

Top Five Situations That Will Get an Appraiser Sued and How to Avoid Them (Staying Out of the Courtroom Unless You're Being Paid to Be There)

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Appraisal Institute**

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Introductions

Bradley E. Lofgren, MAI, Principal – Peregrine Realty Partners

- Founded firm in 2009
- Acquired over \$500 million in commercial office and industrial properties on the West Coast
- Provides asset-level real property valuations to financial institutions and real estate owners/operators for both single properties and portfolios

Peter Christensen, Attorney – Christensen Law Firm

- Legal work focused on matters concerning valuation
- For 14 years, oversaw legal matters for the Appraisal Institute's endorsed E&O provider LIA Administrators & Insurance Services
- Resources for appraisers on his website www.valuationlegal.com include: recent cases of note concerning appraisers, sample limiting conditions, and sample service agreements.

Where are we going?

- Have a conversation about five common situations that may get an appraiser sued or make clients and others so mad that they at least are thinking about suing you.
- Some situations tied to expert/dispute work, some not.
- And, how to avoid them.

Situation #1 – the Difficult, Unrealistic, Unreasonable Client.

- A situation very relevant to expert witness work (but applies to all types of assignments): the difficult, unrealistic, unreasonable client.
- This client is more likely to sue you.
- And, yes, an expert witness appraiser can be sued!
- Lambert v. Carneghi (little known fact – Mr. Lambert who sued the two appraisers in the case was himself an appraiser).
- Litigation privilege?



Situation #1 – the Difficult, Unrealistic, Unreasonable Client

Prevention:

- ✓ Spotting the client who is likely to sue you – follow your survival instinct. “I knew that if I were ever sued, this would be the one ...”
- ✓ Is the client replacing another expert? Has the client fired attorneys?
- ✓ Do you have good engagement agreement? Is it signed?
- ✓ Where can you find a good starting point for your agreements?

<https://www.appraisalinstitute.org/professional-practice/engagement-samples/>

The screenshot shows the Appraisal Institute website. The header includes the logo and tagline 'Professionals Providing Real Estate Solutions', a 'Login' button, and a navigation bar with links: AI Resources, Education, Publications, Professional Practice, News, Advocacy, and About Us. The breadcrumb trail reads: Home > Professional Practice > Professional Practice Documents > Sample Materials for Services. The page title is 'Sample Materials for Services'. The main content area states that neither the Uniform Standards of Professional Appraisal Practice nor the Appraisal Institute Code of Professional Ethics requires the use of written engagement agreements, but that using one is a sound business practice. It lists three purposes for a written agreement: to clarify terms, provide evidence of agreement, and provide a basis for dispute resolution. It also mentions that the Appraisal Institute provides sample materials for appraisers to draft their own contracts. A sidebar on the left contains links to 'Hot Topics', 'Professional Practice Documents' (including Common Appraisal Errors and Issues, Sample Materials for Services, Sample Certification Statements, Use of Designations, Emblems, and Logo, Readdressing, Reassigning, Reappraising, Privacy Issues for Appraisers, AI Reports), and 'Ethics and Standards' (PUCS).

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Sample Materials for Services

Although neither the Uniform Standards of Professional Appraisal Practice nor the Appraisal Institute Code of Professional Ethics requires the use of written engagement agreements, using a written agreement to set out the details of an assignment is a sound business practice.

A written agreement:

- serves to clarify terms of the assignment;
- provides written evidence of both the client and appraiser's agreement to the terms;
- provides the basis for the resolution of disputes arising from the providing of services; and
- encourages the parties to address issues that might not otherwise be addressed.

The Appraisal Institute is pleased to provide the following sample materials as resources for appraisers drafting their own engagement contracts in the non-litigation and litigation contexts. As drafted, the sample materials address non-litigation and litigation appraisal assignments, but they can easily be edited to accommodate review or other types of assignments. The sample materials are designed to be edited or modified as needed.

Professional Practice

Hot Topics

Professional Practice Documents

- Common Appraisal Errors and Issues
- Sample Materials for Services
- Sample Certification Statements
- Use of Designations, Emblems, and Logo
- Readdressing, Reassigning, Reappraising
- Privacy Issues for Appraisers
- AI Reports

Ethics and Standards

PUCS

Sample Non-Litigation Materials

[Explanatory Material and Instructions for Non-Litigation Services](#)

[Sample Cover Letter \(PDF version\)](#)

[Sample Cover Letter \(Word version\)](#)

[Sample Appraisal Services Agreement \(PDF version\)](#)

[Sample Appraisal Services Agreement \(Word version\)](#)

[Sample Engagement Letter \(PDF version\)](#)

[Sample Engagement Letter \(Word version\)](#)

[Sample Terms and Conditions \(PDF version\)](#)

[Sample Terms and Conditions \(Word version\)](#)

Sample Litigation Materials

[Explanatory Material and Instructions for Litigation Services](#)

[Sample Engagement Letter - Litigation \(PDF version\)](#)

[Sample Engagement Letter - Litigation \(Word version\)](#)

Situation #1 – the Difficult, Unrealistic, Unreasonable Client

An example key provision in the Appraisal Institute's engagement letter for litigation assignments:

Right to withdraw

Right to Withhold Services and/or Withdraw. Without liability on my/our part and without regard to the stage of litigation, I/we shall have the right to withhold providing services (including delivering any report or providing testimony) or withdraw completely, at my/our sole option, if any of my/our invoices are not timely paid or if I/we determine that an irreconcilable conflict has arisen.

Situation #1 – the Difficult, Unrealistic, Unreasonable Client

What about a limitation of liability in engagement agreements?

[Consider Inclusion of the following Provision]

Hold Harmless and Limitation of Liability. To assure that my/our services in this matter can be rendered freely and independently, your client agrees to indemnify, defend and hold harmless my/our firm, its owners, appraisers and employees from and against any and all liabilities, losses, costs and expenses relating to my/our consulting or testimonial services under this engagement. The foregoing shall not apply to any matter resulting from my/our gross negligence or willful misconduct. In any case, however, the total collective liability of my/our firm, its owners, appraisers and employees for all claims of any kind arising out of, relating to or connected with this engagement shall be limited to the total fees paid to me/us under this engagement.

Sample limitation of liability for non-litigation agreements:

<https://www.valuationlegal.com/appraiser-engagement-agreements/>

a. Limitations of Liability. To the fullest extent permitted by applicable law, the maximum monetary liability of Appraiser, Firm or Client to one another or to any third party (regardless of whether such party's claimed use or reliance on the appraisal was authorized by Appraiser) for any and all claims or causes of action relating to the appraisal or Appraisal Services Agreement shall be limited to the total compensation actually received by Appraiser for the appraisal or other services that are the subject of the claim(s) or cause(s) of action.

This limitation of liability extends to all types of claims and causes of action, whether in contract or tort, but excludes: (i) claims/causes of action for intentionally fraudulent or criminal conduct, intentionally caused injury, or unauthorized use or publication of the appraisal or Appraiser's work product or (ii) claims/causes of action by Appraiser or Firm for the collection of unpaid compensation for the appraisal or other services (for which the maximum recovery shall be the total amount unpaid and owing to Appraiser, plus applicable interest and late charges).

Situation #2 – You Haven't Been Paid in Six Months

The unpaid receivable:

- Another situation highly applicable to litigation work (but also applicable to other assignments).
- A very common direct path for an appraiser expert witness to be sued stems from attempting to collect large unpaid fees at the end of a matter that did not end as well as the client had hoped.
- The client contends it's not paying because your work was "subpar/negligent." (And, counterclaims if you sue to collect.)



Situation #2 – You Haven't Been Paid in Six Months

Prevention:

- Managing receivables. Making sure you're being paid – especially up to the time of trial.
- Another reason to use a good, signed engagement agreement.

Retainer. *[See Instructions for alternative wording.]* It is my/our policy to collect a retainer and receive the fully executed engagement letter before I/we begin providing services. The retainer for this matter shall be \$_____. This retainer will be applied to my/our final invoice for time and expenses, with any unused amount refunded to the party who paid the retainer unless that party directs, in writing, that the refund be paid to a different party.

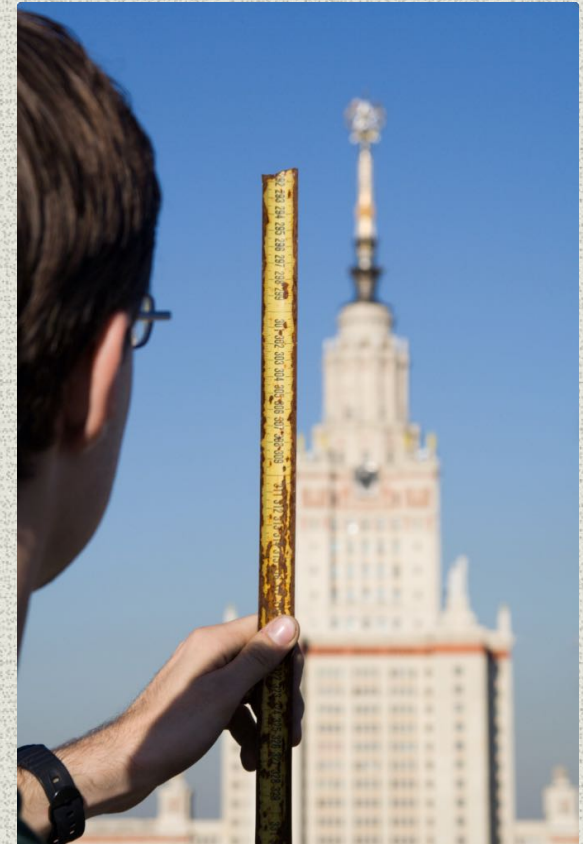
Responsibility for Payment. *[See Instructions for alternative wording.]* I/we understand you are retaining my/our services in connection with the representation of your client. While we will be issuing our invoices directly to you for delivery to your client, your client shall be responsible for payment in accordance with the terms stated in this letter and has acknowledged that responsibility by signing below. However, in the event that your client fails to pay for our fees and expenses on a timely basis, your firm agrees to pay the balance owed.

Situation #3 – What's the Single-Most Common Actual Error Leading to Negligence Claims Against Appraisers?

The appraiser misstated the square footage of the subject property's structure (house, building, warehouse, whatever it may be).

Prevention:

- Now that you know this error is so common, the prevention is a bit obvious: more attention to this item.
- Explain special issues regarding measurement or disagreements, and identify sources.
- Mistakes will be made nevertheless and the claims mostly come from borrowers/purchasers – so what's also critical here = precise and narrow intended use and user language in every report, every time.
- When appraisers do a good job on intended use and user, there is very helpful case law for both commercial and residential appraisers in California.



Situation #4 – Cutting Corners

Unfortunately, appraisers – even some of those recognized as the best – have been alleged to cut corners, whether accidentally or knowingly.

- Not completing the stated scope of work.
- Lack of full inspections.
- Incomplete analysis.
- In a recent case, for example, the allegation is that the appraisers did not look in the basement, but instead relied on a prior inspection and used a prior photo. It turns out the basement had flooded in the interim.
- Have appraisers been rushing their work or becoming complacent in recent booming work years?
- It's appraisals at or near the peak of markets that often wind up in claims years later.



Situation #4 – Cutting Corners



Prevention:

- 5 minutes can save 2-3 years of litigation.
- Even if claims seem rare, appraisals can have consequences for appraisal firms and their owners.
- Important to create “ownership” for appraisal quality among staff appraisers.
- Peter’s observations: in large firms, there can be a disconnect between the appraisers producing the work and the ramifications stemming from legal claims and larger firms have experienced dramatically more severe legal claims than smaller shops in recent years.

Situation #5 – The Pandemic?

Are appraisers being sued for alleged errors tied to valuation effects stemming from the pandemic, whether negative or positive?

- No, but lawsuits about valuations do appear to be increasing slightly in number by both lenders and borrowers – due to financial conditions.
- Do appraisers need a giant COVID-19 disclaimer in their reports?

Prevention:

- You may want to consider some brief COVID-19 wording. Example:
This appraisal was performed during a period of economic uncertainty stemming from COVID-19. The analyses and value opinion in this appraisal are based on the data available to the appraiser at the time of the assignment and apply only as of the effective date indicated. No analyses or opinions contained in this appraisal should be construed as predictions of future market conditions or value.
- Be sure to explain any changes in your scope of work/inspection due to COVID-19 and to be specific about relying on information supplied by third parties.
- What's most important? (1) Staying on top of and reporting changing markets, of course. (2) Precise, narrow intended use and user language in every report, every time.

