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The USPAP Trap: The Perfect Gotcha Question for a Testifying Appraiser

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Attorneys in real estate litigation are always searching for the perfect question to ask a real estate appraiser hired by the opposition. The goal, obviously, is to find a way to discredit the appraiser or the appraisal report and, hopefully, persuade the court to exclude the appraisal report entirely and/or disqualify the appraiser as an “expert” in the pending case.

There is now a tool available to the trial lawyer that permits the perfect question to ask the appraiser on the witness stand. However, to properly execute this strategy, the attorney must understand the **Uniform Standards of Professional Appraisal Practice**,¹ referred to as **USPAP**, and be able to explain to the judge how USPAP applies in this strategy.

As an aside, the author developed this strategy while participating in an **Appraisal Institute** course titled “The Real Estate Appraiser as an Expert Witness: Preparation and Testimony.” I was initially hesitant to write this article because, as a practicing real estate appraiser who gives testimony as an “expert” in real estate litigation, this strategy could be used against me when I testify in court in the future. Upon reflection, though, I decided that it is actually in my best interest to write and publish this article as it would then create additional personal motivation for me to be sure that my litigation appraisal work is “bulletproof.”²

Although it would be difficult to explain USPAP entirely in this brief article, a brief introduction to the parts of USPAP that are relevant to this strategy would include the following points:

- (1) USPAP is a standard set of requirements that all appraisers *must* follow in the preparation of any appraisal, appraisal review, or appraisal consulting assignment in every state in America except those states that are “voluntary.” And in the “voluntary” states, following USPAP is required under any of the following criteria:
 - (a) The appraisal is performed for use in a “federally related” transaction (as defined in FIRREA (the Financial Institutions Reform, Recovery and Enforcement Act of 1989);

¹ **Uniform Standards of Professional Appraisal Practice**, The Appraisal Standards Board, The Appraisal Foundation, 2010-2011 edition.

² For more information on how an appraiser can “bulletproof” his appraisal report, see Chapter 10: “Bulletproofing an Expert’s Report”, **The A-Z Guide to Expert Witnessing**, Steven Babitsky, James J. Mangraviti, Jr., and Alex Babitsky, SEAK, Inc., Falmouth, Massachusetts, 2006.



- (b) The appraiser is a member of a professional appraisal organization that requires following USPAP (such as the Appraisal Institute);
- (c) The appraiser voluntarily indicates in the appraisal report that he intended to follow USPAP.

There are about a half dozen states, including California, for example, that are “voluntary” states where appraisers are not required to be licensed unless the appraisal is performed for a “federally related transaction.” If an appraiser’s license or certification is not required, then USPAP would not necessarily be required.

- (2) USPAP is revised periodically by the Appraisal Foundation, currently every two years. When the Appraisal Foundation releases the new edition, it is generally incorporated into the statutes of each state automatically as the state licensing agencies in each state incorporate USPAP as the required legal standard for licensed or certified appraisers. Thus, USPAP is actually part of the law in each state, governing the activity of all licensed or certified appraisers in that state.
- (3) USPAP is comprised of an introductory section with general provisions that apply to all appraisal practice, followed by ten *Standard Rules* that apply to various kinds of activity within appraisal practice. After the ten *Standard Rules* are ten “Statements” that expand on these *Standard Rules* as they are applied to specific circumstances. The parts of USPAP up through and including the “Statements” have the force of law. In addition to these, the current edition of USPAP has a section of *Advisory Opinions* and a section of *Frequently Asked Questions*. These do not carry the force of law but it is *highly recommended* that the appraiser follow the guidelines and principles contained in these last two sections. These *Advisory Opinions* are considered “safe harbors” for the appraiser.
- (4) The introductory section includes two components that are especially important to understanding the strategy presented in this article.
 - **Ethics Rule.** This section imposes strict guidelines on the appraiser regarding Conduct, Management, Confidentiality, and Record Keeping. The key components of this section which apply are the statements under Conduct: “An appraiser: must not perform an assignment with bias; . . . must not communicate assignment results with the intent to mislead or to defraud . . .”

In other words, if the appraiser has a bias about the subject of the appraisal, appraisal review, or appraisal consulting assignment, he cannot perform the assignment. The most obvious example of bias would be a property owned by the appraiser. I, as an appraiser, cannot appraise my own property, at least not in an appraisal intended for a client other than myself.

Further, if he does accept the assignment, the report, either written or oral, must be delivered in a manner that is not “misleading.” An example of a misleading communications of assignment results would be a report where the appraiser left out a significant item about a major deficiency in the subject of the appraisal, appraisal review, or appraisal consulting assignment. This might give the user of that report the impression that the quality of the subject of the report was superior to its actual quality.

- **Jurisdictional Exception Rule.** This provision is similar to the “severability” clause in most contracts, which stipulates that if one provision in the contract is found to be unenforceable, that provision can be removed without disturbing the balance of the contract. The rule states: “If any applicable law or regulation precludes compliance with any part of USPAP, only that part of USPAP becomes void for that assignment.” A judge (but not just an attorney) can issue a ruling that would fit under this provision.

For example, USPAP requires that every “market value” appraisal must include a definition of value and cite the source of the definition. If a judge instructed an appraiser to ignore that provision and perform a “market value” appraisal without including the definition and citation for the definition, the appraiser could include a reference to the order from the judge in his appraisal reports and perform that appraisal, invoking the Jurisdictional Exception Rule, without violating USPAP. To omit the definition of value without such a basis in law, regulation or court instructions, would be a violation of USPAP, thus a violation of law.

- (5) **Standard Rule 1** governs the activity that an appraiser *must* perform, as a minimum, in the “appraisal.” This Rule governs the research, analysis, and conclusions performed to reach the final opinion of value.
- (6) **Standard Rule 2** governs the report delivered by the appraiser that reports the research and analysis performed by the appraiser and the conclusions reached from that activity. Note that the actual “appraisal” is governed by Standard Rule 1 and the preparation and delivery of the *report* is governed by Standard Rule 2. Most clients think that the written report they receive is the actual appraisal. That is not the case. The “appraisal” is the work the appraiser performed, the documentation used, and the analysis and conclusions from that activity. The data, analysis, and conclusions in the “appraisal” are to be maintained in a “work file” required under the Record Keeping requirements of USPAP. Before an appraiser can deliver a report, either oral or written, about the results of his “appraisal,” he must have a work file containing sufficient data, analysis, and conclusions to justify the contents of his report.
- (7) **Standard Rule 3** governs an “Appraisal Review.” This is the crucial part of this strategy. USPAP defines Appraisal Review 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, appraisal review, or appraisal consulting assignment.” An appraisal review can be delivered in written form or as an oral report. Testimony in a deposition or trial is considered an oral report and falls under USPAP. An appraiser testifying about his own report, as an expert witness, would be obligated to follow the rules in USPAP, including delivering an **unbiased** report which would not be **misleading**. An appraiser cannot be an “advocate” when testifying as an appraiser except to be an “advocate for his appraisal report.”

Under either case, appraisal or appraisal review, or a written or oral report, the same rules about preparing and maintaining a “work file” apply so that an appraiser cannot express an opinion, orally or in writing, about another appraiser’s work product (appraisal, appraisal review, or appraisal consulting assignment) without first preparing a work file that contains the research and analysis of his review of the other appraiser’s work. This also is an important part of this strategy.

With this brief introduction to USPAP, the attorney should be able to understand and apply the strategy for the **Perfect Gotcha Question** in a court trial involving a real estate appraisal.

The principle used in this strategy is to get the appraiser, while on the stand and under oath, to reveal to the court *the weaknesses in his own appraisal* while at the same time providing sufficient evidence to the court to exclude both his report and his testimony because of committing a violation of USPAP while on the witness stand, which then would also be a violation of law and possibly even jeopardize his license or certification status.

Daubert Challenge. The Daubert tests that a judge may apply as the “gatekeeper” of expert witness testimony to determine whether an expert’s testimony is admissible include the following four factors.³

³ Steven Babitsky and James J. Mangraviti, *How to Become a Dangerous Expert Witness: Advanced Techniques and Strategies*, Seak, Inc., Falmouth, Massachusetts, 2005, pages 76-78.

It is generally considered that only one of the four factors must "pass muster" to have the judge admit the testimony:

1. **Tested** – This test is not applicable in real estate appraisals unless the appraisal is using statistical analyses such as a linear regression analysis or something similar. Then it would be applied to those sections of the report and testimony that apply that analysis.
2. **Peer reviewed methodology** – The USPAP standards and rules have well established peer reviewed methods and procedures for the appraisal discipline. Since the Appraisal Foundation creates and edits these standards based on constant input from appraisal professionals throughout the country, it clearly meets this test. The appraisal and the appraiser's testimony can be measured against USPAP to pass or fail this test.
3. **Known or potential error rate** -- The methodology has an known or potential error rate that is sufficiently precise that the test has reasonable reliability. This test is rarely applicable to real estate appraisal testimony.
4. **Generally Accepted Procedures**. The methodology has general acceptance among competent professionals in the applicable scientific or professional discipline. Again, USPAP is the standard for appraisal methodology. Just as in accounting, the GAAP, "Generally Accepted Accounting Practices," are the standards to be applied in testing an account's report and testimony, so USPAP can be applied as the standard for measuring an appraiser's report and testimony.

This strategy uses the second and fourth of the Daubert factors to have the appraiser's expert report and testimony excluded from the record. The first and third are not applicable so if the testimony and report can be shown to fail both the second and fourth test, the questioning counsel can move to exclude the testimony and report.

Application of this strategy would follow the steps outline below.

STEP 1 – Questions About Counsel's Appraiser's Work

The first step assumes that there have been two appraisals performed, one for each side in the case. It also assumes that the appraiser for the opposing counsel has had a chance to read the appraisal produced for the questioning counsel.

After normal questioning about the appraisal performed for opposing counsel, the attorney would ask the following questions:

Counsel: Have you had a chance to read the appraisal performed by [name of appraiser retained by the questioning attorney – we will call him "Appraiser 2"]?

Witness: Yes.

Counsel: Your testimony indicates that you have some disagreement with the analysis and conclusion of Appraiser 2. Would you share with the court at least one good point in Appraiser 2's report with which you agree?

Witness: [would state something good about Appraiser 2's report. Counsel will want to be sure that a "qualitative evaluation" of at least one part of the appraisal is made on the record before proceeding.]

Counsel: Since you have a different conclusion, there must be a point or two with which you disagree. Can you share with the court one of the points with which you disagree?

Witness: [would state a point of disagreement. Again, Counsel will want to be sure a "qualitative evaluation" has been stated on the record.]

Counsel: You apparently believe that your analysis and conclusions are superior to Appraiser 2's at that point. Why do you believe Appraiser 2's report is inferior to yours at this point?

[It is crucial in this series of questions that Counsel, in a non-threatening manner, solicit a "judgment" from the witness about the quality of the work product of Appraiser 2, thus providing what USPAP defines as an "appraisal review."]

Witness: [The witness would naturally discuss the differences between the appraisal of Appraiser 2 and his own work and, perhaps with prodding from Counsel, provide an evaluation statement or two on the record about Appraiser 2's work product. He has then performed, perhaps without knowing it, a Standard 3 review which is not USPAP compliant unless he has actually prepared a work file with the required information about Appraiser 2's work in accordance with USPAP Standard 3. This is highly unlikely, but further questioning below will bring this out.]

STEP 2 – Questions About Witness's Own Appraisal

Counsel: Thank you for that evaluation. I am sure it has been helpful to the court to hear your evaluation of the quality of Appraiser 2's work. Obviously, you are very familiar with your own appraisal. Can you share with court what you think is the best and strongest component of your report?

Witness: [The witness will be glad to share a strength, giving an "evaluation" of the quality of his own work to the court. It does not matter what he says as long as he is making a *qualitative statement* about his own work.]

STEP 3 – The Trap

Counsel: I presume that you are familiar with USPAP?

Witness: Certainly.

Counsel: You know, then, that **USPAP Standard Rule 3** governs the process of performing a USPAP Compliant Appraisal Review?

Witness: Yes. [If no, then Counsel would provide a copy of USPAP and ask the witness to read the definition of Appraisal Review found on Page U-1, lines 29-31. then ask the witness to read page U-30, Lines 911-915.]

Counsel: If I were to ask you to prepare a Standard Rule 3 appraisal review of your own appraisal report, what would you report as the *most glaring error or problem* in the appraisal?

*[This is the **key question** in this strategy and must be asked **exactly** as shown after the appraiser has **already** expressed an opinion of the quality of both the questioning counsel's appraisal and the witness's own appraisal. He has expressed an opinion about the strongest quality of his own report, which is "on the edge" of an appraisal review. Counsel is now pulling the witness further into a formal "appraisal review" of his own work.]*

*If the witness is **not** aware of what has just happened, he will struggle to find a weak spot in his report and put it on the record for Counsel to explore. **Any** response indicating an evaluation of his own report will do, even if it is not a significant problem. Hopefully the witness will be honest and share what he views as the weakest part of his own report, which Counsel can develop in further questioning to impeach the appraisal conclusions. This should be done later, after the steps below so*

as to not disrupt the flow of this strategy. If the strategy is unsuccessful in excluding the witness and his appraisal, Counsel will want to pursue these “glaring errors” further.

Since he is under oath, this could become a very important admission. Since USPAP requires that any appraisal review report cannot be “misleading,” if it is obvious that he has not reported his “most glaring error or problem,” then he has violated USPAP in this “not misleading” requirement also.

If the witness **is sharp** and understands the implications of this question, he will give the only “correct” response which is as follows:

“I am unable to provide you a USPAP compliant Standard 3 appraisal review as USPAP requires me to be unbiased. Since the appraisal I would be evaluating is my own work, it would be impossible for me to deliver an unbiased appraisal review. My only option under USPAP rules is to decline the assignment.”]

STEP 4 – Provide the Jurisdictional Exception

If the witness has not given the “correct” answer, you can bypass Step 4 and proceed to Step 5.

If the witness’s response shows he understands USPAP and cannot “legally” provide a USPAP compliant Standard Rule 3 appraisal review of his own work, Counsel will then ask the witness to read the Jurisdictional Exception Rule into the record.

Counsel: Your response indicates that you understand USPAP very well. My compliments. Since you understand USPAP, can you read the provision on page U-15, lines 433-451.

Witness: [would read these provisions about the Jurisdictional Exception.]

Counsel: Would you explain to the court what this rule means?

Witness: [Would explain to the court that if law or regulations require, one part of USPAP can be removed and the appraiser can then perform the appraisal review assignment without violation of USPAP. If this explanation is not clear, Counsel would expand the questioning to bring out this point and point out also that a judge can issue a ruling that would permit invoking the jurisdictional exception rule.]

Counsel: Thank you for that explanation. [Turning to the bench] Your Honor, would you be so kind as to make a ruling in this case over-ruling the “bias” provisions of USPAP so that the witness can give a proper answer to this question?

[It is important that you have the judge limit the ruling to only the “bias” provisions of USPAP. Hopefully, the judge would cooperate and rule that the witness could give his opinion of his most glaring error or problem in his report without regard to the “no bias” provision of USPAP.]

The witness would then give testimony about what would be in his USPAP Standard Rule 3 review appraisal report. You would permit the witness to continue without interruption until he completes his oral appraisal review report.]

STEP 5 – Bring Down the Hammer

Counsel: So your Standard Rule 3 appraisal review would report that [repeat the positive and negative qualitative evaluations the witness provided regarding his own work]

Witness: Yes

Counsel: Is there anything else that you would include in your Standard Rule 3 appraisal review oral report given to the court today?

Witness: No

Counsel: Is there anything else about your report that you would like to include to make your Standard Rule 3 appraisal review complete?

Witness: no

[The question should be repeated until all of the relevant points of evaluation and content that the witness is willing to share are on the record. Counsel should have a list of the required content in an appraisal review report as listed in bold in USPAP Standard Rule 3 and check off each required component as it occurs in the witnesses oral report.]

To understand this step, Counsel needs to understand that the appraisal review that was just performed and delivered (with or without the judge's ruling providing the Jurisdictional Exception) most likely violated USPAP, thus violated state law, because the appraisal review, even of his own appraisal report, is considered a new "assignment" and requires the preparation of a separate work file. Since the appraiser most likely has not prepared a separate work file on Counsel's appraiser's work, and definitely had not prepared a work file for the separate assignment of the review of his own work, both "oral appraisal review reports" violated USPAP.]

STEP 6 – Evaluate the Oral Review Report Requirements

Counsel: Let's evaluate your orally delivered appraisal review against USPAP. Please turn to page U-34, and read lines 1071-1076.

Witness: [Would read the lines from USPAP]

Counsel: Before you delivered your oral report a few minutes ago, did you prepare a separate work file on your report that would be a file for this appraisal review?

Witness: Of course not. You just asked me to give it to you extemporaneously.

Counsel: According to USPAP, are you permitted to do that?

Witness: No. But the judge ordered me to.

Counsel: The judge simply overruled the "bias" provision of USPAP permitting you to review your own report. His order did not overrule any other provision of USPAP.

Counsel: Please read lines 1085 – 1141 [Counsel may select only small segments of this section to be read rather than the entire passage.]

Witness: [Witness will read the appropriate lines.]

Counsel: Did the oral report contain all of the information required in this passage for an appraisal review report?

Witness: No. [The witness may defend his actions by stating that it was only an oral report and not a written report so that it cannot be expected to have all of these items.]

Counsel: Will you please read to the court lines 1195-1196.

Witness: "To the extent that it is both possible and appropriate, an oral Appraisal Review Report must address the substantive matters set forth in Standards Rule 3-5."

Counsel: It appears that you have not complied with Standard Rule 3-7.

[After the witness has "hung himself" and provided testimony about the weaknesses of his own work, as well as shown by his own reading of the USPAP requirements that he omitted, thus providing sworn testimony on the record that he just delivered a non-compliant appraisal review, your next step is to make a motion to exclude the witness as he has violated the USPAP provision of providing an appraisal review without previously creating a work file on the questioning Counsel's appraiser's work, or a separate work file on his own appraisal for the appraisal review. He also delivered an inadequate appraisal review under oath and confirmed under oath that his oral appraisal review report was not USPAP compliant. The motion to exclude would be based on the fact that the appraiser violated USPAP, demonstrating that he was not sufficiently aware of the appraisal standards, thus providing the basis for a Daubert challenge of the witness's testimony and report.]

STEP 7 – If unsuccessful, pursue the weaknesses

If this approach is not successful in excluding the testimony and appraisal, Counsel can at least now pursue questioning about the weaknesses identified by the witness in the witness's own report.⁴

This strategy will provide:

- 1) At the least, the help from the witness's comments about his own appraisal will permit Counsel to pursue and expose the weaknesses in that appraisal.
- 2) At the most, the exclusion of the witness's testimony and/or report by virtue of the impeachment process and application of the Daubert tests of not staying within the "generally accepted practice" of real estate appraisal as documented in USPAP and not following the "peer reviewed" methodology for an appraisal review.
- 3) If the witness's testimony and report are permitted to stand, the judge may instruct to jury to give less weight to the witness's testimony as it has been shown to be inferior compared to the appropriate standards and the witness has been shown to have a low level of competence in performing appraisals and appraisal reviews in compliance with the clear USPAP provisions.

This strategy would work best in a trial setting. It would be less effective in deposition as the judge would not be present to provide the Jurisdictional Exception ruling that would permit counsel to proceed if the witness were sharp enough to see the trap developing. If used properly in deposition, however, the transcript could be provided to the judge before trial with a motion to have the judge rule on admissibility of the witness and his report before trial even begins. It might even provide sufficient evidence of weakness to motivate the opposing party to settle before going to court.

⁴ "Even if the judge does not exclude an expert's opinion under Rule 702 or the *Daubert* line of cases, an expert's methodology and the reliability of the facts and data upon which the opinion is based will remain legitimate areas of inquiry on cross-examination. This is because the expert's methodology is relevant to the weight the fact finder should give the expert's testimony." Steven Babitsky, James J. Mangraviti, and Alex Babitsky, *The A-Z Guide to Expert Witnessing*, Seak, Inc., Falmouth, Massachusetts, 2006, page 125.