

# Preparing for Expert Testimony

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## Abstract

This article is based on the author's twenty-plus years of experience as an expert appraisal witness and on advice gleaned from the books and articles listed in the bibliography. The five-step process presented in this article includes recommendations for ensuring an appraisal's quality and enhancing the perception of the witness as an appraisal expert.

## Introduction

*Black's Law Dictionary*<sup>1</sup> defines "expert testimony" as:

"Opinion evidence of some person who possesses special skill or knowledge in some science, profession or business which is not common to the average man and which is possessed by the expert by reason of his special study or experience."

An individual becomes an expert witness through preparation, education, teaching, and publications. An expert appraisal witness is recognized by his\* peers as having obtained specialized knowledge in the appraisal field with respect to the subject matter under litigation. The expert appraisal witness is also one who is capable of forming an accurate opinion and who can relate that opinion in a straightforward, honest, and convincing manner.

Many appraisers do their best to avoid expert witness testimony because it is arduous, time-consuming, and adversarial. Once an appraiser agrees to testify, however, he must avoid considering the case as a personal win-or-lose proposition. An appraiser is not an advocate for either party. It is important to recognize that an expert witness appears before a court or board to assist its members in understanding a complicated, technical subject that would not typically be in the average lay person's field of knowledge. He must remember he is on the witness stand only to give testimony about the appraisal and to assist the trier of fact in understanding the material.

Expert witnesses who appear in an adversarial proceeding should expect to be examined about their qualifications by one attorney and then cross-examined about those same qualifications by the opposing attorney. They will be required to present their qualifications and to discuss the background, experience, knowledge, and education which they possess to convince the court that they have the capability,

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<sup>1</sup> Black M. A., Henry Campbell, *Black's Law Dictionary. Abridged 6<sup>th</sup> edition.* (St. Paul, MN, West Publishing Co., 1991)

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knowledge, and background to make an effective presentation of fact and to help the judge or board members understand the problem before them.

Experts bring their knowledge, information, and appraisal experience to the court. However, they must always remember that the objective of the opposing counsel is to make the expert witness look ineffective and unprofessional so that the court will give little weight to that person's testimony. For expert witnesses, therefore, pre-trial preparation is the most important part of the entire trial process. If witnesses and the documents on which they base their opinions are carefully prepared, and they have practiced responses to every possible question, their courtroom experience will go smoothly. A well-prepared and well-rehearsed witness has little to fear from cross-examination. Following the five steps in this article will help expert appraisal witnesses successfully survive their day in court.

### **Expert Witness Characteristics**

Regardless of their profession, expert witnesses have several characteristics in common. They are:

- well prepared
- thorough
- professional in attitude and appearance
- knowledgeable about the subject matter
- unbiased
- credible
- honest

Besides these characteristics, an expert appraisal witness is one who:

- ensures that the appraisal is accurate, thorough, complete, and unbiased
- works as a team with the client's attorney
- informs the client's attorney of pertinent appraisal terminology, theory, and techniques
- furnishes the client's attorney with the questions the attorney should ask to
- ensure that the expert's appraisal is presented fairly and effectively
- supplies the client's attorney with a list of cross-examination questions
- to ask the opposition's expert appraiser
- knows and adheres to the *Uniform Standards of Professional Appraisal Practice* (USPAP) requirements for the presentation of an oral report

### **Step 1: Fine Tune the Appraisal**

The expert's trial preparation must begin with a critical reading of the appraisal report, an unbiased analysis of its strengths and weaknesses, and a comparison of the appraisal report to USPAP Standards to ensure compliance.

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### ***Have an Outside Reviewer to Critique the Appraisal***

One of the ways an expert witness can prepare for an effective, factual, and accurate presentation is by using a peer reviewer. The reviewer should be someone the professional appraiser trusts and knows has the knowledge, background, and insight to perform a careful, detailed appraisal report review. A review is, of course, not mandatory, however it assists the appraiser in spotting any potential weaknesses in the logic or presentation of the material before the opposing attorney sees the document.

It is important to deliver a copy of the appraisal report several weeks before the trial to the reviewer. The review appraiser should already be acquainted with the property rights that were appraised and with the subject property. It is important that the reviewer prepare an appropriate review document in accordance with Standard 3 of USPAP. Because of the amount of work involved, the reviewer is usually compensated for their time. This is not a requirement for every case, but when a case has a substantial financial risk to the party who is employing the expert, this step is well justified.

A week or so after delivering the appraisal, the expert should review the document with the reviewer. The reviewer can provide insights concerning the strengths and weaknesses of the appraisal report's content and logic and comment on its overall quality. The reviewer should also ensure that USPAP Standards were followed. It is important to remember, though, that, if the opposition discovers the existence of the review appraisal report, they will most likely ask for a copy of it during the discovery phase. It is also possible that the reviewer could be subpoenaed to testify at the hearing.

### ***Check the Appraisal Report's Format and Content***

After both the expert and the reviewer have finished working together with the appraisal report, the expert should make some final checks to ensure that the document is professionally presented.

*Section dividers.* Adding section dividers not only makes the narrative appraisal report look professional but also makes it easy to reference during the trial. A labeled section divider should be placed just before each appraisal topic such as "background," "sales comparison approach," "income capitalization approach," "reconciliation," etc.

*Page numbers.* Every page of the appraisal should be consecutively numbered so the judge, the attorneys, and the witness can quickly find the same page. Page numbers are the only way to do this efficiently.

*Calculations and content.* Proofreading the document and rechecking both the formulas and the calculations are essential. The physical facts of all the buildings should be checked by both the appraiser and the review appraiser. One of the most damaging things to an individual's credibility, and to the presentation of the facts and analysis, is finding an error during the court proceeding that should have been caught early in the

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preparation of the appraisal report. For example, discovering that the building is of a different dimension than stated in the report is devastating to the morale of both the expert witness and the attorney when the error is brought to the court's attention by the opposing attorney. It also plants seeds of doubt in the minds of the court as to the expert's reliability and credibility. As a final precaution, the appraiser can—and perhaps should—have someone who has not yet read the appraisal report meticulously check the spelling of every word, paying special attention to the owner's name and the property's address.

*Photographs.* The old saying, “a picture is worth a thousand words,” is absolutely true when presenting an appraisal report. All of the photographs in all copies of the appraisal report should be crystal-clear.

*Reinspect All the Properties.* It is the expert's responsibility to present credible, factual, and truthful testimony supporting the opinion of value. To do this, the appraiser must have a clear understanding of the property under discussion and of all the comparable properties. This makes a site visit to update the appraiser's mental image of the property imperative. The expert should revisit the property that is under dispute and also revisit the properties used as comparables. This might be neither easy nor convenient, especially if the properties are either commercial or industrial and the comparable properties are spread over a large area. It is important for the appraiser to know the condition of all the properties at the time they were used in the original appraisal document and also to be aware of any changes that might have taken place since the effective date of value. This is especially important if an appraiser for the opposing party has used the same comparable property but has a different description because of the time when the photograph of the comparable was taken. The difference in the description could also be due to changes to the property which have taken place subsequent to the sale.

If the expert witness cannot personally revisit the subject and comparable properties, he or she should call an appraiser in the jurisdiction where the property is located. The local appraiser should be asked to reinspect the parcel and provide a written statement of the findings and conclusions of that inspection.

### Quick Tips

1. Triple-check the appraisal's physical facts including the spelling of the client's name and the property address.
2. Prior to the court date, attend at least one hearing in the venue in which you will be testifying. You will leave with a much clearer understanding of that Court's rules and procedures.
3. It is extremely helpful to know the opposing counsel's cross-examination style, so talk with other appraisers. You may find a colleague who has some knowledge about the counsel who will be cross-examining you.
4. Know how many copies of the appraisal to make for the Court, who will bring them to the hearing/trial, and when they are to be distributed. Use a yellow post-it note to mark each recipient's name or title on the front of each appraisal.
5. Before Court convenes, give your business card to the court reporter. It helps the reporter identify who you are and ensure your name is spelled correctly.
6. Moderate your liquid intake prior to the time you go into the courtroom. You may be there a long time.

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*On-site photographs.* When revisiting the sites prior to testifying it is advisable to shoot a number of pictures of the subject and of the comparables using either a 35-mm or a digital camera. These photos will serve as visual aids during testimony to help the court understand the property and to assist the expert in clearly presenting the facts. It is important to remember that the appraiser shot photographs during the original visit to the subject and comparable properties. The pictures shot while revisiting the site are to aid the expert witness in understanding any changes that have taken place from the time the property was sold—or from the effective date of value—to the present. It is also a good idea to check with legal counsel to ensure that (a) the photographs are admissible, and (b) the witness will be allowed to approach the easel to point out the various features being discussed. If this is allowed, the best of the photos should be blown up to produce good, clear, sharp photographs of at least 11" x 14," which can then be mounted on foam-core board.

## **Step 2. Work With the Attorney as a Team**

Because testifying is a partnership, the expert witness and the client's attorney should work very closely to ensure that the partnership functions like a fine watch. An attorney who is experienced in the presentation of real estate valuation makes the best partner. These two individuals are a team in preparing for, and the delivery of, the expert's testimony. It is essential that early in the pre-trial preparation process the expert witness and the attorney work together so the attorney clearly understands the specific facts that need emphasis. Also of great importance is that the attorney is informed about where the appraisal's and testimony's strengths and weaknesses lie. For example, if the DCF analysis in the report is especially sound, this should be pointed out to the attorney. Or, if the comparable properties were not in the subject's neighborhood, the appraiser should explain why they are still valid comparables.

### ***Know the Language***

The attorney must understand the economic principles and practices upon which the appraisal is based. It might help the attorney if the expert highlights selected pages in the most recent edition of *The Appraisal of Real Estate* which illustrate the steps taken in performing the appraisal and the methods used in establishing the opinion of value.

The attorney must clearly understand all the appraisal terms used in the appraisal report. It is important that the expert witness provides a glossary of terms and calls the court or board's attention to that glossary during the expert witness testimony. This is especially helpful if the trier of fact is not familiar with the terminology used by appraisers. Terms like "market value," "functional obsolescence," "economic life," and "yield capitalization," which have very specific meanings in real property appraisal, might have little meaning to an attorney, a judge, or a board member.

On the other hand, the expert witness must understand the court's definitions of "expert witness" and "market value." There is nothing more shocking to an expert witness than

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finding out that the definition of “market value” used in the appraisal report is not the same as that used by the court or board. Understanding the characteristics that comprise an expert and the definition of market value that is being used is extremely important to an expert’s credibility.

### ***Play by the Court’s Rules***

Communication between the attorney and the expert witness must be open and clear. In some cases the expert witness will need to explain USPAP and its impact on the appraisal report written by the expert witness. In other cases it might also be necessary to explain how the Standards of the Appraisal Institute influence an expert witness and what he or she might not be allowed to do when presenting information and analyses. It is important to remember that, while the expert witness must conform to the court’s rules, conformity to the requirements of both the Appraisal Institute (if the expert is a member) and USPAP are also required.

The appraiser also needs to clearly understand rules of law such as the hearsay rule and any administrative rules that might apply to a particular jurisdiction and situation. The attorney can and should clearly advise the expert witness about what is acceptable during testimony. It is important to remember that an attorney can not advise the expert witness (appraiser) as to appraisal methods, approaches or techniques, or value conclusions. What the attorney should do is help the expert clearly understand the rules of the court or board before which he or she will be appearing so the testimony meets those criteria. For example, if both expert witnesses have used the same comparable property, and yet there are differences in the analysis of that property, there needs to be a clear and understandable explanation of those differences so that both the attorney and the trier of fact understand them.

*Courtroom courtesies.* Although this might seem obvious, the attorney should tell the expert the correct form of courtroom address, such as “Your Honor” or some other phrase.

The client’s legal counsel should explain the hearing’s procedures to the witness: Will the witness be excluded from the courtroom during the delivery of other testimony? What is the flow of materials? How should exhibits be identified? When will the expert witness be called? Knowing these details helps the expert to be prepared and professional.

The attorney should also explain to the witness when to stand, when to sit, and where to sit when testifying and while waiting to testify. Sitting a distance away from both the client and the client’s attorney helps ensure that the appraiser is viewed as an impartial expert witness.

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*Discovery.* Appraisers must know the jurisdiction's rules of discovery. If they do not, they might learn that their appraisal report cannot be used in court because it was not delivered to the opposing counsel prior to the discovery deadline. This is an area the client's attorney should have covered with the expert. If the attorney hasn't talked about discovery, it is the *appraiser's* responsibility to ask.

If the opposition has prepared an appraisal report and the attorney has obtained a copy of it through the discovery process, the expert witness should be given a copy of it and should follow the suggestions listed earlier in this article: examine it critically, understand the differences between it and the one the he has produced, and know what it says and what it leaves unsaid.

After reading the opposition's appraisal report, the appraiser analyzes both its strengths and weaknesses. Being careful to follow *USPAP*, Standard 3, the appraiser makes a written record of the review that is readily available if either the opposition or the court requests a copy of it.

*Hearsay.* Most courts have a hearsay rule. It is important that the witness clearly understands that rule and how it might impact the appraisal report. Once the expert understands the rule, he or she should make two copies of the appraisal report. The expert and the attorney should then highlight any places where the witness has relied on another person's information or work. For example, an engineering report might have been referenced, or an opinion from a REALTOR® or a banker regarding loan rates or marketing time might have been used in the appraisal report. Because the engineer who prepared the report or the REALTOR® or banker who gave the opinion will not be in the courtroom, this information be regarded as hearsay, and might not be admissible. The attorney needs to clearly understand the places where outside information gathered by the expert from other sources was used or relied on and then work with the expert to ensure that the appraisal report and the appraiser's testimony are acceptable within the court's rules.

### ***Prepare for Direct Examination***

*Compose the questions.* After reviewing both appraisal reports, the appraiser and the attorney work together developing questions for direct examination. The questions and their answers must give a clear, factual, convincing, and honest account of the property's value. Three things should be remembered in answering all questions: always tell the truth, be factual, and don't shade the situation. A falsehood or shading will come back to haunt the witness sooner or later—if not during the present trial, then during another trial.

#### **Appraisal Review Note**

Many appraisers believe it is inappropriate to participate in the analysis of information submitted by the opposition.

There are, however, professional appraisers who specialize in reviewing appraisals and providing attorneys with their opinion of the document's veracity.

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Appraisers who are expert witnesses must remember, too, that there is absolutely nothing wrong with saying “I don’t know,” or “I did not consider that fact.” The testimony is one appraiser’s professional opinion of the estimate of a property’s value. Unless information has been omitted or the appraiser has been negligent, the fact that the witness did not follow the exact method another appraiser might have used does not make the witness wrong.

*Rehearse the answers.* A rehearsal of the questions and answers with the attorney ensures a complete understanding of the answers that will be given and the style in which the expert speaks. The attorney can then be confident that the answers are legally sufficient and appropriate to the hearing situation. Sample direct examination questions are included at the end of this article.

*Practice in front of a video camera.* Few expert witnesses will use the video camera; however, those who desire to continually improve their testimony technique will find it an invaluable tool. The attorney and appraiser focus on the expert’s performance as a witness. The attorney asks the direct examination questions just as they would be asked in court, the appraiser answers them, then both parties examine the videotape keeping in mind the following questions:

- Does the witness appear nervous, calm, haughty, knowledgeable?
- What message is the witness’ body language telegraphing?
- Is the witness believable?
- Is the witness able to relate the facts succinctly?

The video camera tells no lies. It allows the attorney and the expert witness to answer the questions listed above and to practice the delivery until it is smooth and natural. The video camera provides an excellent tool for the expert witness—especially for the beginning expert witness—to practice stating the facts in a clear, concise, and straightforward manner. It allows the expert witness to eliminate irritating personal habits (e.g., shaking the change in one’s pocket) which might distract the court or board from the central theme of the hearing: the clear and concise presentation of factual material and expert opinions.

### *Consider Both Sides of Cross-Examination*

As mentioned earlier, another important area in preparing for cross-examination is assisting the attorney in analyzing the opponent’s appraisal. Reading the opposition’s appraisal is most helpful to the expert’s understanding of the other appraiser’s approach.

*Analyze the opposition’s appraisal and prepare questions about it.* After analyzing both appraisal reports, it is extremely important that the witness and the attorney work together to begin writing the questions which, in all probability, the opposition might ask during cross-examination. (This is also an excellent opportunity for the appraiser and attorney to develop cross-examination questions to be posed to the opposition’s expert witness.) The primary objective of cross-examination is to destroy the effectiveness of

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the expert witnesses and discredit their testimony. If the opposing counsel cannot do that, he or she must dilute or neutralize the effect that the expert had during the initial testimony. For example, if the opposing counsel can clearly demonstrate that one or more of the physical facts the expert witness has used in the appraisal report is incorrect, or that one or more of the analyses or adjustments that were used is inappropriate, then the impact of the expert's testimony has been effectively neutralized.

The opposing counsel might also want to obtain favorable admissions from the expert witness about the facts to which the expert has testified. In this way, opposing counsel will hope to reveal the appraiser's ignorance about the property in question or inaccuracies in the appraisal report and, therefore, discredit the appraiser's strength as an expert. A strong witness needs to be prepared for those questions with honest, consistent answers.

### **Step 3. Prepare the Client**

Participating in a trial, whether before a court, a board, or a tribunal, is much like prize fighting—the expert witness must expect to be hit with unexpected questions during cross-examination. The appraisal will, in all probability, not be perfect—especially in the eyes of the opposing counsel. Therefore, the expert needs to prepare his client and the attorney for the unexpected.

It is important that the expert's client be given a copy of the questions that the witness and attorney have developed for direct examination and for cross-examination. These demonstrate the complexities of the hearing process and the difficulties facing the appraiser in the capacity of an expert witness. It also helps the client understand the overall process.

### **Step 4. Inspect the Courtroom**

After the appraisal report has been reviewed, tweaked, and submitted to the attorney, and the answers to possible questions have been thoroughly rehearsed, the expert is almost ready to testify. Because the hearing is the next step, the expert witness needs to inspect the hearing site.

If possible, a week or two before the trial the appraiser should examine the courtroom to evaluate the physical situation relative to testifying:

- Where does the tribunal or judge sit?
- Where are the attorneys' tables?
- Where will the court reporter be sitting?
- When testifying, where will the witness sit in relation to the other people involved in the hearing?
- Where in the room would the expert prefer to sit while waiting to testify?
- How are the acoustics in the room? Can everyone in the courtroom hear the appraiser's normal voice? Is there a microphone system? How does it need to be placed to catch the witness' voice?

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If the expert cannot examine the courtroom prior to the hearing, early arrival on the day of the hearing is mandatory for the expert to have ample time to become comfortable with the physical surroundings. After examining the room the appraiser should sit quietly and make mental preparations for the examination. Mental and physical preparations help to ensure that the expert witness will appear calm, credible, knowledgeable, and well prepared on the witness stand.

The expert witness should keep in mind that this hearing is not personal; it is a discussion about an appraisal report written by an experienced appraiser—an expert. An expert appraisal witness is an individual who, by training, knowledge, experience, and research, is able to arrive at an impartial and credible opinion of a property's estimated value.

### **Step 5: Testify**

To help him be perceived as a credible expert, the appraiser must imagine being in the judge's place. A judge expects an expert witness to be calm, knowledgeable, and organized; to testify clearly regarding how the appraisal was performed; and to answer the opposing counsel's questions succinctly and convincingly.

The tips below can help the appraiser succeed in testifying as an expert witness:

1. Always tell the truth. This is a basic rule of self-preservation for an expert witness. The appraisal expert who tells the truth is extremely hard to discredit.
2. Remember that credibility is everything. Once credibility is lost, the appraiser loses value as an expert.
3. Think before speaking. Feel free to take a long pause before answering a question. This also gives your attorney a chance to object to the question, if that is appropriate, and gives you an opportunity to think about your answer.
4. When answering a question, always face the hearing officer/judge and/or the jury, but not the attorney who asked the question.
5. Be sure to answer only the question that was asked.
6. Do not volunteer information. Answer only the question that is asked. Do not add information unless asked a specific follow-up question.
7. The best answers to opposing counsels questions are: "Yes," "No," and "I don't know."
8. If asked about an error in the appraisal, admit to making the error. If you are truthful about what the error is, how it relates to the appraisal process, and its effect on the property's estimated value, you have a good chance of continuing to have credibility with the court.
9. If you do not understand a question, ask for clarification or for a restatement of the question.

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10. When asked to either discuss or agree to information that was in a deposition, ask for time to read the document again so that you clearly understand what it does and does not say. Do not rush.
11. Never speculate, guess, or assume. Remember that the people you are speaking to are typically *not* appraisers.
12. Avoid the use of adjectives and superlatives that reflect judgment. A witness should stick to the facts.
13. As an expert witness, you are entitled to explain your answers fully. If you are interrupted by the opposing counsel, you should let the attorney finish his or her remarks. Then you should firmly, but courteously, ask the judge if you may finish your response.
14. Do not take the hearing as a personal affront. Do not let the opposition's attorney affect your professional demeanor in a negative way.

## **Conclusion**

Appraisers know that location is the most important aspect when estimating the value of a parcel of property. Similarly, preparation is critical to an expert witness's success on the stand. If the expert is honest when testifying, and has done a thorough job of both personal and appraisal report preparation, it will be very difficult for the opposing counsel to demolish his testimony.

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## Footnotes

1. Black M. A., Henry Campbell, *Black's Law Dictionary. Abridged 6<sup>th</sup> edition.* (St. Paul, MN, West Publishing Co., 1991.)

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## **Appendix A**

### **Quick Tips**

1. Triple-check the appraisal's physical facts including the spelling of the client's name and the property address.
2. Prior to the court date, attend at least one hearing in the venue in which you will be testifying. You will leave with a much clearer understanding of that court's rules and procedures.
3. It is extremely helpful to know opposing counsel's cross-examination style, so talk with other appraisers. You may find a colleague who has some knowledge about the counsel who will be cross-examining you.
4. Know how many copies of the appraisal to make for the court, who will bring them to the court or board, and when they are to be distributed. Use a post-it note to mark each recipient's name or title on the front of each appraisal.
5. Before court convenes, give your business card to the court reporter. It will help the reporter to identify who you are and it will ensure that your name is spelled correctly.
6. Moderate your liquid intake prior to the time you go into the courtroom. You may be there a long time.

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## Sample Questions for Direct Examination

1. What is your profession?
2. How long have you been engaged in this profession?
3. What educational preparation have you undertaken to participate in this profession?
4. What kinds of experience have you had?
5. Have you participated in educational offerings either as a teacher or an instructor?
6. Have you written articles, books, etc. about the appraisal process or about the appraisal of a specific property ?
7. Are you familiar with the *Uniform Standards of Professional Appraisal Practice*?
8. Did you complete this appraisal in accordance with those Standards?
9. Have you ever taken a course in the *Uniform Standards of Professional Appraisal Practice*?
10. Could you give a brief description of the *Uniform Standards of Professional Appraisal Practice*?
11. Have you completed this appraisal using generally accepted appraisal techniques?
12. Do you hold a professional designation?
13. Does the organization from which you hold your professional designation have a code of ethics and a process for ethical discipline of appraisers who do not follow its standards?
14. When did you physically visit the property in question?
15. How much time did you spend at that property?
16. Did you physically inspect the comparable properties that you used in the sales comparison approach?
17. Did you conduct an interior inspection of those properties?
18. Did you verify the sales that you used in the sales comparison approach?
19. Did you use the income capitalization approach?
20. How and where did you obtain your income data?
21. How did you develop your capitalization rate?
22. Did you ensure that income and expenses comparable to those of the subject property were included in the income and expenses of the comparable properties that you used in developing your overall rate?

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