

And it even comes with an alarm system!



THE PERILS OF PRIOR APPRAISAL

By Michael Rikon

Appraisers typically send a draft of their appraisal report to attorneys or other real estate professionals for prior review or comment before finalizing their reports. There are several good reasons to do so. This review can be extremely helpful to ascertain if something is missing or inaccurate in the appraisal in terms of the comparable sales or comparable leases used by the appraiser. In addition, the law may require a certain formula for the assessment of damages that the lawyer should check. New York law, for example, requires a two-step appraisal of partial takings, the

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before and after method, which involves two calculations made by identical methods. *Diocese of Buffalo v. State of New York*, 248 N.E.2d 155 (N.Y. 1969). Many appraisers, incorrectly, will simply calculate direct damages and subtract them to determine the remainder. A review also may reveal that factual information is inaccurate or incomplete. The appraiser may not be aware that the property should be valued as part of a larger holding. Furthermore, consequential damages to the remainder may have resulted from the use to which the taken property had been devoted; for example, a change in access to the highway may have created consequential damages if it changed the highest and best use of the remainder property.

Although an attorney's review of

an appraisal is valuable, the downside to such process is that draft appraisals create written "prior appraisals" and a paper trail of changes. The danger is that the reviewer may totally revise the report and, in doing so, put the appraiser's credibility in question. It becomes increasingly difficult for any expert to continue to provide meaningful, reliable testimony when it is shown that the appraiser drastically changed his or her opinion of value after the submission of a draft appraisal. Woe to the obsequious appraiser who increases or reduces value without reason.

USPAP Standards

The extent of risk of impeachment from "prior appraisals" is directly related to the scope of materials discoverable. The Appraisal Foundation

has adopted requirements regarding appraisal report retention. The Appraisal Foundation is an independent organization established in 1987 by the appraisal profession and authorized by Congress as the source of appraisal standards and appraiser qualifications. The Appraisal Standards Board of the Foundation has established requirements for appraisers by adopting Uniform Standards of Professional Appraisal Practice (USPAP) to promote and maintain a high level of public trust in appraisal practice. USPAP addresses the ethical and performance obligations of appraisers through definitions, rules, standards, and statements. The Appraisal Standards Board also provides a process for the issuance of advisory opinions.

USPAP requires an appraiser to maintain a work file for each appraisal. The work file must contain the name of the client and related information; true copies of any written reports, documented on any type of media; summaries of oral reports or testimony, or a transcript of testimony; and all other data, information, and documentation necessary to support the appraiser's opinions and conclusions. Uniform Standards of Prof'l Appraisal Practice Ethics Rule—Recordkeeping (Appraisal Standards Bd. 2008–09).

The appraiser must retain the work file for a period of at least five years after preparation or at least two years after final disposition of any judicial proceeding in which the appraiser provided testimony related to the assignment, whichever period expires last. *Id.* This is a mandatory part of USPAP's ethics rule. Thus, the failure to maintain copies of prior reports may violate the appraiser's ethics, which alone may result in substantial impeachment.

Impeachment by a Prior Appraisal

Once it has been determined that a prior opinion of value exists, such opinion must be produced for use on cross examination. It does not matter what label has been put on the prior

report—"draft," "attorney's work product," "confidential," or any other notation. If prepared by the witness, it qualifies as a prior appraisal. Allowing a prior appraisal to be produced provides opposing counsel with a fair opportunity for effective cross-examination, consistent with a party's constitutional right of confrontation.

The rules of evidence allow a party to impeach the credibility of the adversarial witness on cross-examination through the use of prior inconsistent statements. "Once a proper foundation is laid, a party may show that an adversary's witness has, on another occasion, made oral and written statements which are inconsistent with some material part of the testimony, for the purpose of impeaching the credibility and thereby discrediting the testimony of the witness." *Prince Richardson on Evidence* § 6-411 (11th ed.) (citing *People v. Duncan*, 385 N.E.2d 572 (N.Y. 1978)).

In New York, it is well established that a prior appraisal prepared by an expert witness testifying at trial may be introduced into evidence to impeach the credibility of the expert's testimony. See *Gerosa, Inc. v. State of New York*, 580 N.Y.S.2d 280 (App. Div. 1992); *Hicksville Props., Inc. v. Bd. of Assessors*, 498 N.Y.S.2d 24, 25 (App. Div. 1986) (citing *Swartout v. State of New York*, 354 N.Y.S.2d 254 (App. Div. 1974) ("where an unfiled appraisal report was prepared by a party's trial expert and is inconsistent with his trial testimony, the unfiled report may be introduced into evidence for impeachment purposes and used to cross-examine the witness")).

One court believed that impeachment by a prior report was extremely important and held that

there is no question regarding the use of any other appraisals made by witness himself relevant and pertinent to the proceeding to impeach his credibility by showing that he made a prior statement inconsistent with his testimony on

the trial. They are required to be produced for that purpose and to be used to that limited extent on the witness' cross-examination, which will afford him the opportunity to explain any apparent inconsistency.

In re City of New York (Brooklyn Bridge Sw. Urban Renewal Project), 270 N.Y.S.2d 703, 707 (Sup. Ct. 1966).



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One very well-regarded New York judge stated:

[A]ll prior appraisals prepared by an expert witness called to testify or by the appraisal firm by whom that appraiser is employed must be produced upon proper demand. Such appraisals are admissible, if relevant and germane to the proceeding, when utilized to impeach said witness's credibility by developing prior statements inconsistent with his testimony at the trial.

Sullivan v. State of New York, 292 N.Y.S.2d 244, 247 (Ct. Cl. 1968).

Another court reversed an award because of the trial judge's failure to allow the impeachment of an appraiser by a prior appraisal. The court noted, "the trial court erred in refusing to direct production of the prior appraisal of the subject property made by the expert witness called

by the State to testify and in refusing to permit inquiry into an appraisal made of neighboring land by the State appraiser." *Wettlaufer v. State of New York*, 411 N.Y.S.2d 775, 778 (App. Div. 1978).

Conditional Immunity of Prior Reports

Prior appraisals generally remain protected until the appraiser testifies. A New York appellate court held that a motion court improvidently ordered the state to turn over an appraisal report prepared in contemplation of the settlement of an eminent domain proceeding. The court stated that the report

enjoy[s] the conditional immunity from disclosure which is conferred on material prepared for litigation To the extent that the report might become relevant and discoverable for the purpose of impeaching the State's appraisal expert at trial, disclosure at this juncture is premature. We note that if the State chooses to call the expert to testify, a reasonable adjournment will sufficiently protect claimant's right to cross-examination, but we also note the possibility that the State may choose not to call the expert as a

witness. In sum, we cannot agree with the dissent that the cloak of immunity protecting the State's appraisal report may presently be removed merely because, at some point in the future, the material sought may become discoverable.

CMRC Corp. Ltd. v. State of New York, 704 N.Y.S.2d 219 (App. Div. 2000).

Other states do not have the same conditional immunity of appraisal reports. Kansas, for example, allows appraisals to be used for impeachment if the appraiser was retained by the owner even if another appraiser testifies at court. The court held the valuation opinion is a statement attributable to the landowners that is an admission. *Mooney v. City of Overland Park*, 153 P.3d 1252 (Kan. 2007).

Reliance on Another's Appraisal

If an appraiser relies on another appraiser's report, that report may be used for impeachment.

[W]hile it is true that materials prepared for litigation by an appraiser who is not called as a witness are protected from disclosure as attorney work product . . . , here, petitioners established that Lagassa's prior appraisal relied upon and incorporated information contained in Thompson's prior appraisals of the subject hydroelectric power facilities. As such, these prior appraisals are relevant for the purpose of impeaching Lagassa on cross-examination and, thus, are subject to disclosure.

In re Niagara Mohawk Power Corp. v. Town of Moreau Assessor, 779 N.Y.S.2d 608, 610 (App. Div. 2004) (citing *CMRC Corp., Ltd.*, 704 N.Y.S.2d at 219). The interesting thing about this holding is that the prior appraisals were to be used to cross-examine a different appraiser.

In another New York case, the court held:

The rule in New York is that an appraisal prepared by an expert witness who is not called as a witness and which was intended to be used solely for litigation, or for negotiation in an effort to accomplish a settlement prior to trial, or to establish a basis for a pretaking advance payment is not admissible at trial, as the appraisal enjoys a conditional immunity from disclosure as material prepared for litigation The one exception to that rule is that all appraisals prepared by an expert witness who is called to testify must be produced as such are admissible when used to impeach said witness's credibility by developing prior statements inconsistent with his testimony at trial.

Erie County Indus. Dev. Agency v. Muszynski, 629 N.Y.S.2d 646 (Sup. Ct. 1995). It also stated:

Because earlier courts have relied so heavily on the concept of allowing, for impeachment purposes, the discovery of prior inconsistent statements by the opposing party, this court must conclude that statements made prior to the within litigation by the litigation appraiser relative to the value of the contested properties may form the basis to permit discovery thereof.

Id. at 647.

Conclusion

USPAP standards require an appraiser to maintain a work file for each appraisal. The file must include all prior appraisals, including working drafts. Once the appraiser testifies, any conditional immunity of a prior report disappears. An appraiser can be substantially impeached by the prior appraisal. All of this should be kept in mind when requesting draft appraisals for review. ■

