Reducing the Risk of Litigation ~ A Primer

Appraisers can expect the courts to judge their work according to the following simple principles:

1. Was reasonable care used to investigate and report on relevant facts pertaining to a property? To the extent that investigation of these facts would be expected by the courts, appraisers are considered to have a “positive duty to investigate” such matters.

2. Were all matters and facts reported correctly, such that no incorrect statements were made, and a reader could not be misled by the report?

To protect yourself, make certain your practices include the following, possibly trite and obvious, but nevertheless very important factors:

Expect Litigation

Given the way courts assign liability, it is common that suit is filed against everyone for whom the remotest possibility of error or omission exists. In any litigation involving deficiencies in land, the appraiser almost certainly will be sued.

Avoid Assumptions

In the rush to complete your work, it can be tempting to make assumptions based on what you believe to be correct. Erroneous assumptions form the basis of many lawsuits. Assumptions made in haste will be scrutinized at leisure and in great detail in litigation, and there is no defence for incorrect assumptions or bald misrepresentations.

“He who has the best notes in a professional liability lawsuit usually wins.” Almost all professional liability lawsuits are essentially disputes over facts, and battles over credibility are involved. If you want the judge to find you more credible than the plaintiff, the availability of good notes, made at the time, is critical.

Notes should always be kept of all discussions, phone conversations and investigations. Consider the practice that some professional liability law firms follow internally: Prepare and distribute widely within your office, inexpensive, pre-punched note pads, containing spaces for the name of the person interviewed, the date, the file or client name, and so forth. The easier it is to make a note, the greater the chances that a record will be kept.
Appraisers who don’t have appropriate work files for all appraisals are being sloppy and asking for trouble. Always use metal fasteners to keep your notes in the file, and always fasten the notes in.

**Communicate**

Liability lawyers say that a distressingly high proportion of lawsuits might have been avoided by proper communication at the right time. Pick up the phone, or go see your client about anything unusual. This communication can involve client education about the extra amount of work required to appraise an ex-service station site, the extent of inspection abilities that appraisers have, or the difficulties in selecting comparables in an area where land contamination is prevalent, because the details are seldom known. If you will be late in delivering a report; tell the client well in advance, so you don’t have to rush and take unnecessary risk of errors. Keep notes of any verbal communications!

Your client doesn’t want to get into a lawsuit over your mistakes any more than you do.

**Disclose the Nature of Your Investigation**

In both your report and in any written proposal to the client prior to accepting the assignment, make abundantly clear the nature of your investigation, and of any things not done. This disclosure should be obvious to the reader. Put it right in the letter of transmittal; don’t bury it within the body of the report. Also, disclose this information prior to undertaking the assignment.

If you don’t state that you will be conducting an historical-use study of the property, and your investigation revealed nothing to suggest one would be warranted, then you will be safe if it subsequently turns out that a study would have revealed evidence of toxic contamination. By the same token, if you state your investigation will include a personal inspection of the property, then you had better do a thorough personal inspection, because your work will be judged on this basis! If you will only be conducting a brief inspection of the property, or only viewing part of the property - common for larger properties - then this should be clearly stated.

**Assumptions and Limiting Conditions**

By disclosing the factors not considered in your work, the possibility is reduced that a reader of your report will be misled. However, such statements provide little benefit if you did an improper job. If you stated a personal inspection was conducted, then you will be held responsible to do so according to the standards of the profession, regardless of any limiting condition to the contrary. Notwithstanding this, assumptions, limiting conditions and disclaimers might have significant value in your defense. The Institute regularly publishes recommendations on Assumptions and Limiting Conditions in the Canadian Appraiser and its text books.
Report the Obvious

Make certain your report identifies anything obvious about the property. For example, one may state clearly that the property will be appraised as if no toxic hazards or contamination exist. However, this will not relieve the appraiser of a duty to report the matters that are obvious. If you do not mention in your report that asbestos insulation is observable on the ceiling, for example, you may be found liable.

Report the Unusual

If the building is unfinished in any respect, not built to standard specifications, of unusual special purpose design, or is in any way an unusual property, these facts should be disclosed in the report.

Write Professional Reports

Make certain your reports do three things:

1. say what you did;
2. say exactly what you know; and,
3. report the basis for everything else.

Suppose the owner of a property says that it does not contain UFFI. What do you report? “There is no UFFI on the property?” Absolutely not! Report the basis for your knowledge: “The owner of the property reports that the property does not contain UFFI. No independent verification of this fact has been made.”

Pay attention to the way your reports are written. What does a “good well” mean? Does it mean that the flow is sufficient for both people as well as livestock? That the mineral content won’t poison animals, that the coliform level meets health standards, even in the spring when runoff contaminates the well? Or does it mean the well is good for nothing? Use clear, unambiguous writing. The test of a properly-written report is whether it is capable of misleading its reader. Perhaps all you meant to say was that it produces 12 gallons per minute, but you have not determined the potability of the water.

Always assume someone other than your client will rely on your report. A useful exercise is to ask a colleague from another appraisal practice to read a typical report. Does he or she agree that it is incapable of misleading anyone?

Undertake Only What Your Skill and Fee Permits

Not only is it a contravention of the Institute Code of Ethics, but the undertaking of an assignment beyond one’s level of skills is fraught with enormous risk. Either associate with others having the skills, knowledge and experience or turn down the assignment.
Never take on an assignment at a fee inadequate for the scope and complexity of the assignment, unless you are prepared to subsidize the client to remedy undiscovered deficiencies. Not only are you taking on substantial risk, if you are intentionally reckless you may jeopardize your insurance coverage.

If the fee the client is prepared to pay is known to be inadequate for the work involved before the job is even started, either the assignment must be refused or the fee negotiated to a higher level or, if practical, the scope of the assignment reduced. If, after starting the assignment, it turns out the fee is insufficient, then similar negotiations must be held.

Know when to back away. Just because you’ve accepted an assignment, you aren’t obligated to take on undue risk. The fee for a high-risk assignment will not offset the costs of your time and loss of reputation in litigation. If your client will not allow you to back away from your contract, then you must carefully qualify your report.

**Client Relations and Risk Management**

The loss of any regular client can have a significant impact on the bottom line of an appraisal practice. However, it is almost certain that the likelihood of litigation involving appraisers will increase. The direct and indirect cost of such; more often than not evolving from someone to whom the client gives the report rather than the client directly, can also be substantial. Very often clients are surprisingly understanding when approached about matters related to litigation risk. In the final analysis, however, if an individual client is unprepared to accept the way you must do things, you are probably better off without his business. Considerable anecdotal evidence exists to suggest that the fee client who doesn’t want to pay for needed services is often the most likely to sue.

Managing the risk in your client base may even extend to refusing to do work for high-risk clients or client groups. For example, Institute files show that mortgage brokers are involved in a disproportionately high number of appraisals where litigation ensues. While the urge not to turn away work will be strong, the balance sheet for high-risk clients has a negative bottom line. Most appraisers know which individuals, firms or client types in their community have a high risk of litigation, and careful thought should be given to the circumstances, if any, under which it is prudent to continue working for these clients.

**Quality Assurance**

Particularly for a firm having a number of appraisers, significant protection can be gained through the use of check-lists and written procedures that are prepared and updated to reflect developments and additional knowledge. A check-list for an apartment inspection, for example, ensures that all relevant information is obtained and noted during the site inspection, and can be updated as one becomes familiar with, say, environmental things to check. Due caution must be
used, since these lists are unlikely to cover all circumstances but, as an adjunct to your own experience and skills, they can be invaluable. Consider preparing a format book - perhaps based on Appraisal Institute texts - of all the things to cover in your appraisal reports, and review it with each appraisal. You might be surprised how many things you or your junior appraisers forget.

**Professional Standards**

One of the things the plaintiff will try to establish in a professional errors and omissions lawsuit is the appraiser’s failure to comply with professional standards. Be familiar with professional standards, and endeavor to keep abreast of contemporary text books and professional articles.

**CUSPAP Reference**

**Workfile**

**Ethic Standard**

5.9.1 A member must prepare a workfile for each assignment. The workfile must include the name of the client and the identity, by name or type, of any other intended users; true copies of any written reports, documented on any type of media; summaries of any oral reports or testimony, or a transcript of testimony; the appraiser’s signed and dated certification; all other data, information, and documentation necessary to support the appraiser’s opinions and conclusions and to show compliance with this rule and all other applicable Standards, or references to the location(s) of such other documentation.

5.9.2 A member must retain the workfile for a period of at least seven (7) years after preparation or at least two (2) years after final disposition of any judicial proceeding in which testimony was given or any PLIP proceeding, whichever period expires last and have custody of the workfile, or make appropriate workfile retention, access, and retrieval arrangements with the party having custody of the workfile.

**Assumptions and Limiting Conditions:**

**Appraisal Standard**

6.2.10 In the report the appraiser must identify all assumptions and limiting conditions; [see 7.11]

**Appraisal Standard Comment**

7.11.1 Ordinary Assumptions and Limiting Conditions should be grouped together and disclosed in an identified section of the report.

7.11.2 Extraordinary Assumption refers to a hypothesis - either supposed or unconfirmed, which, if not true, could alter the appraiser’s opinions and conclusions. Full disclosure of any Extraordinary Assumption must accompany statements of each opinion/conclusion so affected (see also...
Hypothetical Conditions) [see 12.31]

7.11.3 Extraordinary Limiting Condition refers to a necessary modification or exclusion of a Standard Rule. The burden is on the appraiser to explain and justify such necessity in the report, and to conclude before accepting an assignment and invoking an Extraordinary Limiting Condition that the scope of work applied will result in opinions/conclusions that are credible. [see 12.32]

**Scope of Work**

**Appraisal Standard**

6.2.4 In the report the appraiser must identify the scope of work necessary to complete the assignment; [see 7.5]

**Appraisal Standard Comment**

7.5.1 The amount and type of information researched and analysis applied. Scope includes, but is not limited to, the extent of:

7.5.1.i. inspection

7.5.1.ii. research into physical and economic factors that could affect the property

7.5.1.iii. data research, verification, and inspection of comparables

7.5.1.iv. analysis applied

7.5.2 The scope of work applied must be sufficient to result in opinions/conclusions that are credible in the context of the intended use of the appraisal. The appraiser has the burden of proof to support the scope of work decision and the level of information included in a report.

**Competence**

**Ethic Standard**

4.2.7 It is unethical for a member to undertake an assignment lacking the necessary competence;

**Appraisal Standard**

5.12.1 Prior to accepting an assignment or entering into an agreement to perform any assignment, an appraiser must properly identify the problem to be addressed and have the knowledge and experience to complete the assignment competently; or alternatively:

5.12.1.i. disclose the lack of knowledge and/or experience to the client before accepting the assignment; and

5.12.1.ii. take all steps necessary or appropriate to complete the assignment competently; and
5.12.1.iii. If the appraiser lacks experience and/or knowledge to undertake an assignment, the appraiser must describe steps taken to complete the assignment competently, in the report.

**Appraisal Standard Comment**

12.9.1 The steps necessary and appropriate to complete an assignment competently include personal study by the appraiser, association with an appraiser reasonably believed to have the necessary knowledge or experience, or retention of others who possess the required knowledge and experience.

12.9.2 The concept of competency also extends to appraisers required to travel to geographic areas where they lack the required knowledge and experience. An understanding of local market conditions goes beyond hard data such as demographics, costs, sales and rentals. If an appraiser cannot spend the time necessary in a market area to gain this understanding, affiliation with a local qualified appraiser could ensure competence.

**Canadian Property Valuation Magazine Reference**

Limiting Assignments to Your Scope of Training and Expertise, Vol 52, Book 4, 2008


**Canadian Appraiser Magazine Reference**


[http://www.aicanada.ca/images/content/file/Can_App_Vol_49_Bk_4_01.pdf](http://www.aicanada.ca/images/content/file/Can_App_Vol_49_Bk_4_01.pdf)


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