Report Guidance in a Litigation Environment

Understanding the various compliance issues and USPAP’s jurisdictional exception rule.

By American Society of Appraisers (ASA) Ethics Committee

The Ethics Committee is looking to help our members stay out of trouble. Many of our members perform appraisal services in a litigation environment. As such, they are frequently asked to issue a report that is appropriate for the venue of the litigation. For example, in Federal Court, reports must comply with Rule 26 of the Federal Rules of Civil Procedure in order for an expert’s testimony to be admissible. The U.S. Tax Court has a similar rule in that regard.

The issue that we are faced with is that many of our members are performing litigation services where the attorney (whether he/she is the actual client of the appraiser or merely represents that appraiser’s ultimate client) requests less than what we consider to be an Appraisal Report under the Uniform Standards of Professional Appraisal Practice (USPAP). While our committee believes that most of our membership would like to comply with professional standards, the issue becomes one of being able to continue to make a living while doing so.

USPAP provides for either an Appraisal Report (Self-Contained or Summary) or a Restricted Use Appraisal Report. There is no exception other than possibly under the Jurisdictional Exception Rule, but this rule states in the comments “Instructions from a client or attorney do not establish a jurisdictional exception.”

So here is the problem, ASA received an ethics complaint against one of our members that issued a report for a litigation that was less than a full Appraisal Report (in business valuation, it is either an Appraisal Report or a Restricted Use Appraisal Report based on standard 10). He was hired by the attorney and issued the report to the attorney. In theory, this could have been a Restricted Use Appraisal Report. However, the attorney turned the report over to the other side of the litigation as the expert report. The ethics complaint alleged that our member did not comply with USPAP.

While we understand that as a founding member of The Appraisal Foundation that all of our members are subject to follow USPAP, other organizations allow its members to have a reporting exception for litigation since their work is subject to cross examination. This is the case with the American Institute of Certified Public Accountants (AICPA), the National Association of Certified Valuation Analysts (NACVA), and the Institute of Business Appraisers (IBA). While these organizations only address business appraisers, it is a representation of the problems that our members have trying to compete in a world of other organizations. In Interpretation No. 1-01, “Scope of Applicable Services” of Statement on Standards for Valuation Services No. 1, Valuation of a Business, Business Ownership Interest, Security, or Intangible Asset Background, issued by the AICPA, the following is included:

12. Illustration 4. Does the Statement include any exceptions relating to litigation or controversy proceedings?

13. Conclusion. Yes, the Statement includes a reporting exemption for certain controversy proceedings (SSVS paragraph 50); however, there is no litigation or controversy proceeding exemption from the developmental provisions of the Statement (SSVS paragraphs 21–46) in circumstances in which an engagement to estimate value is performed (Illustration 1).

In essence, this other organization’s standards allow an appraiser to only depart from the reporting portion of the standards but not from the developmental standards. Many of ASA’s business valuation members are also subject to this other organization’s standards since they are CPAs.

So what is an appraiser to do? First, the report should have been labeled a "Restricted
Use Appraisal Report" with content that should have met the criteria set forth in ASA's *Principles of Appraisal Practice and Code of Ethics* as well as USPAP Standard 10.

Presuming the content of the report met the criteria in ASA's *Principles of Appraisal Practice and Code of Ethics* but did not meet the Appraisal Report criteria in USPAP Standards Rule 10-2(a), the action by the attorney might have been precluded if the report had been properly labeled as a Restricted Use Appraisal Report with content as required in USPAP Standards Rule 10-2(b).

If the Court had specific criteria with regard to the content of an appraisal report and the report in question met the Court’s criteria, the issue of appraisal report compliance does not involve USPAP report content requirements, but rather it involves the Court's requirements because the USPAP JURISDICTIONAL EXCEPTION RULE would have applied.

If the content of the report was specified by the attorney (and not by the Court), the USPAP JURISDICTIONAL EXCEPTION RULE would not have applied since USPAP states that "Instructions from a client or attorney do not establish a jurisdictional exception."

It is also important to reiterate certain sections of the ASA *Principles of Appraisal Practice and Code of Ethics* that are material to this scenario.

**Sub-Section 2.2 Objective Character of the Results of Appraisal Undertaking** states in part [the] "numerical result is objective and unrelated to the desires, wishes or needs of the client who engages the appraiser to perform the work." It further states "All the principles of appraisal ethics stem from this central fact".

**Sub-Section 4.3 Appraisers Obligation Relative to Giving Testimony** states in part "... it is unethical for the appraiser to suppress any facts, data, or opinions which are adverse to the case his client is trying to establish ... It is the appraiser's obligation to present the data, analysis, and value without bias, regardless of the effect of such Sub-Section 4.4 Appraisers Obligation to document Appraisal Testimony states in part" "... the appraiser shall, before testifying, complete an adequate written appraisal report, or have complete documentation and substantiation available in his files".

**Sub-Section 6.2 Selection of Appraisal Method** states the requirement that" ... all factors that have a bearing on the value be presented in a clear and logical manner." (See also Section 8.4 Description and Explanation in the. Appraisal Report of the Appraisal Method Used, which states "It is required that the method selected by the appraiser as applicable to the subject appraisal undertaking be described and explained in the appraisal report.")

**Section 7 Unethical and Unprofessional Appraisal Practices** declares that advocacy is unethical and unprofessional. Sub-Section 7.3 Advocacy, states (in part)" ... Advocacy, as here described, affects adversely the establishment and maintenance of trust and confidence in the results of professional appraisal practice and the Society declares that it is unethical and unprofessional."

**Sub-Section 8.6 Appraisers Responsibility to Communicate Each Analysis, Opinion and Conclusion in a Manner that is not Misleading** states the appraiser should state in each report "I hereby certify that, to the best of my knowledge and belief, the statements of fact contained in this report are true and correct, and this report has been prepared in conformity with the Uniform Standards of Professional Practice of The Appraisal Foundation and the Principles of Appraisal Practice and Code of Ethics of the American Society of Appraisers."

In addition to ensuring compliance with the ASA *Principles of Appraisal Practice and Code of Ethics* all members of ASA are obligated to follow USPAP. This obligation currently arises because ASA has agreed, as an Appraisal Sponsor of The Appraisal Foundation, to require such compliance.

Perhaps most importantly in this particular set of circumstances, some valuers and clients as well as third parties in possession of an appraisal report do not understand that the mere fact that someone receives a copy of a report does not make them an "Intended User" of the report under USPAP. As set forth in 2012-
2013 USPAP Statement 9 at page U-96, Lines 2984-2986, "Parties who receive a copy of an appraisal, appraisal review, or appraisal consulting report as a consequence of disclosure requirements applicable to an appraiser's client do not become intended users of the report unless they were specifically identified by the appraiser at the time of the assignment."

The Appraisal Standards Board (ASB)'s responses to USPAP Frequently Asked Questions (FAQs), which are published with USPAP, provide guidance in this matter. See FAQ #122 on page F-56, which directly addresses this point as it applies in litigation (see Question #2 of the FAQ and the entire "Response" through the middle of page F-57).

Also, the requirements in the USPAP Reporting Standards (currently Standards 2, 3, 5, 8, and 10) each contain the same basic obligation as is stated in the title to ASA Principles of Appraisal Practice and Code of Ethics' Sub-Section 8.6. Specifically, in USPAP, "...an appraiser (acting as a reviewer in the case of Standard 3) must communicate each analysis, opinion, and conclusion in a manner that is not misleading." This obligation applies regardless of whether the type of report involved is an oral or a written report.

So, what is the bottom line? Make sure that you specify in your report who is the intended user(s) of your report and that your report is USPAP compliant. Remember that the designation of the intended user will alleviate the burden of the appraiser if the client or her counsel decides to provide your report to others. Also, make sure that your retainer or engagement letter specifies that your report is to be limited in its distribution to only the correct people. A restricted use appraisal report is restricted because in the hands of the wrong people, your work will not be properly understood. Make sure that you label your report properly as well.

As an ethics committee, we hope that we never hear about you!

_The Ethics Committee would like to thank the College of Fellows for their guidance on this matter._

—American Society of Appraisers (ASA) Ethics Committee is comprised of five volunteer members and two staff liaisons. The role of the committee is to provide guidance to members and help ensure compliance with the Society’s Constitution, Bylaws and Principles of Appraisal Practice and Code of Ethics by reviewing reported violations.