

## SELECTING AND WORKING WITH APPRAISERS

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### A. Characteristics to Seek in Selecting an Appraiser

1. *Credentials.* How will this appraiser's written report and oral testimony be received? Is the appraiser experienced with appraising this type of asset? How has the appraiser's testimony been received and treated by courts? (This can be explored through a computer search.) How helpful and effective has the appraiser been in other cases that have not proceeded to judgment and a written opinion? (This can be explored through networking.) The best appraiser to engage is one with whom the lawyer has worked before. But this is not always practical—"there's a first time for everything"—and the best alternative is to obtain copies of the appraiser's previous work-product, if possible, and to talk to other lawyers who have engaged that appraiser.
2. *Independence.* Will the appraiser come across as an advocate for the taxpayer, rather than an objective witness whose first duty is to assist the court? If a business is involved and the appraiser is affiliated with the accounting firm that prepares and/or audits the financial statements of the business, will the appraisal seem objective?
3. *Understandability, credibility, effectiveness.* Does the appraiser have the ability to communicate to an appeals officer or judge (or jury, if there is one) in a straightforward and understandable manner, both in writing and orally? Does the appraiser hem and haw, ramble, overuse aspirated pauses ("uh"), or have any other annoying habit? Does the appraiser generally use good English? Does the appraiser hold eye contact? Does it sound as if the appraiser is speaking from personal experience and judgment, rather than parroting some textbook approach or reciting what the lawyer wants to hear? In sum, does the appraiser project an image of competence, thoroughness, objectivity, confidence, and sincerity?
4. *Adaptability.* Does the appraiser recognize the uniqueness of each assignment and tailor the approaches, methods, and presentations to the assignment? Or does the appraiser do "cookie cutter" work, showing more interest in spouting a generic philosophy than in examining the facts of the case?
5. *Responsiveness, timeliness.* Usually, the appraiser's input is needed to support the taxpayer in meeting certain deadlines. If the case develops into litigation, there will be plenty of important deadlines that must be met. If an appraiser shows difficulty providing what is needed when it is needed—from completing the engagement letter to returning phone calls to submitting written work-product—this could portend more serious difficulties later.
6. *Ability and willingness to listen.* This is an often overlooked, but very important, trait. If a controversy proceeds to litigation and the appraiser is called upon to give a

deposition or testify in court, it is critical that the appraiser understand and answer each question that is asked—nothing more, nothing less, and nothing else—and keep mental track of previous questions and answers, insofar as they bear on the question at hand. Loose cannons are loose cannons!

B. Special Considerations Suggested by Case Law

1. An expert should be able to withstand being “*Daubertized*.”
  - a. As a gatekeeper of expert testimony under the Federal Rules of Evidence, a judge may insist on being satisfied as to both the relevance and reliability of a proffered expert’s testimony. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).
  - b. Reliability may be measured by (i) the testing of technique or theory, (ii) peer review and publication, (iii) observed or potential error rate and standards of control for error, and (iv) acceptance within the relevant professional community. *Id.*
  - c. These standards apply as appropriate to all experts, not just scientists, and may be applied by the trial judge with flexibility. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).
2. In a celebrated case involving the valuation of real estate over a 204-year period, an appraiser, after a week-long *Daubert* hearing, was recently rejected as an expert, in part because he had employed “an intuitive approach in selecting comparable sales,” had made no adjustments for location, size, and similar factors, had operated with time and budgetary constraints, and as a result had produced what the court viewed as an “apples and oranges comparison.” *Cayuga Indian Nation of New York v. Pataki*, 83 F. Supp. 2d 318, 324-27 (N.D.N.Y. 2000).
3. Tax Court opinions also can provide insight into the paces that an appraiser can be expected to be put through. *See, e.g., McCord v. Commissioner*, 120 T.C. 358 (2003), *rev’d*, 461 F.3d 614 (5th Cir. 2006); *Kohler v. Commissioner*, T.C. Memo 2006-152; *Peracchio v. Commissioner*, T.C. Memo 2003-280; *Lappo v. Commissioner*, T.C. Memo 2003-258; *Estate of Kaufman v. Commissioner*, T.C. Memo 1999-119, *rev’d sub nom. Morrissey v. Commissioner*, 243 F.3d 1145 (9th Cir. 2001); *Mandelbaum v. Commissioner*, T.C. Memo 1995-255.
4. *See also Harding v. Commissioner*, T.C. Memo 1995-216 (holding that taxpayers’ “relatively unquestioning reliance” on an appraisal that “was purely hypothetical, and . . . not based on the appraisers’ personal knowledge” was “not reasonable under the circumstances” and did not permit the taxpayers to avoid a negligence penalty).

### C. The Pros and Cons of Engaging More than One Appraiser

1. In the valuation of a business, for example, appraisers might be assembled from several sources, including full-time business appraisers, economists, industry specialists, accountants, and investment bankers.
2. While presenting a large number of witnesses whose testimony is cumulative could be boring and annoying, and could even make the taxpayer appear to be “up to something,” it can be effective if handled sensibly.
3. Moreover, duplication will make it possible to use some appraisers and not others, if, for example, some are not responsive or seem to be “coming out wrong.” Because of the latter possibility, it is important that the formal engagement of the appraiser be a matter between the lawyer and the appraiser, in an effort to treat unused appraisers’ reports, correspondence, drafts, etc. as attorney work-product. In addition, in an estate context, discretion should be used in claiming the cost of an unused appraisal as a deductible estate administration expense.
4. The donor or executor will understandably be concerned about cost. In a large case, however, money spent for sound appraisal assistance almost always is rewarded many times over in tax saved.
5. In addition, the deductibility of appraisers’ fees and expenses can provide considerable leverage, especially in an estate tax audit. For example, if an appraiser’s fee paid in the course of Tax Court litigation five years after the due date of the estate tax is deducted for estate tax purposes as an administration expense under section 2053, the deduction of every dollar, taking into account interest on tax at a rate of 4%, will entitle an estate subject to a 45% estate tax rate to a refund (or an offset of deficiency payment) of approximately 49.9 cents. That means that, in effect, the government must pay all of its own expenses and half of the executor’s expenses.

### D. Identifying the Appraiser’s Objective

1. Generally, the appraiser should be asked to form and present an opinion of “fair market value” (essentially by a willing-buyer-willing-seller standard) which is the same in any tax or non-tax context and is the same whether the other party is the Internal Revenue Service or another family member or business partner or an unrelated investor.
2. While ordinarily it is unnecessary and even inappropriate for an appraiser to address *legal* matters, it is essential to make sure, before they are engaged, that appraisers are familiar with the legal status of the asset being appraised.
3. An understanding of how courts deal with recurring issues of valuation is also essential for an expert who might have to survive court scrutiny.