Valuation for Litigation
Common Problems, Traps, Best Practices & Business Issues
Appraisal Institute Annual Conference
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Presented by
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What We Will Cover Today

I. General Problems and Deficiencies
II. Common USPAP Issues
III. Legal Case Management for the Litigation Appraiser
IV. Issues with Methods and Techniques
Caveats

- These are my personal observations only (and opinions)
- Most focus is on condemnation litigation
- No attempt to investigate laws in every state -- you’re mileage may vary
- No legal advice is given
- I am not a USPAP expert.
- Case law cited is only what I could find -- may not be comprehensive
- Content is geared to the appraiser, not the lawyer
- Checklists
General Observations About Condemnation Appraisals

Common Deficiencies -- Condemnor Appraisers

Common Deficiencies -- Condemnee Appraisers
Big differences in value conclusions between the two sides doesn’t necessarily mean someone is wrong.

*(except that’s often the case)*
See no evil, hear no evil, speak no evil!

Some properties really ARE damaged!
Condemnor Appraisers
Common Observations (continued)

• General lack of understanding of USPAP
• Abuse of USPAP SR 1-2(e) – Comments:
  “An appraiser is not required to value the whole when the subject of the appraisal is a fractional interest, a physical segment, or a partial holding.”

• No market analysis, no supply and demand, no market trends
  USPAP requires (if market value): “Identify and analyze the effect on use and value of ........ supply and demand.....and market area trends” [USPAP SR 1-3(a)]
Improper assumptions:

“All mortgages, liens, encumbrances, encroachments, leases, and servitudes have been disregarded unless so specified with the report.” -- anonymous, actual report *

But, USPAP Standards Rule 1-2(e)(iv) reads:

“In developing a real property appraisal, an appraiser must...identify the characteristics of the property that are relevant to the type and definition of value and intended use of the appraisal, including.....any known easements, restrictions, encumbrances, leases, reservations, covenants, contracts, declarations, special assessments, ordinances, or other items of a similar nature....”

Improper and unidentified extraordinary assumptions and hypothetical conditions.
Condemnor Appraisers
Common Observations (continued)

- Poorly reasoned highest and best use analysis
- Insufficient research to discover facts that could influence the value opinion
- Confusing reduced reporting detail with reduced development -- compliance with Standard 1 is still required, regardless of how it is reported
Condemnor Appraisers
Common Observations (continued)

• Lack of support for adjustments and other interim conclusions
• Failure to understand the Scope of Work Rule -- the *KEY* to getting it right
• Failing to understand what is relevant (germane) to the appraisalal problem and what is not
• **ADVOCACY**
Landowner Appraisers
Common Observations -- Most of the same as Condemnor

• All of the same problems found in condemnor appraisals discussed above, plus:
  • Junk Science -- like damage estimates with no evidence at all
  • ADVOCACY
MAJOR USPAP ISSUES IN LITIGATION ASSIGNMENTS
Major USPAP Issues

<table>
<thead>
<tr>
<th>Standards Education &amp; Compliance</th>
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<tbody>
<tr>
<td>Shocking Level of Misunderstanding &amp; Confusion</td>
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<tr>
<td>Shocking Level of Non-Compliance</td>
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<tr>
<td>A True Profession Adheres 100% to its Standards</td>
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## Major USPAP Issues

### Table

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<th>Ethics Rule</th>
<th>Record Keeping</th>
<th>Competency Rule</th>
<th>Scope of Work</th>
<th>Jurisdictional Exception</th>
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### Chart

- SOW is an “umbrella rule” -- superior to Standards 1 – 10
- SOW governs nearly everything in the appraisal
- 63 FAQs!
Major USPAP Issues
How do Condemnation Law and USPAP Scope of Work Interact?

From USPAP, Scope of Work Rule, Lines 374-377:

“Assignment conditions include assumptions, extraordinary assumptions, hypothetical conditions, laws and regulations, jurisdictional exceptions, and other conditions that affect the scope of work. Laws include constitutions, legislative and court-made law, administrative rules, and ordinances.”

• Linked to Competency Rule: “Competency requires…. Recognition of, and compliance with, laws and regulations that apply...to the assignment” [USPAP Line 307]
• This language governs how development is executed (Standard 1)
• An example of confusion: Standard Rule 1-4(f)

Standards Rule 1-4(f):
“When analyzing anticipated public or private improvements, located on or off the site, an appraiser must analyze the effect on value, if any, of such anticipated improvements to the extent they are reflected in market actions.”
In condemnation assignments, how do you reconcile the “Project Influence Rule” and USPAP SR 1-4(f)?

**Project Influence Rule**: Must ignore any positive or negative change in the market value of property as a result of the same public project for which all or a part of the property is being taken.

**USPAP SR 1-4(f)**: Must analyze anticipated public improvements and their effect on value.
Major USPAP Issues
Condemnation Law and Scope of Work (continued)

The answer is found in the discussion of “Assignment Conditions” in the Scope of Work Rule. [Line 367, 374-377]

Appraisers are required to identify assignment conditions in the SOW and assignment conditions includes identification of the laws and regulations that are applicable to the assignment. [Line 374-375]

So, if the laws and regulations require you to ignore project influence, that takes precedence. Remember, SOW is superior to the Standards Rules.
Definition of the word “When”

• No, not the *Webster’s* definition, which defines “when” mostly in terms of time.

• Standard 1 has 24 “must do” requirements.

• The word “When” appears in Standard 1 twelve (12) times at the beginning of a sentence.

• In *USPAP*, the word “When” really means “IF”. The word “If” also appears in several sections.
Confusion - “When” in USPAP

• An expanded meaning: “When” means “If necessary for credible assignment results under the Scope of Work”

• Many appraisers still believe that everything in Standard 1 is mandatory -- it is not.

• In Standard 1 there are nineteen (19) requirements (see checklist) that are contingent on SOW.

• What is the first word that appears in SR 1-4(f)?

Confused Appraiser

Still don’t believe me? See FAQ #112
Jurisdictional Exception Rule

Actual Excerpts

Identity Withheld to Protect the Guilty

“No hypothetical conditions were considered, other than what may be considered a hypothetical condition under the Jurisdictional Exception Rule”

“For purposes of this assignment....we have disregarded any project influence..... This is a deviation from all or parts of USPAP requirements including Standards 1-1(a), 1-1(b), 1-2(e)(i)(iv), 1-3(a), 1-4(d), 1-4(f).

“This appraisal assignment has been undertaken in order to analyze the subject property before and after a taking for a permanent pipeline easement. The appraisers have been directed to not consider any effect or influence from the project in the analysis and conclusion of the highest and best use of the subject property – or in the valuation of the subject property – before the taking. This is an exception to Standard Rule 1 of USPAP and is allowed under the Jurisdictional Exception Provision.”
Exceptional Jurisdictional Confusion

Scope of Work Rule

Follow laws & regs | SOW precedence over Std. 1

SR 1-4(f) – Value of Public Improvements

“When” means IF | Contingent on SOW

No deviation from USPAP requirements

NO Juris Exception | Appraiser CAN comply
A jurisdictional exception to the Jurisdictional Exception Rule

Uniform Appraisal Standards for Federal Land Acquisitions:

“...these Standards provide that the appraiser disregard any changes in a property’s neighborhood brought about by the government’s project.....these instructions are contrary to .... USPAP Standards Rule 1-4(f), which requires appraisers to analyze the effect on value of anticipated public improvements located on or off site. Therefore, the instructions to appraisers in these Standards in this regard are considered jurisdictional exceptions.”

• This is incorrect
• Further confuses the public and appraisers
• Is this a jurisdictional exception to the Jurisdictional Exception Rule?
“Credible”
The Holy Grail of USPAP Compliance
The Holy Grail of Expert Testimony

• The concept of “credible” or “worthy of belief”, is a recurring theme throughout USPAP, but principally in the Scope of Work Rule and in the various development standards.

• Credible reports and testimony increase the chance of litigation success. Reports and testimony that lack credibility increase the chance of spectacular failure.
The most fundamentally important statement in USPAP about credibility is:

“The credibility of assignment results is always measured in the context of the intended use. Credible assignment results require support by relevant evidence and logic.” [SOW Rule, Lines 353-354]
“Credible”
continued

Other statements in USPAP on credible results:

• SOW, line 343: “The appraiser must be prepared to demonstrate that the scope of work is sufficient to produce credible assignment results.”

• SOW, line 379: “...scope of work must include the research and analyses that are necessary to develop credible assignment results.”

• SOW, line 388: “assignment conditions can’t limit scope of work so that results aren’t credible in context of intended use.”

• SR-1, line 421: “identify problem, determine SOW to solve problem, correctly complete research & analysis necessary to produce a credible appraisal.”

• SR-1, line 424: “Standard 1 is directed toward the substantive aspects of developing a credible appraisal.”

USPAP passages truncated or paraphrased.
What does it take to get to credible assignment results?

- Intended Use
  - Focus on what is germane to the problem
- Intended User
  - Support by relevant evidence & logic
  - Correct research & analysis
  - A correct SOW
Assignment Conditions in Litigation Appraisals

- Lawyer “invokes” a jurisdictional exception
- Laws and regulations applicable
- General assumptions
- Extraordinary Assumptions
- Hypothetical Conditions
- Case law
CASE MANAGEMENT IN LITIGATION APPRAISALS
Lawyer Instructions Versus Appraiser Responsibilities

- Lawyer instructions to minimize details and other analysis (usually landowner attorneys)
- Can’t agree if it negatively impacts credibility of results.
- Appraiser has reporting responsibilities, depending on report option chosen. (Remember highest level of detail required is “summarize”)
- Do what is germane to solve the problem; nothing more is required
- Keep your role clean: Testifying expert – vs - consulting expert – more to come
## The Report Option Decision

### Appraisal Reporting Options for Litigation Assignments

<table>
<thead>
<tr>
<th>Reporting Option</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Appraisal Report</strong></td>
<td>- More than one user OK</td>
</tr>
<tr>
<td></td>
<td>- Client might require it</td>
</tr>
<tr>
<td><strong>Restricted Report</strong></td>
<td>- Limited to one user (the client)</td>
</tr>
<tr>
<td></td>
<td>- Content <em>could</em> be greater than minimum</td>
</tr>
<tr>
<td><strong>Oral Reports</strong></td>
<td>- Rarely used as the only option</td>
</tr>
<tr>
<td></td>
<td>- Might supplement a written report</td>
</tr>
</tbody>
</table>
The Report Option Decision continued

<table>
<thead>
<tr>
<th>Decision Points</th>
<th>“The appropriate reporting option and the level of information necessary are dependent on the intended use and the intended users.” [SR 2-2, line 595]</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>“…the decision on which report option to use is primarily related to the intended use of the appraisal.” [AO-11, line 29]</td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>What does SOW say?</th>
<th>• Scope of Work Rule does not determine reporting option, only development, except it is related</th>
</tr>
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<tbody>
<tr>
<td></td>
<td>• Must identify intended users and intended use in problem identification, which in turn affects report option decision</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>These are NOT decision points</th>
<th>• Lawyer requests, if credibility is negatively impacted</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>• All reports: 1) Can’t be misleading, 2) contain information to enable intended users to understand, and 3) disclose all assumptions</td>
</tr>
</tbody>
</table>
What does it mean “contain enough information for intended users to understand”

<table>
<thead>
<tr>
<th>What is the threshold for enough information?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Long time property owner/developer/manager</td>
</tr>
<tr>
<td>Attorney-client</td>
</tr>
<tr>
<td>Attorney on the other side</td>
</tr>
<tr>
<td>Jury with a mechanic, a nurse, or an administrative asst.</td>
</tr>
</tbody>
</table>

There are always multiple parties in a litigation case. Are they automatically all intended users? No. But they often think they are. Different parties have different uses of your report. FAQ #125
### Appraisal Reports vs Restricted Reports
#### Critical Differences for Litigation

<table>
<thead>
<tr>
<th>Appraisal Report</th>
<th>Restricted Report</th>
</tr>
</thead>
<tbody>
<tr>
<td>Identify the client &amp; intended users</td>
<td>Identify client + use restriction that limits use and understanding</td>
</tr>
<tr>
<td>Identify property + relevant physical, legal, and economic characteristics</td>
<td>Identify property. Physical, legal, and economic characteristics not required</td>
</tr>
<tr>
<td>Summarize information analyzed + reasoning &amp; rationale that supports analysis and conclusions. Amount of detail varies with significant of info to appraisal.</td>
<td>Info analyzed not required. Reasoning not required. Reference the workfile</td>
</tr>
</tbody>
</table>

How do you explain to a Judge why he’s not an intended user?

Appropriate reporting option is dependent on the intended use. Is this lack of content in a Restricted report OK for the intended use?
Cautionary Things to Consider in choosing the report option

- Intended Users – do they understand? How do you know they understand?
- Is information/detail provided sufficient for intended use?
- Watch intended use language – should be narrowly construed if providing a Restricted report
- With Restricted Reports, consider including more content/detail than the minimum
- In Restricted reports, take the workfile requirement and ability to produce an Appraisal Report seriously.
- Appraisal Reports -- “Summarize” is the highest level of detail, but you have to show Std. 1 compliance, including rationale and reasoning
- Appraisal Reports – detail and info germane to the problem, but no more -- be careful when agreeing to restrict details
Reliance on Outside Experts

Condemnation litigants often employ outside experts to assist the appraiser

- Land planners
- Architects
- Engineers
- Parking Consultants
- Cost Estimators
- Arborists
- Others

What are the appraiser’s obligations?

- There are no Certification requirements, as long as these people are not also appraisers.
- Three obligations:
  - Responsible for the decision to rely on their work.
  - Reasonable basis to believe they are competent.
  - No reason to doubt the work is credible.

See: USPAP Lines 765-768, FAQ #261, & On-line FAQ published Jan. 23, 2018
Reliance on Outside Experts
(continued)

Appraiser’s Obligations
• Responsible for the decision to rely on their work.
• Reasonable basis to believe they are competent.
• No reason to doubt the work is credible.

Outcomes
• Most litigation appraisers automatically accept work as competent and credible.
• Difficult to judge competency
• Some guidance in FAQ #261
• Uh-oh. Trier of fact finds outside expert not credible.
• *Du Pont v Hood*, Court of Appeals, Fifth District, 5-8-18
• Is an Extraordinary Assumption in order?
Subpoenas & USPAP Confidentiality Requirements

A “subpoena duces tecum”* arrives. Among other things, it requests that you produce financial records (personal or corporate) and every appraisal that you completed within a 10 mile radius of the subject property in the last 5 years.

* A subpoena duces tecum means you must appear at a legal proceeding and must bring named documents (evidence) with you.

Never ignore this.
Understand that your attorney-client is not your attorney.
Subpoenas & USPAP Confidentiality (continued)

- Subpoena arrives requesting appraisals
- But appraisals are subject to USPAP confidentiality
- Conflict?? How to resolve?

Is there a conflict between the subpoena and USPAP requirements? Which has precedence? What happens when USPAP compliance has been incorporated into State law?
Subpoenas & USPAP Confidentiality (continued)

- USPAP’s Confidentiality provision says appraisers may not disclose assignment results, except to:
  - The client
  - Parties authorized by the client
  - State regulatory agencies
  - Third parties authorized by *due process of law*, or
  - Professional peer review committee
Subpoenas & USPAP Confidentiality (continued)

Is a Subpoena Duces Tecum considered a “due process of law”? Does it overrule the USPAP confidentiality provisions?

What does USPAP say?

See FAQ #63: “USPAP does not identify what constitutes due process of law.”

What do the courts say?
So, is a subpoena a due process of law?

The short answer is: Yes

**U.S. v 2,091.712 Acres of Land:** Appraisers have no evidentiary privilege

**FDIC v Broom:** Appraiser was not an expert witness, but a defendant in the case. Court ruled appraisals must be produced
Subpoenas & USPAP Confidentiality (continued)

All is not lost......

• Your attorney-client may object and will negotiate, but this is based on his/her interests, not necessarily yours.

• If the documents contain trade secrets or other sensitive information, it might open up a door with the Court. You need your own attorney for this.

• What if the documents are irrelevant to the lawsuit? You need your own attorney.

• You can be reimbursed for reasonable costs incurred.

• As a best practice, do you have a responsibility to notify your clients about the requested reports? They may file objections.....
Consulting vs Testifying Expert
A Common Practice -- How to Stay Safe

Valuation Services (AO-21)

| Appraisal Practice | Other Valuation | Not an Appraiser |

Examples

| Appraisal / Expert Witness | Consulting (as an appraiser) | Consulting (advocacy) |

Consulting Expert or Testifying Expert

| Testifying Expert | Testifying Expert | Consulting Expert |

Can you switch roles within the same litigation case?
 ISSUES IN “RECOGNIZED METHODS AND TECHNIQUES”
Recognized Methods & Techniques

Standard Rule 1-2(a): “be aware of, understand, and correctly employ those recognized methods and techniques that are necessary to produce a credible appraisal” (also related to Competency requirements)

- Recognized methods and techniques: no one source
- **Appraisal Institute** is the largest publisher of valuation texts in the world, including TARE, 14th, Dictionary, etc.
- Some are suggesting the disclaimer in AI publications means they can’t be used as recognized methods & techniques
- This is incorrect.

AI BOD Motion, passed early 2018: (paraphrased)

“The current Appraisal Institute Body of Knowledge shall be composed of:

- Currently available textbooks, monographs and Guide Notes, excluding articles
- Current national courses & seminars

*The current AI BOK is an authoritative source of recognized methods and techniques for valuation practitioners.*"
Qualitative vs Quantitative Analysis in the Sales Comparison Approach

- Qualitative Analysis: Adjustments are “Superior”, “Similar”, or “Inferior” -- no numerical adjustments
- Requires significant, detailed, descriptive narrative to be persuasive
- As a stand alone technique, usually not credible, particularly when the range of sales prices is wide
- Magnitude of adjustments?
- Most persuasive: a combination of numeric adjustments and qualitative judgments when extraction of numerical adjustments is not possible.
Damage Estimates & Junk Science

- Lack of support for damage estimates
- “Trust-me” estimates
- Flawed paired sales analysis
  - Not enough data
  - Watch interim adjustments
  - Pairing sales with different HBU
  - Sales to government entities
- Over reliance on broker interviews
- Case studies
- Yes, it’s hard.
Larger Parcel Issues

• Significant presence in Eminent Domain law
• Can be quite complicated
• Linked to Highest & Best Use
• Correctly defining allows appraiser to confine analysis to all or parts that are affected by condemnation
• Flawed larger parcel analysis may result in a mis-leading report
• 3 conditions:
  • Unity of Use
  • Unity of Title
  • Contiguity
Other Problem Areas

• Non-existent Market analysis
• Flawed, or inadequate highest & best use analysis -- lack of mental energy
• Consistency in applying adjustments
• Boilerplate with lack of substance
• Marshall depreciation tables
• Oops! Mistakes...
Thank you!

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