The Appraiser and Review of the Appraiser’s Work in Alternative Dispute Resolution Proceedings (Mediation and Arbitration)
As Retained Expert and as Neutral

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A topical discussion from the perspectives of the retained expert witness, neutral expert, arbitrator, mediator and legal counsel regarding the appraiser and review of the appraiser’s work in Alternative Dispute Resolution proceedings such as Mediation, Arbitration and International Arbitration.

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I. LEARNING OBJECTIVES

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II. THE APPRAISER IN ALTERNATIVE DISPUTE RESOLUTION PROCEEDINGS
Introduction

• Alternative dispute resolution (ADR) includes negotiation, mediation, and arbitration, presents a growing area of need for the skills of valuation professionals.

• Arbitration offers valuers multiple ways to become involved.

• Each role requires the professional to provide different types of services, perform different tasks, and comply with different standards
What Role Can an Appraiser Play?

• Arbitrator

  – the neutral who stated that she or he will decide the dispute faithfully and fairly in keeping with applicable codes of ethics and procedural rules (Appraisal Institute), in an arbitration which is a submission to one or more impartial persons for a final and binding decision (American Arbitration Association)
What Role Can an Appraiser Play? Cont.

- Mediator
  - the neutral... in a mediation, which is a method of non-binding dispute resolution involving a neutral... who tries to help the disputing parties reach a mutually agreeable solution (Black’s Law Dictionary)
What Role Can an Appraiser Play? Cont.

- Expert Witness
- Consulting Expert
- Neutral or Court-Appointed Expert
Appraiser as an Arbitrator/Mediator

- Retained on behalf of one of the parties to the dispute or by both.
- By or through one of the arbitration organizations.
- Appointed by a judge.
- Expected to be an impartial neutral who complies with the ethical and competency requirements of valuation.
Appraiser as a Party-Appointed Expert

• Experts will be asked to opine on an issues may be governed by underlying documents.
• Need to present that opinion in a report that will be exchanged with the opposition.
• Will also prepare rebuttal report.
• Will the comment on the quality and accuracy of the appraisal report submitted by the opposing expert.
• Finally, will likely testify at the hearing.
Appraiser as Non-Testifying Consultant

- Parties and attorneys can retain appraiser as a consultant.
- Consultant is not a defined term in the edition of the Appraisal Institute’s Dictionary of Real Estate Appraisal, Black’s Law Dictionary, the Standards of Valuation Practice (SVP), or in the Uniform Standards of Professional Appraisal Practice (USPAP).
- Dictionaries define a consultant as "a person who provides expert advice professionally."
- Two significant distinctions between the expert witness and the consulting expert: 1) reports and analysis not discoverable; and 2) consulting will not be called to testify.
Tribunal-Appointed Experts

• As a mediator/facilitator, to help the parties work through the issues related to the dispute.

• Might assist the parties in resolving disputes regarding disclosure matters, especially in large-document-volume cases, or in cases where difficult privilege or confidentiality issues might arise.
How to Identify What Role is the Appraiser Playing?

• It is not always easy to discern, as lawyers often use the words "appraiser" and "arbitrator" as interchangeable synonyms.

• The courts use the terms "appraiser," "arbitrator," and "referee," as well as the terms "appraiser" or "appraisement," "arbitration," and "reference." interchangeably in most instances, and they mostly refer to what are generally considered appraisers and appraisals.
What Role is the Appraiser Playing?

• One source of potential confusion can be the language of the underlying lease or other contract that is the basis of the dispute between the parties.
• Reasons:
  o The controlling lease or other contract may pre-date current usage of terms.
  o The drafters of the controlling documents were not sensitive to valuation terminology.
  o The drafters of the controlling documents were not sensitive to valuation definitions.
  o The drafters of the controlling documents were not familiar with valuation standards.
Examples of Confusing Clauses

• The following examples describe "baseball arbitration," in which the arbitrator selects the amount or opinion presented by one party or expert witness.
• This form of arbitration is frequently used, as it is often a less expensive form of arbitration.
Baseball Example 1

The Lease states:

"Minimal Annual Rent shall be determined by appraisal. Each party appoints an appraiser and a third appraiser is selected. The party-selected appraisers will exchange appraisal reports with one another and submit their reports to the third appraiser. The third appraiser will choose the most reasonable of the two appraisals. The third appraiser’s decision on which appraisal is the most reasonable will be final and binding on the parties, and will be based solely on the third appraiser’s review of the two appraisals."
Baseball Example 1, cont.

• How is "the most reasonable" appraisal to be determined?
• Is the third party an "appraiser"?
• Are they to provide an independent appraisal opinion by reviewing the other two appraisal reports and then providing their own opinion of value by agreeing with one of the two value opinions?
• Or is that third "appraiser" to provide an arbitration award by selecting a totally different amount based on the weight of the evidence presented?
The Lease states:
"Renewal FMRV (fair market rental value) is to be determined by each party selecting a real estate professional who shall each submit a memorandum to the third arbitrator. Further evidence is to be presented at the arbitration hearing in the form of oral testimony and arguments of counsel. After the close of the arbitration hearings, the third arbitrator shall choose the estimate set forth in either the landlord’s or tenant’s memorandum, whichever the third arbitrator believes most accurately reflects the FMRV and such choice shall be binding."
Baseball Example 2, cont.

- The use of the phrase "the third arbitrator" implies that all three valuation professionals are "arbitrators," although not delineated as such, while in the first example all three were referred to as "appraisers."
- This clause creates confusion about the tasks to be performed by the two professionals who are to produce a "memorandum."
- Are these professionals to provide an appraisal report and then testify about the contents of the appraisal report?
Three-Person Panel Example

- The Lease states:
  "With respect to the arbitration of dispute or appraisal of value, the party desiring such arbitration or appraisal shall appoint a disinterested person with recognized competence in the field involved as one of the arbitrators or appraisers. Three arbitrators or appraisers shall as promptly as possible determine such matter. Landlord and Tenant shall each be entitled to be represented by counsel at the arbitration or appraisal and to present evidence and argument to the arbitrators or appraisers."
Three-Person Panel Example, cont.

- Do the parties have to agree to first either an appraisal or arbitration scenario.
- Once one form is picked, do you simply discount use of other format – appraiser vs. arbitrator.
III. REVIEW OF THE APPRAISER’S WORK IN
ALTERNATIVE DISPUTE RESOLUTION PROCEEDINGS
Some Common Areas of Disagreement Regarding Inputs to Business Valuation Methods

• **WACC dispute**: Dispute over the calculation of the weighted average cost of capital (the discount factor).
• **Projection dispute**: Dispute over projected future cash flows.
• **Terminal Value dispute**: Dispute over the residual value at the end of the cash flow projection.
• **Comparables dispute**: Dispute over which companies or assets are comparable.
• **Multiplier dispute**: Dispute over which accounting variable should be used in the denominator of the multiple.
• **Market value of comparables dispute**: Dispute over the true value of the comparable companies or assets, as well as what adjustments are necessary to account for the difference between the comparable and the asset in question.

Which Ethical Rules and Standards Must Valuation Experts Follow?

• There are no performance standards that will apply to their work?
• When providing expert valuation opinions, an expert must comply with:
  o Appraisal Institute *Code of Professional Ethics* (CPE)
  o *Standards of Valuation Practice* (SVP) or *Uniform Standards of Professional Appraisal Practice* (USPAP):
Which Ethical Rules and Standards Must Valuation Experts Follow?

**SVP**
- Standard A (when value opinions are provided)
- Standard B (when rebuttal (review) opinions are provided)
- Standard C

**USPAP**
- Ethics Rule
- Competency Rule
- Record Keeping Rule
- Scope of Work Rule
- Jurisdictional Exception Rule
- Standard 1 (when value opinions are provided)
- Standard 2 (when value opinions are provided)
- Standard 3 (when rebuttal (review) opinions are provided)
- Standard 4 (when rebuttal (review) opinions are provided)

Certification Standard
Which Ethical Rules and Standards Must Valuation Experts Follow?

• When serving as an arbitrator, a valuer must:
  • If "acting as an appraiser" comply with:
    o USPAP
    o Ethics Rule
    o Competency Rule
    o Jurisdictional Exception Rule
  • If not "acting as an appraiser" (valuer), valuation standards and the CPE do not apply?
Are There any Arbitration Laws or Regulations That Would Apply to Valuers?

- Every state has adopted an arbitration law, or The Federal Arbitration Act. These laws address the requirements of arbitrators and not the requirements of those presenting testimony in an arbitration.
- The Federal and state laws are very similar, set forth the ethical duties of the arbitrators, and the requirements for disclosure of potential conflicts of interests.
- Disclosure requirements are broader than those required when a Valuer is performing appraisal or appraisal review services. The road map for Valuers providing either expert valuation opinions or arbitration decisions to typically contained in the lease or other contract stipulating that arbitration is to be used to resolve specified disputes.
Suggestions for Decreasing Arbitrator Risk

• Arbitral immunity protects arbitrators, but has its limits.
  o In general: *it protects arbitrators from being sued by parties to the arbitration or by other participants when the party doesn’t like the result or some other aspect of the arbitrator’s decision making.* (Appraisers in Arbitration, P. Konikoff, Appraisal Foundation)

• In the engagement letter for a true arbitration role, refer to the matter as an arbitration.

• Full and open disclosures regarding potential conflicts.

• Read and follow instructions and procedures provided by the parties or in the arbitration clause.
  o Stay within the scope of your jurisdiction.
  o Do not accept assignments for which the required timeframe cannot be achieved.

• Stay within the scope of your competency, or seek to obtain the required competency.

• Note: **Recognize that a mediator’s role and risks have differences in distinction from the arbitrators’ role.**
Expert Witness Liability vs. Witness Immunity in Arbitration

• Arbitral immunity only protects arbitrators.
• Many states recognize “witness immunity” or “litigation privilege,” but it also has its limits.
  o In general, in protects: expert witnesses from claims by unhappy parties in litigation... from civil lawsuits about their testimony, regardless of whether their testimony is right or wrong..... However, only: Some states do extend immunity to protect an expert witness against claims from even his or her own client. (Appraisers in Arbitration, P. Konikoff, Appraisal Foundation).
• Suggests importance of:
  o Producing quality appraisal reports.
  o Up-front disclosures.
  o Engagement agreement.
Is it a USPAP Appraisal Review?

- USPAP defines appraisal review:
  - **The act or process of developing an opinion about the quality of another appraiser’s work that was performed as part of an appraisal or appraisal review assignment;** (adjective) of or pertaining to an opinion about the quality of another appraiser’s work that was performed as part of an appraisal or appraisal review assignment.
  - Reviewers have broad flexibility and significant responsibility in determining the appropriate scope of work in an appraisal review assignment. (USPAP 2018-2019, p. 3)
  - Consistent with the reviewer’s scope of work, the reviewer is required to develop an opinion as to the completeness, accuracy, adequacy, relevance, and reasonableness of the report, given law, regulations, or intended user requirements applicable to that work. (USPAP Standard 3)

• A critical part of the reviewer’s job is essentially to step into the shoes of the intended used of that appraisal and to determine – in light of the intended use – whether or not the report meets the requirement of those intended users.

• An appraisal review that concurs or disagrees with a report’s opinion of value is, in fact, providing an opinion of value. To avoid this situation, the review might more appropriately express that the opinion of value stated in the original report is (or is not) properly stated. (Appraisal Review: What It Is, What It’s Not – And Why It Matters, J. Young, Business Valuation Review)
IV. THE SPEAKERS
Leslie A. Berkoff
PARTNER

Leslie A. Berkoff is a Partner with Moritt Hock & Hamroff LLP where she serves as Co-Chair of the firm’s Litigation and Bankruptcy Practice Group, as well as Co-Chair of the firm’s Alternative Dispute Resolution Group. Ms. Berkoff concentrates her practice in the area of bankruptcy and restructuring litigation and corporate workouts both nationally and locally. Ms. Berkoff is a contributing editor for the ABA publication Business Law Today. In addition, Ms. Berkoff serves on the Board of Editors of Pratt’s Journal of Bankruptcy Law.

Ms. Berkoff frequently serves as a mediator, and is also a trained arbitrator. She is on the Mediation Panels for the Eastern, Southern and Northern Districts of the United States Bankruptcy Courts in New York and the United States Bankruptcy Courts in Delaware and the Eastern District of Pennsylvania, as well as the Commercial Mediation Panel for Nassau County. Ms. Berkoff was recently selected by the American Arbitrators Association to serve on its National Roster of Arbitrators.


Ms. Berkoff speaks and publishes extensively and is a recognized leader in her field.
John Levitske
SENIOR MANAGING DIRECTOR

John Levitske provides business valuation, forensic accounting, and dispute resolution services in complex commercial situations. He testifies as an independent expert witness in disputes, both domestic litigation and international arbitration, regarding issues of valuation, finance, damages, or accounting. He also acts as a neutral expert determiner or neutral arbitrator and advises clients in mediations and negotiations. He is frequently consulted regarding business disputes, shareholder disputes, and M&A transaction disputes. John is a Senior Managing Director in Ankura’s litigation, arbitration, & disputes practice, based in Chicago.

He has over 30 years of experience, with nearly 25 years of Big Four public accounting and international consulting firm experience. His expert work includes jury and bench trials, mediations, and arbitrations (e.g., LCAI, ICC, SCC, AAA, JAMS, FINRA, and ad hoc).

He is co-author of the “Managing Post-Merger & Acquisition Purchase Price Disputes” chapter in the American Bar Association’s (ABA) Alternative Dispute Resolution Handbook for Business Lawyers and the “Internal Corporate Investigations” chapter in the ABA’s Guide for In-House Counsel. In addition, he is national chair of the Dispute Resolution Committee of the Business Law Section of the ABA and a past national president of the Forensic Expert Witness Association.

John has lectured on valuation, financial analysis, and forensic accounting topics to various professional groups, including the ABA, American Society of Appraisers, Association of Insolvency & Reorganization Advisors, Chicago Bar Association, and DailyDAC-Financial Poise. Also, he served as an accounting, finance, and auditing adjunct professor at both the University of Pittsburgh and Point Park University, and as a national exam question writer for both the Uniform CPA Exam and the American Institute of Certified Public Accountants’ Accredited in Business Valuation Exam.
Moritt Hock & Hamroff LLP, established in 1980, is a full-service, AV-rated commercial law firm with 21 areas of practice and 75+ attorneys. The firm is based in New York, with offices on Long Island and in New York City, and provides a wide range of legal services to businesses, corporations, and individuals worldwide.
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- Bankruptcy & reorganization
- Breach of contract
- Buy-sell agreements
- Business interruption, loss, impairment, & destruction
- Business and joint venture separation or dissolution
- Economic damages, value impact, & lost profits
- Executive departure
- Fairness opinions
- Fiduciary duty breach
- Financial reporting & financial statement misrepresentation
- Fraudulent conveyance or preference
- Intellectual property assets
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