

The Role Of The Property Tax Consultant in Litigation
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General Overview

In the event that a valuation settlement cannot be reached during the administrative remedy, the property owner and/or manager often ask for recommendations regarding possible litigation from their property tax consultant. Since litigation support is a large practice area in the property tax consultant industry, consultants play various roles. These roles can range from ***passive*** to ***intricate participation*** during the litigation process. The absolute least agent participation level should include advising the client that an ARB order has been issued and the deadline for filing appeals.

In both scenarios, the consultant handles the property tax appeal through the administrative remedy, which includes protecting the taxpayer's rights and providing remedies available in the Texas Property Tax Code. In a passive role, the consultant's participation typically ends with issuance of the Appraisal Review Board's (ARB) Notice Of Final Order. At this point the property owner assumes the responsibility of appealing a protest provided by Subchapter C of Chapter 41, Section 25.25 or Subchapter B, Chapter 24. The taxpayer will retain legal representation and expert witnesses necessary to proceed with their litigation.

In the latter case the owner will rely on the consultant to become part of the litigation team, typically made up of an expert witness, attorney and the consultant. Each team member has a fiduciary relationship with the property owner and this must be understood and kept in mind. The members of the litigation team bring different areas of expertise, which are needed in order to bring a successful conclusion to a property tax lawsuit. For example, a real estate appraiser might be designated as the expert witness. In addition to preparing a market value appraisal, fair and equitable study and giving testimony, the appraiser may be asked to provide additional services, including: ¹

1. *Advising an attorney on matters of standards of practice, professional code of ethics, market data sources, and industry trends*
2. *Helping frame questions for appraisal experts on either side of the case at depositions and during trial testimony*
3. *Case management*

Additionally, the appraiser can also be utilized to identify incorrect methodology, inaccurate data, and an inaccurate application used by appraisal districts.

¹ As defined in *The Appraisal of Real Estate, Twelfth Edition*

The attorney is the captain of the litigation team and his fiduciary relationship with the property owner trumps all other activity involved in the litigation. The relationship with all other team members is secondary to that of the relationship between the attorney and the property owner. Further, other team members must be aware not to engage in any activity that constitutes the **unauthorized practice of law**. Once litigation has been filed, the property owner will become the Plaintiff and will be the direct client of the attorney. The agent is not the attorney's client. Thus, communications between an attorney and the tax agent may or may not be confidential and may be discoverable. Privileged communications should most often be directly between the owner and attorney.

The attorney's role includes counseling the property owner on the feasibility of litigation, defining and explaining the taxpayer's rights, disputed facts, and remedies. Generally, the litigation process includes the filing of the petition, discovery of the facts (informal and formal interrogatories, requests for production, depositions, disclosure of experts, requests for admissions, etc.), motions to the court, pretrial proceedings such as case management conferences, settlement conferences, referral to mediation or arbitration, preliminary motions to allow or exclude evidence at trial, pretrial briefs, trial preparation, jury selection and instructions, trial by judge or jury, post-trial motions, and appeal of the judgment.

Consultants who participate in litigation support can be divided into two categories; **involved** and **heavily involved**. The consultant that falls in the first category will generally work as a conduit of information between the owner and the attorney. For example, the consultant would forward the attorney copies of evidence used during the administrative process, Notices of Final Order, and other general information.

The **heavily involved consultant** takes his participation to another level, as does his counterpart with the appraisal district staff. Their clients might ask for recommendations regarding legal representation, real and/or business personal property appraisers or other expert witnesses. Typically, the consultant will have a thorough understanding of the litigation process and ideally have experience dealing with the district's litigation staff. The agent should have extensive experience in methodology used for different types of properties. Additionally, possessing knowledge from prior settlements and the type of support documentation by the district is essential. The **heavily involved consultant** will also have strong working relationships with real estate appraisers (MAI's), business personal property appraisers (ASA's), and attorneys specializing in property tax litigation. The consultant generally has a very good understanding of the methodology and the typical range of values for the various classes of properties assessed by the appraisal district. Having settled values through the Appraisal Review Board process, the consultant has knowledge of a fair market value and a fair and equitable value based on other settlements for the tax year in question. This knowledge is very useful to the team during the settlement process.

Professional relationships with the district's staff can be a tangible asset in pursuing a settlement. As Otto Von Bismarck once said: **"Politics is the art of the possible."** This is also true of the goal of most property tax litigation. The goal is to obtain fair and equitable treatment through professional negotiations. Compromise of issues that are negotiable should always be pursued through good faith negotiations. When either the litigation team and/or the district's staff in good faith can no longer pursue negotiations, the matter should proceed to a trial.

Real World Example

The following is typical of our participation in litigation:

In 2004 we advised our client that their office showroom was the highest valued office showroom built in the 1980's in the City of Irving. The lease in place on the subject supported the extremely high value, however we argued to the district that the lease was dated and did not reflect current market rental rates. The staff disagreed and the property was taken to the ARB. After reviewing our income pro-forma and our fair and equitable analysis and the evidence of staff, the ARB ruled to sustain the district's 2004 value. After the suit was filed, a settlement conference was set up to discuss the property. During the settlement conference our team discussed the fact that the single tenant lease entered into in the late 1990's was not indicative of current market rental rates. Additionally, a fair and equitable study² clearly showed that the subject was not being treated fairly in comparison to comparable properties as brought out earlier informally. The result of this two-prong approach was a valuation reduction of approximately 31%. It should be noted that the 2004 value was carried over to 2005, therefore creating a two-year benefit to the client.

Conclusion

The consultant's role is to present suggestions to their clients if the target value is not achieved during the administrative remedy. If litigation is pursued the consultant can become an important member of the litigation team. Interacting with other team members, the consultant should pursue a fair and equitable settlement for the property owner, and always keep his fiduciary relationship with his client.

² *Harris County (TX) Appraisal District (HCAD) v. United Investors Realty Trust. The value followed the guidelines set forth in Article VIII, Section 1 of the Texas Constitution of the Texas Tax Code (Section 42.26 a3, Vernon Supp. 2000)*