

Liability Considerations for Appraisers Working as Expert Witnesses

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Northstar Chapter
Appraisal Institute**

Peter Christensen, General Counsel
LIA Administrators & Insurance Services

www.liability.com
Santa Barbara, CA
800-334-0652
peter@liability.com

An Unhappy Property Owner in a Condemnation Case Sues the Expert Witness Appraiser on the Other Side of the Case

- An experienced appraiser and his firm were hired by the state to value a largely undeveloped parcel for highway condemnation purposes.
- He appraised the property at approximately \$1,000,000.
- Property owner declined a pre-litigation offer based on that appraisal.
- The state then commenced an eminent domain proceeding.
- At trial, the state's appraiser testified to the same \$1m valuation, while the property owner's expert appraiser testified to a \$7m value.

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Facts of the Case (Cont'd)

- The jury split the difference and awarded approximately \$4m to the property owner.
 - The property owner was not satisfied with that outcome.
 - The owner then sued the state's expert appraiser, contending that his valuation was erroneously low and alleging various claims of negligence.
 - The owner alleged that the condemnation award at trial would have been higher but for the allegedly erroneous low value and demanded damages from the state's expert and his firm for the difference.
- ***Will the property owner succeed? We'll see soon.***

Where Are We Going?

- We'll start with a quick overview of appraiser liability legal concepts – what's negligence?
- Then, we'll move into special issues that relate to some areas of litigation work.
- We'll cover:
 - Can the other side sue you?
 - What about your own client?
 - Most common expert witness claim issues.
- I want to be clear – appraiser liability is not out of control. The risk is manageable.

Appraiser Liability Claims

What Is a Professional Negligence Claim?

The key legal elements of a negligence claim:

- Duty owed by the defendant *to the plaintiff* to conform his or her conduct to a standard of care.
- Breach of that duty – *e.g.*, providing an inflated valuation or failing to produce a USPAP-compliant appraisal or, in the case of an expert, perhaps failing to produce admissible work product.
- Reliance by the plaintiff on the appraiser's work.
- Actual damages to the plaintiff.

Who Can Sue an Appraiser for Negligence? In Other Words, to Whom Does an Appraiser Owe a Legal Duty?

The client, of course.

What about third parties? In most states, a professional like an appraiser may owe a legal duty to a third party . . . If the professional knew or reasonably expected that the third party would use or rely on the information being supplied.

That's a fuzzy line.

The “Test” Points to the Most Important Liability Prevention Language in Appraisal Reports: Intended Use and User

Use precise, narrow descriptions of intended use and user.

For example, ***never*** describe intended use like this:

The intended use of this appraisal report is to provide an opinion of market value of the real property that is the subject of this report.

Or this:

Intended use: for internal decision-making.

Intended Use and User Language

If the appraisal is for a divorce, say something like this instead:

The intended use of this appraisal is to provide the client in this report with an opinion of the market value of the subject property for the client's sole use in contesting the division of assets in the client's divorce proceeding. The appraiser does not intend, know of or authorize any other use of this appraisal or content in this report. The appraisal and content of this report should not be used for any other purpose.

What About Residential Lending on the 1004?

The biggest problem liability-wise with the URAR is certification #23:

*The **borrower**, another lender at the request of the borrower, the mortgagee or its successors and assigns, mortgage insurers, government sponsored enterprises, and other secondary market participants **may rely on this appraisal report** as part of any mortgage finance transaction that involves any one or more of these parties.*

What About Residential Lending on the 1004?

Suggested clarification for your addendum:

The appraiser has not identified any purchaser, borrower or seller as an intended user of this appraisal and no such party should use or rely on this appraisal for any purpose. Such parties are advised to obtain an appraisal from an appraiser of their own choosing if they require an appraisal for their own use. This appraisal report should not serve as the basis for any property purchase decision or any appraisal contingency in a purchase agreement relating to the property.

Who Sues Appraisers Engaged as “Experts” or Who Perform Other Non-Lending Work?

- **Client(s) of the Appraiser. Examples:**
 - **Client in a divorce case disappointed with the result.**
 - **Taxpayer who hired appraiser to provide value for return.**
 - **Party to condemnation suit who hired appraiser as expert.**
 - **Parties who jointly engaged appraiser to determine purchase price or a rental rate for a lease renewal.**
- **What about Opposing Parties? Examples:**
 - **Divorcing spouse on the other side of the case.**
 - **Opposing party who lost in litigation.**

Can any unhappy party on one side of any litigation, condemnation, arbitration, etc. sue the other side's expert?

So, Can the Unhappy Party on One Side of Case Sue the Other Side's Expert?

The case in New Hampshire filed against the state's condemnation appraiser answers that question and the answer is "no."

Legal outcome of the case in New Hampshire:

- The trial court dismissed the property owner's claims against the appraiser and his firm based on "witness immunity."
- New Hampshire's Supreme Court upheld that dismissal.
- The Court wrote in its opinion:

"The purpose of this privilege is to encourage witnesses to testify and to ensure that their testimony is not altered or distorted by the fear of potential liability."

Case citation: *Provencher v. Bunzell-Plourde Assocs.*, 142 N.H. 848 (1998).

Litigation Privilege/Witness Immunity

What is “witness immunity” aka the “litigation privilege” in some states?

- Protection for witnesses, including expert witnesses, from claims by unhappy parties in litigation (and in arbitration as well).
- Immunizes witnesses from civil lawsuits about their testimony, regardless of whether their testimony is right or wrong.
- The idea behind the immunity is to foster an environment in which witnesses feel safe to give honest and open testimony without fear that the other side can sue you over what you said.

What About Your Own Client? Can They Sue?

The story of the case:

- A couple owned a high-end home in the San Francisco Bay Area. The home had been destroyed by fire.
- They could not agree with their fire insurance company on the amount of the property loss and had commenced an arbitration proceeding set forth in their insurance policy to resolve that dispute.



Case citation: *Lambert v. Carneghi*, 158 Cal.App.4th 1120 (2008).

What About Your Own Client?

Can They Sue?

- The homeowners retained two appraisers in connection with the insurance loss determination: one appraiser to serve as an arbitrator and another to assist them as an expert witness.
- The proceeding went forward and the loss was determined.
- The homeowners were unhappy with the award and blamed everybody. They claimed that the replacement cost covered by the policy should have been \$1.8 million more.
- They sued the appraiser they hired as an arbitrator and the appraiser they hired as an expert, blaming them both for the unfavorable outcome.
- Let's focus on their claims against the appraiser they hired as an expert.

What Happened to the Appraiser Expert Witness?

- The appraiser contended in defense that as an expert witness, he should be shielded by the witness privilege.
- The Court of Appeal decided:
 - “litigation privilege [aka witness immunity] does not apply to prevent a party from suing his own expert witness, even if that suit is based upon the expert's testimony.”*
- The Court then held that the homeowners’ case could go forward against their own expert witness appraiser.

Other Special Situations for Appraisers Involved in Litigation Assignments

- Serving as “arbitrator” = immunity.
- Serving as a court-appointed expert = immunity.
PETERKA v. DENNIS, 764 N.W.2d 829 (Minn. Supreme Court 2009) (court appointed business valuation expert in divorce case protected by judicial immunity against negligence claims by one spouse.)

Most Common Claims Against Expert Witnesses

The most common claims against experts fall into three categories:

1. **Disclosure Issues**. Expert witness failed to disclose a factual matter to the client that later made the expert's report or testimony less credible and led to a poor outcome. Examples of undisclosed matters that clients have sued valuation experts over include:

- a) that the expert had appraised very similar property in other assignments for different parties at values making the valuation testimony not credible,
- b) that the expert failed to disclose to the client prior discipline or litigation against the expert.

Most Common Claims Against Expert Witnesses

2. **Overly Optimistic Valuations.** Another allegation seen in multiple claims has been that overly optimistic, negligent valuations at the outset of a proceeding caused the client to pursue a case that ended poorly for the client.

➤ The client typically alleges it would not have pursued the case except for the erroneous initial valuation and seeks to recover its attorneys' fees and expenses from its expert.

3. **Outright Errors.** Some cases are based on the straightforward allegation that the expert committed errors in the valuation or errors in testimony that led the court to disregard the valuation or reach an erroneous conclusion, causing a poor outcome for the expert's client. The client then sues its expert, blaming the expert for the unfavorable outcome and seeking to recover the loss from the expert.

Suggestions for Minimizing Liability Risk

How can an appraiser avoid becoming a defendant for expert witness work (aside from getting the valuation right)?

- ✓ ***Trust your instincts about clients and assignments.***
 - When considering a client for an expert witness assignment, an appraiser should trust his or her instinct about the client's propensity to be difficult, unreasonable or unrealistic.
 - If it seems like the client is counting on an implausible valuation or unrealistic litigation result, then that's probably an assignment to back away from.
 - If the prospective client has hired and fired other appraisers (and is bad-mouthing them) or has gone through a series of lawyers, those are also strong clues that the client may be impossible to satisfy.

Suggestions for Minimizing Liability Risk

✓ ***Be upfront with disclosure when being hired.***

- A common scenario for a client suing its own expert is when the expert failed to disclose something relevant to the client's decision to hire the appraiser.
- For example, perhaps the dispute concerns a unique property type such as a mobile home park, but the appraiser fails to tell the client he or she has never appraised such a property and is discredited on the stand because of that.
- Full disclosure is a key to avoiding liability. Here's the basic rule of thumb: an expert witness shouldn't let the attorney who has hired them be surprised by something that could have been mentioned (and possibly resolved) before being retained.

Suggestions for Minimizing Liability Risk

- ✓ ***Always be prudent with the identification of client and intended user(s) in reports. Be as narrow and precise as possible for the assignment.***
- ✓ ***Avoid overreaching, acting as an advocate, losing objectivity. It comes back to bite appraisers when the litigation doesn't work out.***
- ✓ ***An appraiser expert witness should be prepared to answer this question: Are you licensed as an appraiser in this state?***

Use a Good Engagement Agreement

Example Language for Expert Engagement Letters

“Independent Nature of Services. Our/my services will be delivered in a manner that is independent, impartial and objective. I/We do not warrant the outcome of this matter, and neither the amount nor payment of my/our fees is contingent on any result. I/We shall have no liability to your client or any other party for any result or outcome, favorable or not, in the litigation for which we are being retained.”

Example Language for Non-Lending Engagement Letters

“Valuation Dates. If the development of any appraisal opinions are needed in this engagement, your firm shall have responsibility for determining and advising me/us of the date(s) of value that are legally pertinent to the matter.”

Example Language for Non-Lending Engagement Letters

“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. ”

What To Do if a Claim Happens to You?



- **Don't ignore it**
- **Report to E&O promptly**
- **Get legal assistance**
- **Handle the lawsuit appropriately if you are served**

Get Legal Advice – Not Internet Advice

Yesterday at 12:28pm - [REDACTED], IL - 

Anyone have experience with that Llano company trying to come after you for an old appraisal completed? I have a buddy who is no longer in the business getting letters from them on something he completed as an associate in late 2007.



[REDACTED] Just tell him to tell them he burned the files a few years back and have no idea what they are talking about? If they want a new appraisal, maybe he can recommend you but do you really want to hear from these guys years from now on an old report?

Like - Reply -  1 - Yesterday at 12:45pm