selection on factors that are irrelevant to winning the case such as convenience, proximity to their office, proximity to the subject property, a client's recommendation or the expert's cost. The results of this two-part social science research study indicate that in situations where there will be contentious valuation issues or, where the appraisal expert witness will be called upon to criticize the work of the opposing appraiser, it may be in the best interest of the client and outcome of the case to select an appraisal expert who is located outside of the appraisal services area of the opposing appraiser.

Preface to the Paper

After nearly 25 years as a real property valuation expert witness, this author has observed that, in the majority of real estate litigation cases, lawyers typically select their appraiser expert from within the general vicinity of the subject property. However, this practice is contrary to the literature on the expert witness selection process that does not address the location or geographic proximity of the expert to the subject property as a relevant issue (e.g., Couture and Hayes, 2010; Fried, 2008; Tirella, 2006; Strutlin, 1996; Cabaniss, 1997; Bremser and Mathis, 1994; Harrell, 1993; Champagne et al., 1991; Jones, 1955).

This paper explores the reasons why many lawyers select a “local” appraiser and details compelling new research suggesting that, at least for important or high value cases, lawyers should look to the best appraisal expert witness from beyond the general geographic area of the subject property and the opposing valuation expert.

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1 This is one of the few rigorous studies of the process by which attorneys select and evaluate the performance of expert witnesses. It was a survey of 1,000 randomly selected litigators in the Philadelphia, Pennsylvania metropolitan area. The study asked respondents “desirability of expert characteristics,” independent of the specific factors/issues of the case and the important expert characteristics when considering the “case factors.”

2 Early empirical research study that is informative reading on characteristics of expert witnesses selected, their fees, and how they were recruited.
Common Rational for Hiring the “Local” Appraiser

A review of the appraisal expert witness selection literature indicates a limited number of instances from the secondary literature (e.g., non-peer-reviewed or magazine quality) where the hiring of a “local” appraiser is suggested. The reasons for selecting the local appraisal expert witness include:

- Cost savings;
- Convenience and ease of meeting/communication;
- Client feels comfortable with and/or has previously hired their local expert;
- Knowledge of microeconomic conditions, and past trends in the area as a basis for opinions about future market conditions; and
- Where a jury will be influenced by where the expert resides, grew up or went to school.

A commonly stated disadvantage of an out-of-town expert is the added expense of travel. However, “the cost can be worth it . . . when the faraway witness completely overshadows opposing counsel’s local expert” (p. 567).

Another disadvantage, when the out-of-town expert is also a more prominent expert with better credentials, are higher fees. The attorney must consider this practical consideration in the context of what fees the client can reasonably bear, how long the action is likely to run and the expected use of the witness.

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3 Experience in the geographic area is often an attorney requirement, however, it is typically driven by cost savings and convenience and not issues of competence. Competence in microeconomic conditions and market area trends, if applicable to the issues/cause, would be appropriately researched by any competent expert.

4 From Nichols’ The Law of Eminent Domain, rev. 3rd ed., the “description of an expert valuation witness is subject to revision depending on the jurisdiction where the trial will be held. For example, a ... ‘good ole boy’ ...in a small rural area where the state was building a turnpike, may be the best ... expert witness for whichever party retains that witness first” (§13.03). However, it is widely recognized (e.g., Malone and Zwier, 2001) that there “is no requirement that experts be from the jurisdiction involved in the suit, or even from this country” (p. 1).

5 See also Carter (1996) regarding selection of “an appraiser based solely on the fee, you may be making a very costly mistake for your client” (p. 47). And note that the Bremser and Mathis (1994) study found that only 35.9% of attorneys ranked the expert’s reasonableness of fee was of high importance.

6 Haig states that “when comparing hourly rates, an expert’s overall efficiency and competence cannot be overlooked. For instance, if an expert charges a slightly higher hourly rate but takes less time and provides a better product, then the higher hourly rate should not be a detriment. Accordingly, when comparing the costs of prospective experts, an attorney must evaluate the total value of the proposed experts’ services in comparison to their fees and not simply their hourly rates.

7 Additional advice on the topic of cost comes from Jacobson (2004), as follows: “While every lawyer wants his client to retain the best expert possible, in reality the expert selected is usually the best expert that the client can afford. The choice of the expert has to be tempered by the size of the dispute and the client’s ability to pay. However, it is a slippery-slope to over-emphasize the economic issue and select an expert who is more affordable rather than an expert who is significantly more qualified. The lawyer must carefully document his file
In instances where the local appraiser/expert is a client’s recommendation, the attorney must assess whether the client’s advice is based on a desire to throw a friend some business and/or wants to hire the expert (irrespective of qualifications) most likely to favor the interests of the client because of personal or economic ties. Haig’s (2011) advice to counsel on going along with the client-selected expert is:

“Remember, it is the attorney to whom the client will likely give credit or blame for the result of the litigation. As repeatedly noted, the expert often plays a significant—if not the key—role in the litigation process. Accordingly, there are no substitutes for an attorney performing his own due diligence regarding a proposed expert and for an attorney engaging in clear communications with the client regarding the pros and cons of any proposed expert” (p. 563).

Although not explicitly stated in the literature on the cost savings of a local expert, the out-of-town appraisal expert may need additional time and associated costs to comply with the Competency Rule of the Uniform Standards of Professional Appraisal Practice (USPAP) (2014-2015), specifically:

(a) compliance with laws and regulations that apply to the appraiser such as the State’s appraisal licensing law; and

(b) “where geographic competency is necessary, an appraiser who is not familiar with the relevant market characteristics must acquire an understanding necessary to produce credible assignment results for the specific property type and market involved” (p. U-11).

Referring in this section exclusively to USPAP’s geographic competency, the Federal Rule of Evidence 702 requires that “scientific, technical or other specialized knowledge will assist the trier of fact,” and in that situation, (b) “a witness qualified as an expert by knowledge, skill, experience, or education, may testify thereto in the form of an opinion or otherwise ….” Rule 702 was amended in 2000 with the addition of a “reliability” element. Under Rule 702 as amended, a qualified witness may only provide expert testimony “if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.” Therefore, for the appraiser expert, the issue of geographic competence as it relates to Rule 702 that the client understands the impact that selecting the less effective, but less costly, expert may have on the ultimate disposition of the case” (p. 36).

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8 Robert L. Haig, (Ed.), Business and Commercial Litigation in Federal Courts, 3rd ed., vol. 3, ABA Section of Litigation and Thomson/West, 2011. This is one of the most comprehensive sources on when to use experts, locating expert witnesses, the selection of expert witnesses, the disclosures required when expert witnesses are employed in federal court, and the possible pretrial exclusion of expert testimony.

9 The Federal Rule of Evidence 702, prior to its amendment in 2000, required two elements for expert evidence.

10 FED. R. EVID. 702 (emphasis added).
has three components: whether the appraiser competently considered the relevant market characteristics, whether the expert testimony is “based upon sufficient facts or data,” and whether the expert has “applied the principles and methods [she used] reliably to the facts of the case.”

Whether the appraisal expert satisfied the elements of geographic competence will be decided as a precondition for admissibility. However, in most cases the issues will go with the weight of the evidence instead of admissibility.

Acquiring geographic competency will not be an issue for the more experienced/prominent out-of-town expert who will be accomplished in understanding the market characteristics relevant to the valuation issues.

Summary

The most comprehensive literature on appraisal expert witness selection does not recommend the selection of an expert witness to be geographically proximate to the subject property. However, the typical attorney favors the “local” appraisal expert with the rationale being one or more of cost minimization, attorney convenience, client preference and previous knowledge of the subject’s neighborhood or market.

There will be times when cost necessitates the hiring of a local appraisal expert. Additionally, there will be cases where an appraisal expert is required but, since valuation is not the disputed issue, any additional cost for a non-local or better qualified expert is not justified.

However, it is not in the best interest of the case for an attorney to base his or her expert selection solely on:

- Attorney convenience;
- Expert cost;
- Appraiser’s previous market knowledge; or
- Client’s recommendation.

Background and Objective of this Research Study

Constraints on the funds available for expert witness costs will typically result in hiring the local appraisal expert. But absent this limitation, should the attorney favor the local appraisal expert or expand his/her search for an expert outside of the local area or even beyond the State?

The existing appraisal expert witness selection literature indicates that when the out-of-town expert witness overshadows the knowledge and experience of opposing counsel’s local expert, the out-of-town expert is the clear choice.

In the absence of this “clear choice,” this researcher questioned whether the local appraisal expert, by virtue of being “local,” is predisposed to going “soft” or holding

11 Id.

12 Mnookin and Gross (2003)
back on a rigorous critique of the work (e.g., data selection, analysis, conclusions, standard of care, USPAP Standards violations, alleged unethical practices) of the opposing "local" expert. To go “soft” on a justifiable attack on the work and credibility of such an opposing witness would be inconsistent with the ethical standards of the real property valuation profession and a disservice to the retaining attorney and his client.

Therefore, in the attorney’s appraisal expert witness selection process, the attorney must do all that he/she can to select the most knowledgeable, credible, articulate, etc. appraiser, including one who will be uncompromisingly thorough in assisting in the destruction of the opposing expert’s credibility.

This research study is composed of two (2) separate, yet interrelated, research studies, as follows:

1. It is hypothesized, based upon previous social science research (e.g., Scheier and Carver, 1985; Wiekens and Stapel, 2010), that appraisal expert witnesses are higher public self-aware persons than appraisers who do not work as expert witnesses in litigation settings. A highly public self-aware person is associated with the relatively social standard to get along with others, to be accepted, not to be different, and to try to create a favorable public image; and

2. Then, if it is found that appraisal expert witnesses are significantly higher in public self-awareness than non-litigation appraisers, the next research question is whether this high public self-aware expert appraiser will be equally critical of opposing expert witness appraisers who are within his/her sphere of professional influence (e.g., member of the same Appraisal Institute Chapter) as an opposing appraiser who is from a geographically distant area.

The relevant issue for the expert witness selection process is whether an expert witness appraiser who has a desire to “be accepted and create a favorable image” will perform less than the most rigorous critique on the work of the opposing expert.

The objective of the combined studies is to provide attorneys with additional insight into the location/geography of the expert as an empirically relevant component of the expert witness selection criteria.
Research Study Part A

Overview of Research and Hypothesis

What happens when an appraiser expert witness becomes self-aware? Wiekens and Stapel (2010) indicate that “when people are aware of private aspects, more individualistic standards (e.g., to be authentic and to be different from others) are salient, whereas when they are aware of public self-aspects, more social standards (e.g., to get along well with others, to present ourselves in a positive way, to be admired, and not to be different from others) are salient” (p. 17). This same research indicates that when people imagine that they are in a public forum (such as a presentation, deposition, or trial), public self-awareness (but not private self-awareness) increases.

The hypothesis for this first study is that appraiser expert witnesses who work in a litigation setting (e.g., deposition, video-taped, trial before a judge and jury) will score higher in public self-consciousness than appraisers who do not work in litigation settings.

Method

Participants

In October and November 2013, 30 male members of the Appraisal Institute with the MAI designation\(^\text{13}\) and listing their appraisal services as being available for “litigation/litigation support” were randomly selected from 489 members listed on the Appraisal Institute website with this specialty. Another 35 male members of the Appraisal Institute with the MAI designation not listing their services for “litigation/litigation support were randomly selected from the Appraisal Institute website. The response rate of the completed online survey was 72% for appraisers working in litigation/litigation support and 65% for those not working in litigation/litigation support.

Materials and Procedure

Before completing a version of the Scheier and Carver (1985) private versus public self-consciousness scale, participants are asked to imagine themselves at a contentious trial at which they are going to testify on direct examination about the numerous errors, including USPAP Standards violations, in the work of an opposing MAI appraiser, who is also a member of the local Appraisal Institute Chapter. One of the purposes of this introductory paragraph, consistent with the prior research findings of Wiekens and Staple, is to increase the respondent’s public self-awareness that leads to a saliency of the social standards “to present oneself in a positive way, to be accepted, to be admired, and not to be different, whereas an imagined private situation would increase private self-awareness and lead to an increased saliency of the (individualistic) standards to be autonomous and to be different” (Wiekens & Stapel, p. 13).

\(^{13}\) MAIs were selected as the sample population because they have achieved the most rigorous standards of real property valuation education, continuing education and professional standards in America and are likely the preferred choice for an appraiser in a litigation valuation assignment.
The items measuring “private self-consciousness:”

- “I’m always trying to figure myself out”
- “I think about myself a lot”
- “I often daydream about myself”
- “I never take a hard look at myself”
- “I generally pay attention to my inner feelings”
- “I’m constantly thinking about my reasons for doing things”
- “I sometimes step back (in my mind) in order to examine myself from a distance”
- “I’m quick to notice changes in my mood,” and
- “I know the way my mind works when I work through a problem.”

And the items measuring “public self-consciousness:”

- “I’m concerned about my style of doing things”
- “It takes me time to get over my shyness in new situations”
- “I care a lot about how I present myself to others”
- “It’s hard for me to work when someone is watching me”
- “I get embarrassed very easily”
- “I’m self-conscious about the way I look”
- “It’s easy for me to talk to strangers”
- “I usually worry about making a good impression”
- “I feel nervous when I speak in front of a group”
- “Before I leave my house, I check how I look”
- “I’m concerned about what other people think of me”
- “I’m usually aware of my appearance” and
- “Large groups make me nervous.”

All items are measured on a 4-point scale (3=a lot like me; 2=somewhat like me; 1=a little like me; 0=not like me at all).

Results and Discussion

The public self-consciousness scores for the respondents that were listed as being available for “litigation/litigation support” are significantly higher than the scores for the respondents that were not so listed. Additionally, the private self-consciousness scores for the respondents that were listed as being available for “litigation/litigation support” are also significantly higher than the scores for the respondents that were not so listed.

Consistent with past research (e.g., Fenigstein et. al., 1975, Wiekens and Stapel, 2010), the results indicate that public and private self-consciousness are highly correlated; people who are high in public self-consciousness have a tendency to be high in private self-consciousness as well.
Similarly, consistent with past research (e.g., Wiekens and Stapel, 2010) there is a positive correlation between public self–consciousness and the (social) standards to present oneself in a positive way, to be admired, and to be accepted. Similarly, public self-consciousness was negatively correlated with the (individualistic) standard to be different.

Appraisers who listed themselves as being available for “litigation/litigation support” scored significantly higher on both personal and social standards than those appraisers not listed, indicating higher saliency “to be accepted,” “to conform,” “to leave a favorable impression,” “to convey a positive image,” “to get along,” and “to be admired.”

As a secondary check on the idea that “litigation/litigation support” appraisers are more likely to conform, leave a favorable message and other public self-consciousness characteristics, a qualitative analysis of the professional qualifications of the respondents found that 72% of the litigation appraiser respondents had been involved in one or more leadership positions in their professional association(s), were involved in teaching appraisal, authorship and speaking engagements, whereas only 26% of the appraisers not listing themselves as litigation specialists self-reported similar leadership positions or were involved in other professional activities.

Summary

Study A demonstrates that appraisers who list themselves as being available for “litigation/litigation support” score significantly higher on both personal and social standards than those appraisers not listed, indicating higher saliency “to be accepted,” “to conform,” “to leave a favorable impression,” “to convey a positive image,” “to get along,” and “to be admired.” This difference in higher social and personal standards for litigation appraisers was found to be consistent in their self-reported professional achievements (e.g., leadership role, teaching, speaking engagements) and in their professional qualifications.

Research Study Part B

Hypothesis

In this Study B, it is hypothesized that:

1. The imagined audience setting for this question (e.g., trial setting, opposing counsel present, parties in the litigation, triers of fact) will increase the saliency of relatively social standards in respondents;

2. Responses consistent with a higher saliency “to get along” and “to convey a positive image” will be supported by responses that appraisers are less willing to criticize the work of fellow MAI appraisers;

3. That the public self-awareness saliency will not be manifest where the opposing appraiser is from outside the respondent’s appraisal services area or an area that would have no potential influence on his “positive image” and other public self-aspects such as “to get along,” and “to be accepted.”
Method

Respondents are instructed to “imagine yourself in the following scenario.”

“You are a MAI expert witness appraiser in a property value dispute. The setting is a trial in which all parties are present including the attorney who you are working with on this matter, opposing counsel, judge and jury. You disagree with the opposing appraiser on numerous issues that significantly impact his value conclusions and you have sound reasons to believe that he has manipulated the data selection and analysis to favor the interests of his client. The opposing MAI appraiser is not a personal friend, but you recognize the name as someone who does business in your appraisal services area and is a member of your local AI Chapter. From your reading of his appraisal report it is your opinion that he has violated numerous USPAP Standards. Your scope of work did not include a review of his appraisal report, however, just before the start of your direct examination the attorney who retained you has decided to change tactics and tells you that he will be asking you about the appraisal report of the opposing MAI.”

Eighteen (18) statements, measured on a 4-point scale (3=a lot like me; 2=somewhat like me; 1=a little like me; 0=not like me at all), address six general topic areas:

1. General attitude towards opining on potential USPAP violations of other appraisers;

2. Level of reluctance/willingness to criticize an appraisal of another appraiser who is not a MAI and not a member of the local Appraisal Institute Chapter;

3. Level of reluctance/willingness to criticize an appraisal of a fellow MAI who is also a member of the local Appraisal Institute Chapter;

4. Level of reluctance/willingness to criticize an appraisal of a fellow MAI who is also a member of the local Appraisal Institute Chapter with the questions probing whether expressing these opinions have the potential to reflect poorly on one’s reputation/professionalism;

5. Level of reluctance/willingness to criticize the work of appraisers (including MAIs) who are not within their appraisal service area (e.g., a different part of the State or from another State); and

6. Whether it is more important to get along with fellow MAIs or to give opinions on potential USPAP violations.
Participants

In October and November 2013, 40 male members of the Appraisal Institute with the MAI designation and listing their appraisal services as being available for “litigation/litigation support” were randomly selected from 489 members listed on the Appraisal Institute website with this specialty. This is a separate random sampling of appraisers and does not include any appraisers that were invited to participate in Study A. The survey was completed by 31 respondents for a 78% response rate.

Materials and Procedure

All participants responded to eighteen (18) questions.

Results and Discussion

In response to the statements:

- All respondents report that they believe that it is appropriate for them to provide opinions on potential USPAP Standards violations;

- Most respondents are willing to criticize an appraisal of another appraiser who is not a MAI and not a member of the local Appraisal Institute Chapter;

- Respondents indicate significantly less willingness to criticize an appraisal of a fellow MAI who is also a member of the local Appraisal Institute Chapter;

- In responses that reflect less willingness to criticize an appraisal of a fellow MAI who is also a member of the local Appraisal Institute Chapter, respondents indicated that expressing these opinions have the potential to reflect poorly on one’s reputation/professionalism (and other social standards such as “to get along” and “to convey a positive image”);

- It appears that the appraiser’s willingness to provide critical opinions is impacted by the potential social influence of the opposing appraiser (i.e., whether his proximity such as being in the same AI Chapter activates the respondent’s social standards such as “getting along” or whether the opposing appraiser is considered to be sufficiently outside of the respondent’s sphere); and

- Respondents are more willing to criticize the work of appraisers (including other MAIs) when they are not within their appraisal service area (e.g., a different part of the State or from another State). This result would suggest that an appraiser’s willingness to provide critical opinions of an opposing expert is impacted by the potential social influence of the opposing appraiser (i.e., whether being in the same AI Chapter activates the respondent’s social standards such as “getting along” or whether the opposing appraiser is considered to be sufficiently outside of the respondent’s social sphere and saliency of private more individualistic standards (e.g., to be authentic and to be different from others) is a primary influence.
Limitations and Suggestions for Future Research

The limitations of these studies are that:

1. The samples may not be representative of the entire population of MAI members of the Appraisal Institute;

2. The samples may not be representative of female MAI members of the Appraisal Institute;

3. The respondents are all designated members of the Appraisal Institute and may not reflect the responses of individuals who are not designated appraisers of the Appraisal Institute.

Suggestions for future research include varying the respondent population to include both men and women, residential appraisers, appraisers that are not professionally designated (i.e., only state-certified) and appraisers from professional appraisal organizations other than the Appraisal Institute. Future research may be expanded to include expert witnesses in areas such as medicine and engineering.

Conclusions

The results of this two-part research study suggest that in situations where there will be contentious valuation issues or situations in which the appraisal expert witness will be called upon to criticize the work of the opposing appraiser, it may be wise for the lawyer to select an appraisal expert who is located outside of the appraisal services area of the opposing appraiser. The lawyer does not want anything to interfere with their appraisal expert witness being fully committed to engaging in a critique of the work and opinions of the opposing expert.

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