

VALUATION

Appraisal Review—Theory, Risks, and Rewards

By Roger Durkin, JD, MS, FASA

Whether you call your work Appraisal Review, Opposing Expert Critique, or Forensic Consulting, you should be aware of the risks of libel and slander in performing an appraisal review and how best to protect yourself from a law suit.

Appraisal review is the critical analysis of another appraiser's appraisal report. It is defined in the Uniform Standards of Professional Appraisal Practice (USPAP) as: "the act or process of developing and communicating an opinion about the quality of another appraiser's work that was performed as part of an appraisal or appraisal review assignment." A more detailed description of the appraisal review process can be found in Standard-3 of the USPAP.¹ In 2013, the International Valuation Standards (IVS) Guidance Note No. 11 governed appraisal review under IVS. The IVS² Guidance was very similar to

Standard-3 of USPAP. IVS addressed the importance of appraisal review stating, "Because of the need to ensure the accuracy, appropriateness, and quality of valuation reports, valuation reviews have become an integral part of professional practice." The IVS Board decided in June 2012 that there was *ambiguity in the application of the IVSs to valuation reviews, and a potential threat to the public interest if inappropriate reliance was placed on a valuation on account of it having been reviewed.*³ IVS no longer has separate guidance for the development or communication of an appraisal review.

The AICPA Statement on Standards for Valuation Services No. 1 does not address appraisal review. NACVA has a complete set of Appraisal Review Standards. NACVA defines a Business Valuation Review as: "the act or process of developing and communicating a member's opinion regarding the cred-

ibility of the work product of another valuation analyst. It is a type of service, whether in written or oral form, intended to provide to identified users that the report is credible." NACVA describes the appraisal review required scope of work as: "sufficient to provide a member a basis for rendering a credible⁴ Business Valuation Review opinion regarding the relevance, reliability, completeness, and reliable application of the business valuation methodology under review, and its consistency with generally accepted valuation practices."

Appraisal review carries substantial risk if the review appraiser expresses an oral or written opinion that the underlying appraiser was not competent, not qualified, did this bad thing, or did something incorrect without providing substantial evidence to support the assertions.⁵ A written review criticizing

⁴ Credible means worth of belief. Black's Law Dictionary.

⁵ *Substantial evidence* is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

¹ See <http://www.appraisalinstitute.org/>

² See <http://www.ivsc.org/>

³ IVSC Standards Board meeting Thursday, 25 October, 2012.

another appraiser's credibility can be a risky undertaking. If you publish a critical opinion (oral or written) that is not supported by evidence other than your personal experience and intuition, you may be liable for libel or slander.⁶ An appraisal review is a published report to someone. Defamation generally relates to a publicly broadcast false statement that causes injury to the plaintiff. Unless you can prove your critical assertion with substantial evidence, you risk being sued for libel or slander. Appraisers fall into the category of professionals. Therefore, a written or oral attack, without basis (evidence), on an appraiser's professional reputation, character, or standing may constitute defamation per se.⁷ The plaintiff appraiser does not have to prove injury/damages. Injury to an appraiser's reputation, business, profession, or calling is assumed.⁸

This risk of defamation applies to professional association peer review committees. A Massachusetts federal jury awarded appraiser Daniel Briggs over one million dollars in damages for professional libel.⁹ The case has national implications because one of the libel defendants was his appraisal association. The Society of Accredited Marine

Surveyors' (SAMS) Ethics Committee found Briggs in violation of their Code of Ethics and Practice by making a misleading appraisal. The SAMS' Board revoked Briggs' membership. Briggs sued for defamation. "The test to be applied as to the defamatory character of published words is whether in the mind of any considerable and respectable class of the community they tend to injure the reputation of the person to whom they refer and expose him to hatred, ridicule and contempt."¹⁰

Shannon Pratt, renowned business valuation guru, said to his client that a particular business appraiser was not qualified to have performed a professional practice enterprise appraisal. One of the plaintiffs was a former N. H. supreme court justice and former congressman. The cost of defending the lawsuit was significant because Dr. Pratt lives in Oregon and he was sued in New Hampshire federal court. Dr. Pratt was found not liable for defamation because he had a substantial evidence basis for his opinion.¹¹

An appraisal review is not and should not be a personal attack. It must be an objective, professional, critique based on evidence measured against applicable appraisal standards, the logic of the presentation, and the credibility of the appraisal report.

The appraisal review process can be difficult because many appraisal associations' appraisal standards are principles-based vague, and ambiguous guidelines rather than imposed appraisal practice rules. Similarly, the

concept of *credibility* is itself vague and ambiguous. Critiquing a business valuation report for "its consistency with generally accepted valuation practices" requires the underlying appraiser and report to have committed to performing his or her appraisal in accordance with defined appraisal standards. There is no agreement of a set of *generally accepted valuation practices* (standards) in the business valuation profession. We have IRS 59-60 Standards, USPAP Standards, IVS Standards, AICPA Standards, NACVA Standards, ASA Business Valuation Standards, and business broker standards.¹² If the underlying appraiser is a member of the particular appraisal association, then imposition of the particular *generally, accepted valuation practices* of that association may be practical in finding non-compliance with the association's requirements. Rule-based critique often gives way to a personal interpretation of valuation practices and fall into a personal opinion critique. The review appraiser has to measure the underlying report and performance against some established enforceable rule. An unsupported personal opinion based on the experience of the review appraiser is not sufficient evidence and might lead to a defamation lawsuit.

Having one's appraisal report critically and objectively reviewed can be a significant and positive benefit to any appraiser. The majority of appraisers have not had the experience of a critical appraisal review, therefore after a few years of practice, many appraisers devel-

6 Libel is the written or broadcast form of defamation, distinguished from slander, which is oral defamation.

7 By itself, intrinsically. In the law of defamation, slander, or libel *per se* refers to certain language that is actionable as slander or libel in and of itself without proof of special damages.

8 A defendant is liable for defamation if it publishes a "false statement regarding the plaintiff, capable of damaging the plaintiff's reputation in the community, which either causes economic loss or is actionable without proof of economic loss." *White v. Blue Cross & Blue Shield of Mass. Inc.*, 442, Mass. 64, 66 (2004).

9 *Daniel C. Briggs, v. Boat/U.S., Inc. and Society of Accredited Marine Surveyors, Inc.*, No. 12-11795, DJC U.S. Dist. Ct, Mass. (2014).

10 *Rawson v. Arlington Advocate, Inc.*, 336 Mass. 31, 33-34 (1957).

11 *Douglas and Hewson v. Shannon Pratt and Associated Press*. U.S. Fed. Dist. Court N.H. Civil 98-416-M (2000).

12 A subject for another time, is to explore innate appraisal dogma including why business appraisers insist that every valuation apply 59-60 and define value as fair market value.

op an omnipotent attitude. The experience of having your appraisal reviewed objectively can significantly improve your appraisal work. The ASA's Appraisal Review Committee developed 60-hours of multi-discipline appraisal review courses that specifically address the development and communication of an objective appraisal critique. The course material and textbooks have progressively improved because of positive critical reviews from students. In-class students have hands-on review experience of actual (redacted) appraisals. These exercises have added¹³ practical experience to the theory of the Appraisal Review Paradigm and appraisal report writing in general.

One day, we may accept the unification of our diverse appraisal standards and thereby improve our appraisal

profession. At present, the various appraisal standards and their supporting associations are like competing churches, each with its own agenda, dogma, and need to survive. Like the multiplicity of churches, we will not become one church with one creed. Government imposition of licensing for business appraisers should be carefully handled as if it were a loaded gun. The cost of defense against licensing boards has run into the hundreds of thousands of dollars. Licensing of real estate appraisers has all but destroyed the concept of a real estate appraisal designation.¹⁴ Real estate appraisal enforcement of licensing law and regulations has caused the demise of over 20,000 real estate appraisers since 2007. **VE**



Roger Durkin has five ASA designations, holds a Fellow of ASA, a Master of Science in Valuation, a Juris Doctorate, and has been a multi-discipline appraiser for over forty years. He taught USPAP for twenty years, Narrative Appraisal Report Writing, the Appraiser as Expert Witness, and Appraisal Review around the U.S., Canada, Lithuania, Mexico, and Slovenia. His law firm is primarily plaintiff and defense counsel for appraisal related negligence claims. E-mail: durkinrp@aol.com

13 The National Association of Certified Valuers and Analysts (NACVA) offers a four-day workshop on business appraisal review. Upon completion of the appraisal review and passing a final exam, appraisers qualify for the Accredited in Business Appraisal Review (ABAR) accreditation.

14 Be aware that Federal real estate appraisal law and the Agencies' regulations prohibit federally regulated financial institutions from excluding appraisers from consideration for an assignment solely by virtue of their membership, or lack of membership, in any appraisal organization.