

THE TENSION BETWEEN EXPERT WITNESSES AND COUNSEL

Paula K. Konikoff, JD, MAI, AI-GRS

Michael Rubin, Esq.
Rutan & Tucker

Moderator

Valeo Schultz, MAI
Cushman & Wakefield

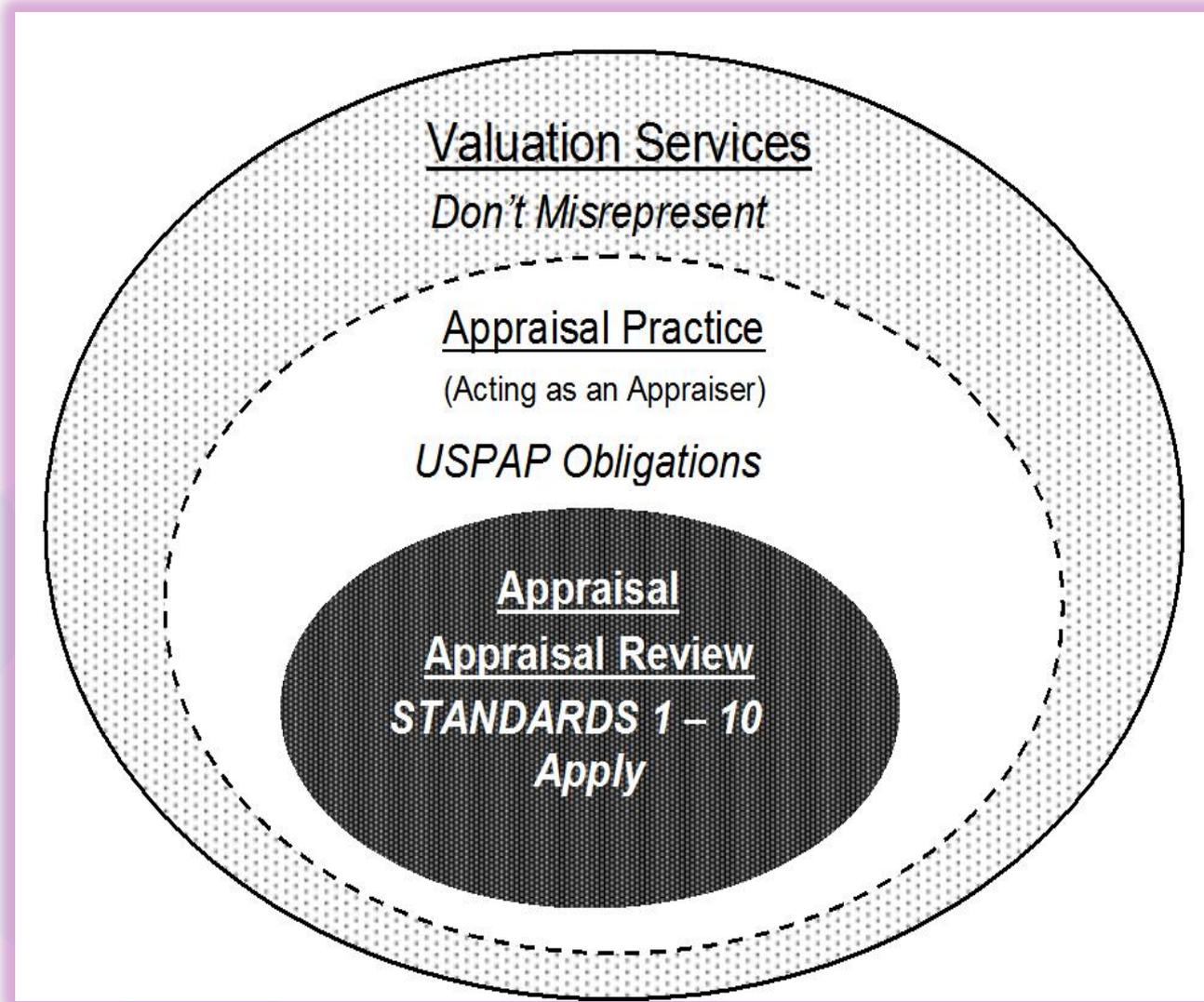
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Source of Inherent Tension

2

Attorneys are required to advocate for their clients' position

Valuers “acting as appraisers” — regardless of the task being performed (the deliverable) — are required to be independent, unbiased and NOT advocate for their clients' position.



When does USPAP apply?

4

USPAP applies when *acting as an appraiser or performing services as an appraiser*

If not, USPAP does not apply.
Appraisal practice =
services performed by appraisers

What does “acting as an appraiser” mean?

One who is expected to perform valuation services competently and in a manner that is independent, impartial and objective.

What does “acting as an appraiser” mean?

6

Competently: With expertise, related to valuation

Independent, impartial and objective:
Without bias

What are “valuation services?”

Services pertaining to aspects of property value.

Comment: Valuation services pertain to all aspects of property value and include services performed by both appraisers and others.

(USPAP, 2016-17 edition, line 132)

- Not just services provided by appraisers
- Not just valuation (appraisal)

Attorney/Appraiser Tension

ADVOCACY

- Advocacy/Appraiser
 - Advocating the Appraiser's Position
 - **Cannot** be an advocate for a litigant's position
- Advocacy/Attorney
 - Ethically **required** to advocate the client's position

Duties of an Attorney

“The duty of a lawyer both to his client and to the legal system, is to represent his client zealously *within the bounds of the law.*”

People v McKenzie (1983) 34 Cal. 3d 616, 631

California Rules of Professional Conduct

Rule 5-200 Trial Conduct

10

In presenting a matter to a tribunal, a member:

(A) Shall employ, for the purpose of maintaining the causes confided to the member ***such means only as are consistent with truth;***

(B) Shall ***not seek to mislead*** the judge, judicial officer, or jury by an artifice or false statement of fact or law;

California Rules of Professional Conduct

Rule 3-200 Prohibited Objectives of Employment

11

A member shall not seek, accept, or continue employment if the member knows or should know that the objective of such employment is:

(A) To bring an action, conduct a defense, **assert a position in litigation**, or take an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person; or

(B) **To present a claim or defense in litigation that is not warranted** under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of such existing law.

City of Los Angeles v Decker 18 Cal. 3d 860 (1977)

12

- ▶ California Supreme Court reversed judgment of the trial court on the grounds of improper conduct by the City's attorney at trial.
- ▶ Owner's appraiser valued the property based upon a highest and best use for an airport parking lot.
- ▶ City's attorney argued there was no need for such airport parking, while not disclosing City documents indicating such a need.

“A government lawyer in a civil action ... has the responsibility to seek justice and to develop a full and fair record, and he should not use his position or the economic power of the government to harass parties or to bring about unjust settlements or results.” (p. 871)

City of Los Angeles v Decker 18 Cal. 3d 860 (1977) (cont.)

“The duty of a government attorney in an eminent domain action, which has been characterized as a ‘sober inquiry into values, designed to strike a just balance between the economic interests of the public and those of the landowner ..., is of high order. ‘The condemnor acts in a quasi-judicial capacity and should be encouraged to exercise his tremendous power fairly, equitably and with a deep understanding of the theory and practice of just compensation.’” (p.871)

State Department of Transportation . v Grathol 158 Idaho 38 (2015)

- ▶ Idaho Supreme Court in a condemnation case awarded attorneys' fees against a property owner and in favor of the State, on the grounds that the property owner's appeal was frivolous.
- ▶ Remanded the case to the District Court to determine whether attorneys' fees should be assessed against the property owner for the eminent domain trial on the grounds that the owner's positions were allegedly pursued frivolously, unreasonably or without foundation.

State DOT . v Grathol
158 Idaho 38 (2015) (cont.)

- ▶ Owner's appraiser testified at trial that the larger parcel for severance damage purposes was only 30 acres of the 56+ acre overall parcel, thus justifying use of smaller parcel comparables in his market data approach.
- ▶ State argued that appraiser did so because he was allegedly pressured by the owner to come up with a higher value.

Hypothetical Example #1

16

Chris is hired to prepare an expert analysis and report. In addition, Chris is also asked to assist the attorney in finding means to contradict and attack the substance and credibility of the other side's report.

Can Chris accept this assignment?

Hypothetical Example #2

Alex drafts an expert report and meets with counsel and the client. The attorney has thoughts about what he perceives to be inconsistent adjustments made to various comparable sales and to absence of commentary concerning the circumstances of one of the sales that the attorney thinks influenced the price.

Hypothetical Example #2 (cont.)

18

- ▶ Can Alex ethically listen to the attorney?
- ▶ Can Alex make changes to his expert report if he is persuaded that the attorney makes good points?
- ▶ Should Alex clearly document for the opposing side that his original draft had different information but he made the changes based upon a persuasive discussion with the attorney.

Hypothetical Example #3

Jan drafts an expert report. Counsel believes that some of the analysis is excessive and expresses concern about having to defend those portions of the analysis. Counsel asks Jan to err on the conservative side and present a less aggressive analysis.

Can Jan ethically make the desired adjustments and changes to the expert report?

Common Mistakes by Appraisers

20

- ▶ Doing the client a "favor" in valuing the property high or low.
 - ▶ Becoming an advocate. [See USPAP Ethics Rule on Conduct (appraiser "must not advocate the cause or interest of any party or issue")]
 - ▶ Making 2 and 2 equal 5.
- ▶ Extreme positions.
- ▶ Failure to consider possible highest & best uses other than existing use.
- ▶ Inconsistent adjustments.
- ▶ Inconsistencies with past appraisals.

Common Mistakes by Appraisers

- ▶ Not being personally familiar with the comparable sales (e.g., not inspecting them and their surroundings personally).
- ▶ Not verifying (confirming) sales information sufficiently (not probing the details of a transaction).
- ▶ Use of sales that are not "open market" transactions.
- ▶ Not being suspicious enough concerning transactions.
- ▶ Gratuitous information in appraisal.

Common Mistakes by Appraisers

- ▶ Relying upon someone else's investigation.
- ▶ Failure to personally meet with the owners of the subject property.
- ▶ Using the prohibited “developers approach” except for highest and best use analysis.
- ▶ Assuming dedication when not warranted.
- ▶ Not double checking the math.
- ▶ Not being consistent with the experts the appraiser is relying upon.
- ▶ Multiple Regression Analysis.
- ▶ Keeping drafts that are not final.

Common Mistakes by Appraisers

- ▶ Not following the definition of fair market value set forth in CCP 1263.320.
- ▶ Not excluding from fair market value the increase or decrease attributable to the matters which CCP 1263.330 requires be excluded, particularly:
 - ▶ the increase or decrease attributable to the project for which the property is being taken (except for those occurring before the property was reasonably expected to be included in the project).
 - ▶ the increase or decrease attributable to the eminent domain proceeding in which the property is taken.
 - ▶ the increase or decrease attributable to any preliminary actions of the plaintiff relating to the taking of the property.

Common Mistakes by Appraisers

- ▶ Basing the opinion in part upon any of the matters for which EC 822 prohibits basing the opinion, these include but are not limited to:
 - ▶ the price of an acquisition of property if the acquisition was for a public use for which the property could have been taken by eminent domain.
 - ▶ the price at which an offer or option to purchase the property being valued or any other property was made, or the price at which the property was optioned, offered, or listed for sale or lease, except as an admission by another party to the proceeding.
 - ▶ an opinion as to the value of any property or property interest other than that being valued.

Common Mistakes by Appraisers

25

▶ ***Not preparing for a deposition.***

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26

Paula K. Konikoff, JD, MAI, AI-GRS

915 Wilshire Blvd. Suite 2060

Los Angeles, CA 90017

212.308.6676

pkonikoff@psnyc.us

Michael Rubin, Esq.

Rutan & Tucker, LLP

611 Anton Blvd, 14th Floor

Costa Mesa, CA 92626

(714) 641-3423

mrubin@rutan.com

www.rutan.com

RUTAN

Moderator

Valeo Schultz, MAI

Cushman & Wakefield

601 S. Figueroa St., 47th Floor

Los Angeles, CA 90017

213.840.1932

valeo.Schultz@cushwake.com