

Cross-examination at a Jury Trial

by Paul Talmage, MAI

abstract

Cross-examination at trial is the best and sometimes the only opportunity for an attorney to discredit the analysis leading to an opposing appraiser's value conclusions. An attorney wants the members of the jury to believe the appraiser he or his clients have hired, and to find fault with the appraiser he will cross-examine. An attorney will use the cross-examination to attack the opposing appraiser's vulnerabilities and credibility. This article describes the means by which an appraiser can competently prepare for and confidently respond to cross-examination questions before a courtroom jury.

Cross-examination (cross) provides the opportunity in court to challenge an expert witness. It follows direct examination (direct) during which an attorney asks the expert questions on matters usually supporting the interests of the attorney's client. Cross-examination may be followed by redirect examination (redirect) when there is an opportunity to rebut any damaging admissions.

The verdict of a jury in a real estate valuation case is often determined by its collective perception of "who won" the contest between the attorneys and opposing appraisers. It behooves the appraiser as the expert witness to be well prepared for cross-examination, and to know the nuances of defending valuation opinions expressed before members of a jury.

Preparation from the Start

Experienced trial appraisers do not usually think ahead to a possible cross-examination when initially contracting for their appraisal services, in part because only a small percentage of appraisal assignments ever reach that period of intense scrutiny. Yet they know from experience that whatever goes into and is retained in their files, including the initial contracts with the clients, may be subject to inquiry in a deposition if not during the trial itself.

From the start an attorney admonishes the appraiser to keep file contents to a minimum in order to limit inviting avenues of discovery for opposing counsel. In recent years such admonitions have run afoul of the *Uniform Standards of Professional Appraisal Practice* (USPAP), which requires that specific data and analysis be included either in appraisal reports or, if formal reports are not prepared, as file memoranda.

Attorneys and even appraisers in recent articles and educational forums have pointed out the glaring weakness of appraisal files that are missing information mandated by USPAP; many see such gaps as an opportunity for the attorney to attack the appraiser in cross-examination. Appraisers subject to cross must be prepared to defend against the accusation of USPAP noncompliance. They should not assume that USPAP's reference to "jurisdictional exception" will always act as a shield in their defense. The exception rule voids only those parts of the standards deemed "...contrary to the law or public policy...." Issues such as discovery do not qualify.

Remember Cross in Deposition

Deposition is the formal setting for the attorney to discover well before trial how the opposing appraiser arrived at conclusions pertinent to the case. Prior to the appraiser's direct testimony in court, the deposition will serve as the primary means for the attorney to prepare for cross-examination. Following deposition and prior to trial, the opposing attorney and appraiser or litigation consultant will thoroughly analyze the deposition responses in search of weaknesses. They will page through comparables and other data turned over in deposition in search of errors, inconsistencies, and vulnerabilities.

Deposition mistakes and oversights tend to resurface in cross-examination. The appraiser will very much want to avoid those awful "hour-long" minutes in cross-examination that cause audible heart thumps and doubts about one's career choice. The risks of such misfortunes are reduced by taking the deposition seriously. Flippant or humorous answers in deposition can sound entirely different when read before a jury. And the appraiser, while required to answer questions fully in deposition, should not volunteer anything more than is asked.

Whatever is brought out in deposition signals, for the most part, the relative strength or weakness of the appraiser's position, and many cases settle before trial based at least in part on these perspectives. This is reason enough for the appraiser to do well in deposition.

Two Weeks Prior to Testimony

The appraiser should prepare early for testimony. The consequences of last-minute cramming for direct and cross testimony are much worse than the consequences of cramming for a history final: a bad showing risks not only the client's money but the appraiser's reputation. The appraiser, if not already contacted by the attorney, should prompt the attorney well in advance of trial to coordinate and plan direct testimony and cross defense.

When preparing for cross-examination, the attorney and the appraiser will want to look for weaknesses in the appraiser's own valuation, deposition testimony, and anticipated direct testimony. At times an attorney may hire for this purpose an appraisal consultant or reviewer, someone other than the testifying appraiser.

Once weaknesses are uncovered, the appraiser must prepare for cross-examination questions in those areas and also prepare counterpoints for occasions when these would be appropriate responses to

cross questions. Two weeks prior to testimony—perhaps longer for complex cases—the appraiser preparing for cross-examination should:

- Read and highlight deposition transcripts to avoid saying anything contradictory in either direct testimony or cross-examination.
- Learn the opposition's case. Study and take notes about the opposing appraiser's deposition transcripts. Do the same with the transcripts of other witnesses who speak to issues the attorney thinks the appraiser should know about. Ask the attorney if it is advisable to review any documents submitted by other experts from either side.
- Know the vulnerabilities. Make a list of and research all items of uncertainty in the valuation analysis, comparables, deposition transcripts, direct testimony outline, and other applicable materials. Investigate any peripheral areas that could be subjects of cross-examination; know more peripheral information about the comps than would typically be reported in direct testimony. Realize that the opposition will similarly investigate vulnerabilities on both sides.
- Research the opposing appraiser's comps, particularly those not used or those for which the other appraiser gave different information. Those comps not seen earlier should be inspected prior to trial. The appraiser should be prepared to testify as to why certain comparables were not used and how they relate to the subject property.
- Prepare a cross-examination binder with easy-to-reference information regarding sales and other areas of possible cross questions. The appraiser should remember, however, that whatever is brought to the witness stand can also be used by the opposing attorney. The binder should include the appraiser's deposition transcripts so that if the opposing attorney refers the appraiser to statements made in deposition, the appraiser can check the complete transcripts to determine if an answer was taken out of context, and if so, explain how.
- Review pertinent sections of the current Appraisal Institute text, *The Appraisal of Real Estate*, 12th edition, to clarify any methodological uncertainties. The appraiser may be asked in cross to read a short excerpt of the text that appears to contradict what was described in direct testimony. It is important to keep the text in court, though not necessarily on the stand. The appraiser who has

earlier read any sections regarding areas of uncertainty will more likely be prepared with a ready response in cross-examination.

- Be able to explain in cross whatever was referenced in direct. For example, the appraiser who has used a 12 percent yield rate in the valuation and stated so in direct, could then be asked in cross to explain the concept of present value.
- Learn, at least in a general sense, about other litigation issues involved in the case, e.g., those related to goodwill, alleged guarantees/agreements, or questionable methodologies by other experts. The appraiser should ask the attorney to explain these additional litigation issues because it may not otherwise be clear where the opposing attorney is headed with a line of questioning during the cross, especially if the questions do not relate directly to a central valuation issue.
- Check the direct testimony outline and all valuation calculations for any appearance of inconsistencies, and be prepared to answer questions regarding these in cross-examination.

To provide the highest quality of service to the client, the appraiser must prepare for both direct and cross-examination well in advance of the trial.

Two Days Prior to Testimony

With approximately two days before the expected appearance, the appraiser should:

- Read the deposition transcript highlights and the transcription notes of the other witnesses.
- Review the list of any previously uncertain items and peripheral items to anticipate answers to possible cross questions.
- Ask the attorney what has happened so far in the trial that is important to know about or that is different from what had been assumed previously
- Leaf through the cross-examination binder to become familiar with its contents—this will help to quickly locate specific materials during the trial.
- Be well prepared for direct testimony.

Two days prior to the first court appearance, the appraiser should be primed for testimony. The best defenses in cross are 1) a clear, logical, and well-supported presentation in direct examination, and 2) confident, direct, and ready responses to anticipated questions in cross-examination.

Immediately Prior to Testimony

Prior to testimony the appraiser should check on the status of the case.

- Ask the attorney about the make-up of the jury if he has not already volunteered this information. Knowing the educational levels, social backgrounds, and potential biases of the jury is important not only for how the appraiser will present direct testimony but also for knowing how best to respond to cross-examination questions. The goals in knowing the make-up of the jury are clear communication and the avoidance of appearances detrimental to the client's case.
- Ask the attorney about any up-to-the-minute changes.
- Get plenty of rest, avoid cramming and do not rush.
- Avoid frantic, last-minute changes before direct examination. But if changes to testimony are unavoidable as dictated by court discussions, take a deep breath and make them as calmly as possible. Then think through how the cross-examination may shift to reflect these changes.

The appraiser should be mentally and emotionally rested before taking the witness stand. This is especially true for cross-examination.

Cross-examination Testimony

Appraisers should never advocate for a clients' interests, even in cross-examination. However, when testifying it is expected and appropriate for appraisers to advocate and defend their opinions of value within the rules set by the court.

Listening to Questions

When in court the appraiser should be alert, listen carefully to the cross-examination questions and not rush responses.

- If a question is not understood, the appraiser should say so, and the attorney will ask the question another way.
- If a question is asked and an objection is raised but overruled, the appraiser should ask that the question be repeated or read back before answering if there is any uncertainty about the question after the delay.
- If the attorney asks a question in such a way that it incorporates a misleading overgeneralization or distorts a previous answer that the appraiser gave, the appraiser should correct the attorney imme-

diately and wait for the attorney to ask the question again. Alternatively, the appraiser can phrase the answer in such a way that it clearly highlights the misstatement and incorporates the corrected premise.

- If a question is actually two or more questions combined, the appraiser's attorney should object on the grounds that it is a compound question. If the attorney does not do this, the appraiser should answer each part of the question separately, making it clear that the opposing attorney has asked for more than just a single response.

Answering Questions

The appraiser should answer cross-examination questions honestly and directly without trying to confuse an issue. A thorough attorney will eventually flush out the pertinent information, and the jury will know the appraiser's initial response was an attempt to avoid providing a clear or complete answer. On the other hand, the appraiser should never be bullied into saying something that is not true.

The appraiser should not typically volunteer any more information than is requested. Doing so can sometimes allow the attorney additional questions on a subject that was not discussed in direct testimony, one that might be detrimental to the client's case. (There are exceptions, as will be discussed.)

If the appraiser does not know the answer to a question, he should say so and not speculate. An attorney may ask a series of questions related to irrelevant minutiae that are designed to elicit a series of "I don't know" responses from the appraiser. In situations like this the appraiser should, if possible, break up his short answers early on with a brief statement. For example, if the attorney asks for the traffic counts of each of the streets in front of the comparables, the appraiser might respond, "I don't know the traffic counts because they are insignificant valuation factors for industrial properties in this neighborhood." Such responses can mitigate the impact of admitting a lack of knowledge, and also can alert the appraiser's attorney to return to this subject for amplification in the redirect examination following cross.

The appraiser should typically respond to harmless yes or no questions with yes or no answers. By exercising brevity the appraiser can save up, or "bank," opportunities to give extended answers to key questions without appearing argumentative. A judge may admonish the appraiser who appears contentious, or the opposing attorney may object to an appraiser who continually gives expansive answers.

“If the appraiser does not know the answer to a question, he should say so and not speculate.”

When a longer answer to a key question is warranted, but the short answer is clearly yes or no, the appraiser should first give the short answer and then begin his explanation. There are occasions in cross when a short response can be misleading or incomplete. If the opposing attorney appeals to the judge that the question should be answered only with a yes or no, the judge may cut short the appraiser's explanation. The appraiser can still wait for the client's attorney to raise the issue again in redirect, but the delay can often weaken the effort to correct a misapprehension on the part of the jury.

There also are occasions when the appraiser recognizes the opportunity in cross to emphasize a strong counterpoint. At times, presenting an opposing argument naturally flows in cross and is entirely appropriate. In such cases, the appraiser should make good use of the opportunity, but not go far afield from the subject raised.

At a break between cross and redirect the appraiser can suggest to the client's attorney the importance of coming back to key points, although the attorney probably already knows when correction or emphasis is necessary. Sometimes the appraiser and attorney do not have the chance to confer before redirect examination, and the attorney may have to launch immediately into redirect without a break. At such times the appraiser can only hope that the attorney raises the issue again.

In brief, it is best to try to respond fully to key questions asked in cross-examination *during* cross-examination, rather than to wait for redirect to come back to those issues. If this is not possible, the appraiser will have to wait.

Showing Emotion

An appraiser's appearance in cross-examination may be as big a factor in the jury's verdict as giving sound answers to the questions. If an appraiser must answer questions disadvantageously, those questions should be answered without the appearance of embarrassment or frustration.

A confident appearance may not necessarily help the client's case, but an appraiser appearing to be

“caught” or “guilty,” even on some minor issue, can cause great harm. This is especially true in trials involving complex appraisal issues that the jury has difficulty understanding. In these cases the jury may rely more heavily than usual on their impressions of the appraiser’s appearance and behavior to compensate for their lack of complete comprehension.

The appraiser should avoid showing anger in the face of the opposing attorney’s aggressive questions or insinuations. All questions should be answered calmly and patiently. The real audience is the jury; let the jury get annoyed with the attorney, not with the appraiser.

At times an engaging personality favorably disposes the jury toward an appraiser. This can work against attempts by the opposing attorney to discredit the appraiser’s character. Nonetheless, the appraiser as a testifying witness should be businesslike and not attempt to “win over” the jury. A businesslike demeanor is most important in cross-examination, during which the opposing attorney controls the subject of the exchanges.

Never the Client’s Advocate

The appraiser must never be or appear to be an advocate for the client’s interests. During cross-examination the appraiser should not erode the persuasiveness of direct testimony by giving the impression of being a “hired gun.” Opposing attorneys will sometimes make this accusation. The appraiser must defend against these characterizations by being mindful of appearances during cross-examination exchanges.

Jury Contact

In cross the appraiser does not know what the line of questioning will be and, thus, concentrates closely on what the opposing attorney is asking. Typically, the appraiser will look at the jury less frequently during cross than during direct testimony. If some jury members appear to lose interest during cross they are probably not missing anything the appraiser particularly wants them to hear. Moreover, the appraiser is not necessarily trying to keep the jury engaged.

On the other hand, in direct examination the appraiser wants the jury to pay attention and understand the valuation analysis. Still, during most of the cross-examination, and especially when there is opportunity to make a counterpoint, the appraiser should address the jury directly.

Conclusion

The three most important factors in giving successful testimony in cross-examination are preparation, preparation, and preparation. Sound direct testimony and confident responses to cross-examination questions leave the best impression on a jury.

While testifying, an appraiser should listen carefully to questions, answer them calmly, and try not to create misconceptions by giving incomplete answers to key questions. The appraiser also should look for opportunities to assert counterpoints succinctly without appearing to be argumentative or to be advocating the client’s interests.

References

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Paul Talmage, MAI, is president of Dana Property Analysis, with appraisal offices in the Phoenix area since 1986 and in the San Francisco Bay area since 1974. He specializes in complex litigation assignments as an expert witness and litigation consultant, particularly in eminent domain matters. **Contact:** Talmage@danaproperty.com
