



**VALUATION** BEYOND  
BORDERS

2017 INTERNATIONAL CONFERENCE

Presented by Appraisal Institute Canada & Appraisal Institute

# The Inherent Conflict Between The Expert Witness and The Attorney

Paula K. Konikoff, JD, MAI, AI-GRS

Craig Steinley, SRA, AI-RRS

Shaw Centre, Room 202

Ottawa, Canada

June 11, 2017

## When the Conflict Occurs

- Only when testifying or providing consulting services “as an appraiser”
- Does not occur when providing consulting services as an advocate

## Source of the Conflict

- Advocacy/Attorney
  - Ethically **required** to advocate the client's position
- Advocacy/Appraiser
  - Advocating the Appraiser's Position
  - **Cannot** be an advocate for a litigant's position

## “Acting as an Appraiser”

***Appraiser:*** One who is expected to perform valuation services competently and in a manner that is independent, impartial, and objective.

# Duties of the Attorney

“[2] As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. ***As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system.*** As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.” [emphasis added]

*Model Rules of Professional Conduct, American Bar Association*

Preamble and Scope

## Duties of the Attorney

**“The advocate has a duty to use legal procedure for the fullest benefit of the client’s cause, but also a duty not to abuse legal procedure.** The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law’s ambiguities and potential for change..” [emphasis added]

*Model Rules of Professional Conduct, American Bar Association*

Comment to Rule 3.1 Meritorious Claims & Contentions

## Where is the Line?

The line that a valuation professional must be mindful of, and not step (or be led or be pushed, even inadvertently) across, is compliance with the applicable Standards.

## Hypothetical Example

Alex drafts an expert report and meets with counsel, the client. The attorney has thoughts about what he perceives to be inconsistent adjustments made to various comparable sales and about the absence of discussion regarding the circumstances of one of the sales that the attorney thinks influenced the price.



## Hypothetical Example (cont.)

- Can Alex ethically have this conversation with the attorney?
- Can Alex make changes to his expert report if he is persuaded that the attorney makes good points?
- Must Alex clearly document for the opposing side that his original draft had different information but he made the changes based upon a persuasive discussion with the attorney.

## **Case #1**

You are retained to prepare an expert report and to testify at deposition and trial. In addition, counsel has also asked that you assist the legal team in finding means to contradict and attack the substance and credibility of the other side's report.

Can you accept this assignment? Should you?

## Crossed Line = Advocacy

In a significant 2002 study by the Federal Judicial Center, judges and attorneys agreed that, in addition to the expense of experts, **the most important problems with expert evidence stem from adversarial bias and/or advocacy by experts.** Both judges and lawyers complained [that] experts too often abandon objectivity and become advocates for the side that hires them.

Carol Krafka *et al.* (Federal Judicial Center), *Judge and Attorney Experiences, Practices and Concerns Regarding Expert Testimony in Federal Civil Trials*, 8 *PSYCHOL., PUB. POL'Y & L.* 309-32 (2002). [emphasis added]

## Biased

Not reasonably supported, and favoring or promoting the cause or interest of the client, one's self, or another.

Appraisal Institute Code of Professional Ethics and Standards of Valuation Practice

## Case #1, Continued

Same case. You are retained to prepare an expert report and to testify at deposition and trial, but now counsel asks you to assist in developing the Q&A for the deposition of the opposing expert and attend that deposition.

Can you accept this assignment? Should you?

## Case #2

You have been contacted by an attorney to serve as a rebuttal witness in a case involving real property appraisals.

Can you accept this assignment? Should you?

## Case #2, Continued

You have now delivered the “final” draft of your expert rebuttal report. Counsel asks that you add an opinion that the appraisal expert whose report you are rebutting “should have known” that some of the information in his report was inaccurate, but included it to support a higher value.

Can you make that change to your report? Should you?

## Expert Testifying to State of Mind

An expert may not opine to what another person subjectively **knew, expected, or intended.**

- Excluding state of mind testimony as speculative and irrelevant; *George v. Kraft Foods Global, Inc.*, 800 F. Supp. 2d 928, 933 (N.D. Ill. 2011)
- Excluding expert testimony on a party's intent; *Meds. Co. v. Mylan Inc.*, No. 11-cv-1285, 2014 U.S. Dist. LEXIS 61084, \*16-17 (N.D. Ill. May 2, 2014) [emphasis added]



## **Case #3**

You are retained to review appraisal reports that are the subject of a lawsuit. At deposition, you are shown emails between the appraiser whose work you are reviewing and her client. The emails address aspects of the appraisal process used. You are asked your opinion of the meaning of this correspondence. It appears to be typical client/appraiser back and forth to you.

How should you answer the question?

## Expert Testifying to State of Mind

Expert was “an engineer, not a mind reader” and could not opine on **“what the parties knew or intended.”**

*Remy Inc. v. Tecnomatic*, 1:11-cv-00991, S.P.A., 2012 U.S. Dist. LEXIS 18880, \*26 (S.D. Ind. Jan. 25, 2012) [emphasis added]

## Case #3, continued

At deposition, you are shown memos between an appraiser and an office colleague. The memos discuss concerns regarding whether the methods and techniques used comply with Standards, and if they should be changed. You are asked to provide an opinion as to whether these memos indicate the appraiser knew he was doing something wrong.

How should you answer the question?

## Expert Testifying to State of Mind

An expert was “not a mind-reader” and could not testify that he knew a party’s intent to hide information or lied about certain information.

*Kure Controls, Inc. v. Vanguard Prods. Group*, No. 02 C 3767, 2008 U.S. Dist. LEXIS 3993, \*11 (N.D. Ill. Jan. 17, 2008)

### Case #4

Again, you have delivered the “final” draft of your expert rebuttal report. It includes your opinion that the appraisal report contains inaccurate data, comparable sales that could not be verified, and a mixture of incorrect and accurate information in other portions of the appraisal report. Counsel asks you to add an opinion that the inaccuracies in the work under review were intentional and so amounts to “fraudulent work.”

Can you make that change to your report? Should you?

### Intent = State of Mind

- “...the reviewer must avoid drawing a conclusion about the intent of the appraiser responsible for the work under review. Again, **determining intent is not a reviewer’s job**, even when the review is part of a fraud investigation”
- “A reviewer might also be asked to help a client determine if an appraiser committed fraud, which is a criminal issue related to an appraisal’s intended use, although **the reviewer ultimately cannot make a decision about fraud.**”

*Review Theory and Procedures, Appraisal Institute, 2015, at pp. 121 and 26. [emphasis added]*

### Case #5

You have been retained to opine to the compliance of certain appraisal reports with applicable valuation Standards. Your report has been entered into evidence and your deposition has been taken. You are now testifying in direct examination at trial and the attorney, your client, asks if, in your opinion, the non-compliant opinions and conclusions you identified in the appraisal reports you reviewed generally tended to increase the value conclusions in those reports.

How should you answer that question?

## Unsupported Expert Opinions

- [N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert. *Gen. Elec.*, 522 U.S. at 146.
- Talking off the cuff—deploying neither data nor analysis—is not an acceptable methodology. *Lang v. Kohl's Food Stores, Inc.*, 217 F.3d 919, 924 (7th Cir. 2000).



## Unsupported Expert Opinions

The Seventh Circuit has consistently held that “an expert who supplies nothing but a bottom line supplies nothing of value to the judicial process.”

*Zenith Elecs. Corp. v. WH-TV Broad. Corp.*, 395 F.3d 416, 419 (7th Cir. Ill. 2005).

# Why to not Cross the Line

...an expert loses usefulness to the Court and loses credibility when giving testimony tainted by **overzealous advocacy**... In most cases, as in this one, **there is no dispute about the qualifications of the appraisers. The problem is created by their willingness to use their resumes and their skills to advocate** the position of the party who employs them without regard to objective and relevant facts, contrary to their professional obligations.

*Boltar, L.L.C., Joseph Calabria, Jr., Tax Matters Partner, V. Commissioner Of Internal Revenue, United States Tax Court, 136 T.C. No. 14 [emphasis added]*

## Why to not Cross the Line

X presents - - **as a seductively slick witness**, but his professionalism is more as a witness than as a realistic assessor. He has done a very detailed analysis, **but he does not arrive at a credible market value.**

*BPG Hotel Partners VII, LLC v Board or Supervisors of Loudoun County, Virginia;*  
Case No. 77550. [emphasis added]



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Questions  
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