WHO ARE THE PEOPLE IN YOUR APPEAL (AND WHAT ROLES DO THEY PLAY)?

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I. Who Are the Players?

A. The Main Characters

1. The Client

- The most important person in a property tax appeal is the client. Aside from having the most obvious and compelling interest in the result, the client ultimately makes the most important decisions. It is the client who decides whether to pursue an appeal, accept/reject a settlement, etc. That is not the job or role of the advocate. The client also needs to be involved in all strategic decisions involving an appeal and ultimately will make those decisions as well.

- The client often will serve various roles during the appeal. In the administrative stage, the client may serve as both the advocate and the witness. During a court proceeding, the client often serves as a witness.

- Throughout the pendency of an appeal, the client serves the important function of providing the necessary information to support the appeal. This can be specific to the asset in question or broad industry information or both.

- Finally, the client can provide continuity and historical knowledge from one stage of the appeal to another. A different advocate may represent the client in an administrative appeal versus a court appeal. An important role of the client can be providing background for all the other persons who become involved.

2. The Assessors

- The government agency charged with assessing property for tax purposes is the counterpart to the client—it makes the initial decision regarding the assessment of the property, and decides when/whether to make settlement offers or accept/reject a settlement.

- Also similar to the client, it is not unusual for that body to serve in multiple roles in the early stages of an appeal. For example, the first level of an administrative appeal of an assessment often is to the agency itself.

- However, there is one major difference. It is unlikely that the actual members of a Board of Assessors were involved in the assessment of a specific property, unless the property is especially unusual or a large percentage of the tax digest (or located in a more rural location). The initial decision typically would be made by the appraisal staff and then ratified/endorsed by the board when approving all the assessments. So, any appeal that is heard initially by the actual Board of Assessors might be their first review of the actual merits of the matter.

B. The Supporting Casts

1. The Advocates

- Both sides rely on an advocate in any appeal. As noted above, it is not unusual for the client to act as its own advocate during the administrative appeal. The assessors' staff almost always acts as the advocate for its own position in this early stage.

- Taxpayers are much more likely to retain an independent advocate, especially as the appeal progresses. That person might be a consultant, an accountant, an appraiser or an attorney. Most jurisdictions do not have any formal requirements of who can represent a taxpayer until the matter is docketed in court.

- While appraisal staffs typically defend their own assessments (at least until the matter is in court), they are sometimes assisted by third parties, especially if that third party was involved in the original assessment. It has become more commonplace for jurisdictions to retain third-party assessment or audit firms to assist (or even perform outright) the

assessment function. In those instances, it is very common for the third party to act as an advocate (as well as a witness) on behalf of the assessors.

- It is generally required that an attorney represent a party in court. (The one exception is that a natural person, i.e., not a corporation, partnership, limited liability company, can act as their own attorney in court.)

2. The Witnesses

- Both sides will rely on witnesses to present their case. In the early stages of the appeal, the witness very well might be the same person as the advocate. In other words, either the taxpayer or perhaps a consultant will appear at the administrative appeal hearing and present both testimony and argument. And, of course, the appraisal staff will be doing the same thing.

- Taxpayers often will rely on a third-party appraisal at the administrative stage, even if the appraiser does not appear. The person handling the appeal will present the appraisal and "testify" about what it contains.

- Once a matter is docketed in court, the rules regarding testimony are much more formalized. For example, it is no longer possible for the taxpayer or advocate to testify about what is contained in an appraisal—the party who prepared the appraisal must testify. Thus, when an appeal reaches court, the number of witnesses usually increases in order to best present the case under the formal rules of evidence.

- In court proceedings, taxpayers generally do retain an independent expert to testify while the assessors often rely on the appraisal staff. In very large matters, however, the assessors are more likely to retain an outside appraiser/expert.

C. The Audience

As will be discussed more fully in Part IV, the appeal may be before a variety of different audiences:

- The Board of Tax Assessors

- Some sort of "independent" government review board

- Arbitrators
- Mediators
- Court – either a judge or, in some jurisdictions, a jury

II. Who Is Your Advocate?

A. Selection of an Advocate

1. There are a variety of choices available when selecting an advocate to handle an appeal. These include the property tax manager of the client, an outside consultant, appraisers and attorneys.

2. Factors to consider in making the choice:

- The stage of the appeal is very important. It is not atypical, perhaps even common, for the initial appeal to be handled by the taxpayer. That is true even if an outside appraisal has been obtained. As noted above, the taxpayer at this early stage can simply use the appraisal to support its position without actually calling the appraiser as a witness.

- The size of the dispute obviously is important. The larger the dispute, the more likely it is justified to seek (and pay for) outside expertise to advise the taxpayer or handle the appeal.

- A closely related issue is the likelihood that the matter will be quickly resolved. If it is likely that a matter will be resolved at the first level of an appeal, then it may make less sense to rely on outside expertise. If it is likely that the matter will not be resolved short of a court appeal, then outside expertise may be sought earlier.

- In those situations, it could make sense to retain separate advocates to handle different stages. For example, you may wish to retain a consultant to handle the administrative appeal but already have selected the attorney who will handle the court appeal. The consultant would then have the primary role during the administrative stage and the responsibilities would shift once the matter is docketed in court. However, it could also make a difference if a record is created at the administrative level.

- The type of dispute can be important in determining who to select as an advocate. For example, if the matter is strictly a valuation dispute, then you may wish to rely on a consultant (or appraiser) who is experienced in valuation. But if the matter turns on the resolution of a legal issue, such as whether an exemption is applicable, then you may wish to rely on an attorney experienced in property tax matters.

- Experience with the particular jurisdiction or forum is also very important. A client may be very experienced with appealing its own property but never dealt with a particular jurisdiction or forum. Selection of an outside advocate who is knowledgeable about that particular jurisdiction or forum might make sense in those instances.

B. Role of the Advocate

1. The dictionary defines an "advocate" as one "who argues for a cause" or "pleads on another's behalf." It does not define an advocate as one who will make the ultimate decisions (that's the client's job) or be the expert witness.

2. It is the advocate's role, subject to the client's overall approval/direction, to determine the strategy and move the matter through the appeal process.

3. As noted previously, it is not unusual for someone—either a client or an outside consultant—to act in several roles during early stages of an appeal. They may be both the advocate and the witness. Once the matter is in court, however, that is no longer a real option. A person cannot do both (at least not both effectively). It is very difficult for someone who acted as advocate earlier in the process to then provide effective testimony as a witness. So, if a client wishes to use a particular person as a witness ultimately in any court proceeding, it should be careful to limit that person's role in the administrative proceedings to a witness role as well.

III. Who Are Your Witnesses?

A. What type of witnesses do you need?

1. "Fact" versus "expert" witnesses (what is the difference)

- "Fact" witnesses can testify about matters for which they have personal knowledge. So, for example, a plant manager would

be able to testify about how a particular machine works or how much was paid for a particular machine.

- "Expert" witnesses may provide "opinion" testimony. They may, for example, provide their opinion on the value of a particular machine. Unlike fact witnesses, expert witnesses may rely upon "hearsay" evidence. In this example, the expert might rely upon the plant manager telling him about how the machine works or how much was paid for it. The expert is not required to have independent personal knowledge of those facts. Experts also might rely on other expert opinion, general knowledge in the area, treatises, and all other sorts of secondary materials.

- Do not overlook the possibility of obtaining expert testimony from your "fact" witnesses. In this example, the plant manager very well might be qualified to offer an opinion on the value of the equipment. Even if he were uncomfortable in estimating an exact dollar amount, he might be able to testify that the value is "substantially less" than what was paid for the item due to obsolescence.

- "Rebuttal" witnesses may be needed to provide testimony to rebut issues raised by the opposition or express an opinion to corroborate opinions of the fact or expert witnesses. The selection of a rebuttal witness may be planned in advance or selected after testimony of all primary witnesses.

2. What are you trying to prove?

- Most cases will require a combination of fact and expert witnesses. In a typical valuation case, you will want at least one fact witness to describe the property. You will want at least one expert witness to testify about the value. You may want other witnesses to testify about other important facts. For example, if the property was recently purchased/sold, you may want a witness that was involved in the transaction to testify about how the purchase price was derived. (Even if not admissible as "opinion" from an "expert," the testimony is permissible to show what was paid and how it was determined.)

- Find the witnesses to tell your story instead of limiting the story by your selection of witnesses. In other words, do not decide upon your witnesses and then determine what testimony should be elicited. You should instead decide what you want

to be introduced as evidence and find the best witnesses (fact or expert) to tell the story.

3. Need for witnesses to be complimentary

- Do not assess your witnesses simply as individuals (although you certainly must do that) but as a group. It is unnecessary for each witness to be able to tell the entire story. They just need to be able to tell their portion of it well.

- Witnesses, particularly expert witnesses, need to know who else is testifying and the essence of that testimony. If kept uninformed, it is all too easy for the expert's testimony to be at odds with what other witnesses are saying.

B. Independence of the Witness

4. Experts (from both client and attorney)

- An expert must be perceived as credible and independent. If not viewed in that manner by the factfinder, the testimony will be unpersuasive regardless of the credentials of the expert or the merits of the testimony.

- There is an inherent tension between the desire of both the client and the advocate or attorney to use again and again an expert who has been successful in the past and the perception that the expert who repeatedly testifies might not be independent.

- You need to focus on both how many times an expert has worked with the particular advocate or attorney and the particular client. There is no magic "number" of times that an expert may testify before being perceived as not independent. It will depend upon the demeanor, experience and other factors personal to each expert.

- While certainly not essential, working for both taxpayers and governments helps an expert to be perceived as independent.

- Finally, careful adherence to professional guidelines and extensive preparation help show independence. (Conversely, departing from professional guidelines in a case for a client that has used an expert many times will be perceived badly by the factfinder.)

5. Employees of client (use as fact and/or expert witness)

- At first blush, it might be hard to view an employee as independent. However, employees often are viewed as very credible witnesses. For example, in an equipment valuation case, the plant manager probably will be the single most knowledgeable person about the equipment, including any potential obsolescence.

- Also, local employees often have credibility with the factfinder. (This can be especially important when other participants—attorneys and/or expert witnesses—are not local.)

- Employees involved in the operations are typically the best witnesses. Thus, a plant manager might be the best witness to describe how the machinery works and someone from the financial side might be the best person to describe the recent acquisition/sale of the property. It would be the rare case that the property tax manager should testify.

C. What to look for in specific witnesses

1. Appearance/demeanor

- Witnesses do not need to be professional models. They do need to appear professional.

- During the testimony, the witness should be firm, professional and polite. For most people, at least, "being yourself" is sufficient. (For those that are not, you probably should revisit your decision to use the person as a witness.) Do not ever lose your temper. Arrogance is not well-received.

2. Substance/Experience

- Extensive testimony experience is not essential. In fact, for a variety of reasons, it can be detrimental. (For example, prior testimony can be used to impeach the witness.)

- Substantial experience with the subject matter, however, is essential. Witnesses who are truly an expert on the subject matter project that expertise to the factfinder as a matter of course.

- Substance can be both academic and practical. For some types of testimony, extensive academic credentials are helpful. For other testimony, e.g., how does this machine work, practical experience is more useful.

3. Credibility

- Credibility is closely aligned with substance/experience. Witnesses perceived as truly an expert are given credibility by the factfinder.

- Credibility is also established by demeanor. The factfinder must perceive you as truthful.

4. Potential impeachability

- There are obvious benefits with an expert that has substantial testimony experience and extensive academic publications. The downside is that all of this information potentially may be used to impeach or discredit the witness.

- The witness must know and disclose as soon as possible all potentially damaging prior testimony or writings. It is usually possible to minimize the effect of such prior views if disclosed during direct testimony with an explanation. If not diffused in that manner but instead "sprung" by the opposing side during cross-examination, the prior views will be perceived to be much worse than they probably are.

- There are some instances where the prior testimony or writings of an expert simply make it impossible to use that expert in a particular case. A candid and frank discussion, preferably before being retained, regarding all potential problems is necessary to determine if that expert should be used. (It rarely is.)

5. Other issues

- Selection of witnesses sometimes will turn on subjective factors, perhaps unrelated to knowledge or experience. For example, how will a "Big City" appraiser be received by a jury in rural Texas? Has a particular expert appeared before the judge in past cases and was he successful?

- Furthermore, the audience is extremely important. Some expert witnesses may be particularly well-regarded by a local

assessor and may be very effective in resolving a case short of trial. Some witnesses may be very good for a bench trial but not a jury trial.

D. Witness preparation

1. Determine exactly what the witness is supposed to do

- For example, a typical assignment for an expert witness is to determine the fair market value using a specific definition as of a certain date. The engagement letter should state the assignment precisely so there is no misunderstandings.

- When doing this, though, keep in mind that the engagement letter is probably discoverable by the other side.

2. Determine exactly what the expert witness is supposed to prepare

- In the typical valuation dispute, a self-contained appraisal is prepared and submitted as evidence and serves as the basis for the expert's opinions. In some jurisdictions, such a report is not admissible as evidence. It is the expert's testimony that is the evidence in court. In any litigation case, the lead attorney will advise the witness as to what is legally required to be submitted.

- Accordingly, it is important at the outset to discuss what written report should be prepared and to specify that in the engagement letter.

- Also, the expert may have to prepare some sort of written report to satisfy professional standards. Again, this should be discussed and spelled out in the engagement letter.

- It is critical to distinguish between the expert's written report and the analysis. You may not wish to have a full written report because it will not be admissible in court and will serve no purpose. You probably do wish for the expert to complete a full analysis of the issue (and then that analysis to be stated in a summary report).

3. Determine who should retain the expert witness

- In some jurisdictions it is helpful for the attorney to retain the expert because it will limit the amount of information that is "discoverable" by the other side.

- In other jurisdictions, the expert's workpapers and other documents are discoverable so there is no reason not to have the expert retained directly by the client.

4. Determine what is needed to perform the engagement and who should perform the necessary tasks

   - The expert must decide what information is necessary. It is not the job of the attorney or the client to tell the expert what is needed.

   - That said, the expert needs to be thoughtful about what is requested. He probably will be asked during a deposition what information was requested and what was provided. A large discrepancy between the two may be difficult to explain. Accordingly, the expert should try to request only what is needed and is available.

5. Decide who will obtain information

   - This must be done under the supervision and control of the expert who is relying on the information.

   - The expert can rely on employees with the client or with the expert's company to perform the actual collection of the data, etc., but the expert must be able to testify that it was under his "supervision and control."

   - If the expert fails to supervise, the best that can happen is that his work will be considered shoddy. It is certainly within the judge's discretion, though, to exclude the testimony altogether and it has been known to happen.

6. The expert must determine the result

   - The advocate, attorney or client cannot be perceived as trying to influence the result. If so, then the expert's independence will be questioned.

   - As noted below, there is nothing wrong with the expert communicating with both the attorney and the client. It is what is communicated that is important.

   - Also, the expert who testifies must make the decision. It cannot be his support staff or colleagues. While there is

nothing wrong with an expert relying on others to perform the ministerial tasks and assist in the analysis, the key decisions must be made by the testifying expert.

- There are two potential "bad" results for undue influence on an expert. The factfinder could simply give the expert's testimony very little, or no, credence in making the determination. It is also possible for the judge to exclude the testimony altogether.

- It is unusual, although it happens, for the communication to be as blatant as "we want you to determine the result to be x." Rather, typically it is pressure, either real or perceived, on the various steps in the valuation methodology.

- So, for example, the selection of the appropriate discount rate is a big determinant of the ultimate value. If the expert has determined the value using one discount rate and then subsequently settles on a value with a much different discount rate, there will definitely be a series of questions why the decision was made to change rates. If it is shown that this was due to the pressure, real or imagined, blatant or subtle, then the expert's entire testimony likely will be ignored.

7. What is discoverable by the other side

- You must assume that everything in the testifying expert's files will be requested and made available to the other side. This includes all communications with the client, all internal analysis, drafts of any report, and everything else.

- In today's world the request will cover all emails, drafts of documents, and everything maintained in computer format. The simple fact that you have "deleted" an email from your personal inbox does not mean it is no longer on the system and is not discoverable.

- It is less clear whether the documents pertaining to an expert who is not testifying are available for discovery. For an expert who is never expected to testify, the documents should be protected by the "work-product" doctrine, especially if the expert was hired directly by the attorney. For the expert who had been hired to testify and a decision later made not to use that expert, then you should expect that the other side will obtain those documents and will ask your current expert why any of his assumptions or analyses are different.

E. Use of a non-testifying expert

1. Once in court, discovery typically commences with each side serving the other "document requests" and questions known as "interrogatories." Some of these document requests are specific to your expert, e.g., a request for the expert's workpapers or a question about his methodology, and there is nothing wrong with involving the expert in the response. In fact, a failure to involve the expert probably would cause the response to be viewed as less than complete.

2. It can be problematic, though, to involve the expert in answering discovery that is not specific to the expert's testimony. It is too easy to characterize the expert's involvement as "crossing the line" into advocacy and making the expert's independence suspect.

3. The same is true of using the expert to assist you in preparing your discovery requests of the other side and reviewing those responses. It is a question of judgment and degree. Asking your expert a few technical questions should not cause a problem. Having your expert draft the discovery would be a problem.

4. If the case is complex and it is necessary to have an expert involved in much of the pre-trial discovery and trial preparation, then it is preferable to retain a non-testifying expert.

5. If retained, the non-testifying expert can be used to review and critique work product prepared by the opposition, assist in discovery, formulate trial strategy, evaluate and prepare cross-examination questions for witnesses, prepare for trial and actually participate in the trial.

6. Use in this way should make the non-testifying expert part of the trial team and thus, as noted above, all communications should be privileged.

IV. Who is Your Audience?

A. The Board of Assessors

1. The Board of Assessors typically consists of non-tax professionals who often are serving in a volunteer capacity (or very small compensation). It is unusual for a member to have an appraisal background. They do typically receive some amount of training or education as part of the job.

2. As a result, the Board of Assessors often is very reliant on the appraisal staff, particularly the chief appraiser. (This may be especially true in more rural areas.) In some jurisdictions, the chief appraiser may even be one of the members of the Board of Assessors.

3. As noted previously, a hearing (or review) by the Board of Assessors often is the first level of administrative review. Given that the Board was responsible for issuing the initial assessment, this review rarely changes the result.

B. The Appeal/Equalization Board

1. The next level of administrative review (or sometimes the initial review) is an administrative body whose sole function is to provide these reviews. This Board typically functions on a county level.

2. This Board also typically consists of volunteers (or individuals serving for very small compensation) and has even less training or experience in valuation.

3. The review board often is very closely aligned with the Board of Assessors, often sharing space, administrative assistants, etc.

4. Needless to say, in the typical case, this level of review often is perfunctory. This is especially true for business property and any property that requires some level of sophistication in valuation knowledge.

5. Some states have a state board of equalization or review, which provides a second level of review from the county boards of review. This board often is much more sophisticated and experienced. Accordingly, unlike matters before the county boards of review, these hearings typically require more preparation and should be approached more in the manner that one approaches an appeal in court.

C. Arbitration

1. Some jurisdictions now offer arbitration, either as an alternative or in addition to other administrative appeal options or an appeal in court.

2. Arbitration generally is a procedure in which the parties select a person or persons to serve as decision maker. The hearings are

typically more formal than other types of administrative hearings but less formal than a court proceeding.

3. In some jurisdictions the decision of the arbitrator cannot be appealed. This is known as "binding" arbitration. When the decision can be appealed, then the procedure is referred to as non-binding arbitration.

4. One advantage of arbitration is that it generally is less expensive than a more formal court appeal. Less time (and perhaps no time) is spent on formal discovery. The hearings themselves also tend to be shorter. The "rules of evidence," which places various restrictions on the form of evidence in a court proceeding, typically do not apply.

5. Perhaps the biggest advantage of arbitration, however, is the ability to select the arbitrator. Jurisdictions differ on how this is done.

   - In many jurisdictions the parties attempt to agree on a single arbitrator. If they cannot agree, then they each pick one and those two select a third.

   - In some jurisdictions the arbitrator is selected by a judge or the parties must select the arbitrator from a pre-approved list determined by a judge.

6. Regardless of how the arbitrator is selected, in almost all instances the arbitrator is more qualified than the administrative review board (and will have more valuation training than any judge).

D. Mediation

1. Mediation is a procedure in which the parties (the taxpayer and the assessors) are brought together with a third person who attempts to "mediate" the resolution of a dispute.

2. Mediation often is required by courts as a first step in the litigation process. Many courts provide this service to the parties through an office of dispute resolution.

3. The job of the mediator is to attempt to have the parties agree on a result. It is not the mediator's job to decide the matter, although the mediator does apply pressure to each side to

compromise. If the parties cannot agree, then the case proceeds in court (or whatever forum in which the appeal resides).

4. Mediators typically are attorneys or retired judges who specialize in this type of work. The mediation itself resembles a settlement conference and not some sort of hearing. The mediator typically will meet with the parties together, then separately, and then together again.

5. When mediation is not required, some form of it sometimes can be helpful in resolving a matter. One procedure that has been effective is for the parties to hire a third-party appraiser jointly to value the property. (This appraiser obviously needs to be well-regarded by both parties.) Then, while that appraiser's valuation is not binding on either party (and not admissible as evidence in any subsequent hearing), it can be used by the parties to facilitate settlement discussion.

E. The Court

1. Most jurisdictions have a "bench trial" for property tax appeals

- In these jurisdictions, you need to determine, if possible, the experience of the judge in this type of case. If it is a tax court, a business court, or even a court that specializes in business litigation, it is typical for the judge to be familiar with valuation concepts.

- In courts of general jurisdiction, however, it is unusual for the judge to have much property tax appeal experience or even experience with valuation issues. Keep in mind though that some property tax cases involve issues similar to other types of cases—i.e., a simple valuation case for property tax purposes is similar to an eminent domain case.

- In either situation, research the judge. You must know how experienced they are when you take the stand. You do not wish to insult the judge by being either too basic or too complex.

- Judges tend to be smart and a "quick study." Even if they have never heard a property tax appeal, most will grasp the issue and valuation nuances very quickly.

2. A few jurisdictions have jury trials for property tax cases

- Juries are especially challenging. The range within the jury in intelligence, attentiveness, and dedication to the task at hand can make it very difficult. Adding to the difficulty, especially in rural settings, is the likelihood that some of the jurors may have some tie to the subject property or perhaps an interest in the outcome. For example, a juror may believe that if they grant relief to a taxpayer, their own property taxes will increase, possibly influencing their decision.

- In a jury trial, though, the goal generally is to convince the "leaders" in the jury that you are right and then rely on them to convince the others. (The hard part is that you do not know who these leaders will be.)