Principles of Valuation Course

AR 202
Appraisal Review
& Management
Litigation Services

Student Manual

May 2022
# Table of Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Student Notes</td>
<td>3</td>
</tr>
<tr>
<td>Course Logistics</td>
<td>3</td>
</tr>
<tr>
<td>Course Prerequisites</td>
<td>3</td>
</tr>
<tr>
<td>Course Purpose</td>
<td>3</td>
</tr>
<tr>
<td>Course Participants</td>
<td>4</td>
</tr>
<tr>
<td>Instructors</td>
<td>7</td>
</tr>
<tr>
<td>Bibliography</td>
<td>8</td>
</tr>
<tr>
<td>ASA Conduct and Harassment Policy</td>
<td>9</td>
</tr>
<tr>
<td>Scope of Policy</td>
<td>10</td>
</tr>
<tr>
<td>Session One</td>
<td>11</td>
</tr>
<tr>
<td>Course Basics</td>
<td>11</td>
</tr>
<tr>
<td>Review Course Prerequisites</td>
<td>11</td>
</tr>
<tr>
<td>Task 1: Discuss Course Logistics</td>
<td>12</td>
</tr>
<tr>
<td>Course Technology</td>
<td>12</td>
</tr>
<tr>
<td>Class Etiquette Agreement</td>
<td>14</td>
</tr>
<tr>
<td>Course Schedule &amp; Timing</td>
<td>14</td>
</tr>
<tr>
<td>Task 2: Introductions, Voir dire practice, review CV’s</td>
<td>15</td>
</tr>
<tr>
<td>Being an Expert in the Legal System</td>
<td>16</td>
</tr>
<tr>
<td>Task 3: Who are experts &amp; what do they do?</td>
<td>16</td>
</tr>
<tr>
<td>Remote Testimony</td>
<td>20</td>
</tr>
<tr>
<td>Task 4: Testifying in the virtual world</td>
<td>20</td>
</tr>
<tr>
<td>End of Session One</td>
<td>21</td>
</tr>
<tr>
<td>Session Two</td>
<td>22</td>
</tr>
<tr>
<td>Session 1 review</td>
<td>22</td>
</tr>
<tr>
<td>Task 5: Anatomy of Civil Case based upon Law 101 video</td>
<td>23</td>
</tr>
<tr>
<td>Task 6: Depositions</td>
<td>25</td>
</tr>
<tr>
<td>End of Session Two</td>
<td>26</td>
</tr>
<tr>
<td>Session Three</td>
<td>27</td>
</tr>
<tr>
<td>Task 6: Depositions – continued</td>
<td>27</td>
</tr>
<tr>
<td>Task 7: How Does USPAP Apply to the Appraisal Expert?</td>
<td>28</td>
</tr>
<tr>
<td>Task 8.1: How doe USPAP Apply to the Appraisal Ethics?</td>
<td>32</td>
</tr>
<tr>
<td>Task 8.2: Expectation of Independence and Ethics</td>
<td>34</td>
</tr>
<tr>
<td>Legal System: Structure and Process</td>
<td>35</td>
</tr>
<tr>
<td>Task 9: Understand the Structure of Court systems and other Expert Venues</td>
<td>35</td>
</tr>
<tr>
<td>Federal Court System</td>
<td>35</td>
</tr>
<tr>
<td>State Court System</td>
<td>36</td>
</tr>
<tr>
<td>Other venues</td>
<td>36</td>
</tr>
<tr>
<td>End of Session Three</td>
<td>37</td>
</tr>
<tr>
<td>Session Four</td>
<td>38</td>
</tr>
<tr>
<td>Session 3 review</td>
<td>38</td>
</tr>
<tr>
<td>Showtime</td>
<td>39</td>
</tr>
<tr>
<td>Task 10: Direct and Cross Examination</td>
<td>39</td>
</tr>
<tr>
<td>Establishing yourself as an Expert Witness</td>
<td>42</td>
</tr>
<tr>
<td>Task 11: Expert Witness competence, qualifications, and methodology</td>
<td>42</td>
</tr>
<tr>
<td>End of Session Four</td>
<td>43</td>
</tr>
</tbody>
</table>
Session Five ........................................................................................................44
  Task 12: Redirect examination ........................................................................45
  Task 13: Developing a reputation as the Go-To expert ................................46
  Task 14: Opportunities for an Appraisal Expert Witness ..........................48
  Task 15: Other Expert Witness Appearances ............................................49
End of Session Five .........................................................................................50
Session Six ....................................................................................................51
  Summary of Session Five .............................................................................51
Case Management .............................................................................................52
  Task 16: Communications: Documents provided, Emails, Texts ..............52
  Task 17: Retention/Services Agreements ..................................................53
  Task 18: Records and Evidence Handling ...............................................55
End of Session Six ............................................................................................58
  Task 19: Course Review .............................................................................59
Additional Training Opportunities ....................................................................60
End of Session Six ............................................................................................60
Course Supplementary Evaluation ....................................................................60
Student Notes

This class is taught in a dialogue format, which may be new to you. This format will involve a great deal of interaction with your peers and the instructor, so please come prepared to participate. The main objective for AR202 is for each student to have written an appraisal report that is in compliance with USPAP Standards 7 and 8 and meets the requirements set forth in the MTS Report Checklist.

Course Logistics

Class will run for six days. See ASA Website for exact times. Exam will follow. The course will be taught live on Zoom technology. The ASA Education department can help you with technical support as needed. Please make sure you have a working video camera connected to your computer, good internet speed, good lighting on your face (not back lighting), and a quality microphone. Often the built-in computer camera and microphone are adequate for class purposes providing there is limited background distractions and noise. During the class you will use the chat, polls, and breakout rooms to enhance the learning experience.

All of the course materials and assignments are managed on ASA LMS.

You will need to sign into your google account or sign-up for a new one. After you join the classroom, you will see a welcome from the instructor with assignments which are due the Friday before class starts.

DOWNLOAD the course materials for the Materials tab. The Student Manual is the main document that we will be working with in class, and many find it frustrating to try to manage it on their electronic device along with other materials. We recommend you print out the Student Manual and put it in a binder. The other materials can be left in electronic format.

Course Prerequisites

Complete the assignments on the front page of ASA LMS, summarized below:

1. 2-days in advance of the class, Turn In to the instructor a copy of your most recent CV. If not turned in on time student cannot proceed with the class.
2. 2-days in advance of class, Introduce yourself by answering the question on the LMS.
3. 2-days in advance of class, Turn In to the instructor a redacted appraisal you prepared. If not turned in on time student cannot proceed with the class.
4. Read the SEAK blog Litigation support professional Requirements and watch the related video https://seak.com/blog/expert-witness/expert-witness-requirements/.
5. Video cameras MUST be turned on during the synchronous portions of the class or student will not be able to proceed with the class.

Course Purpose

The purpose of this course is to support appraisal professionals with high quality training courses on litigation support professional services.

1. Expert services work is a logical add-on skill to Appraisal Review services. Learning about litigation support services provides opportunities to expand and diversify your business opportunities, improve credibility and become a better appraiser. Serving as an expert witness is challenging, interesting and lucrative. A successful expert witness can earn a six-figure income working just a handful of hours per week.
2. Because court rulings such as Fry, and Daubert, written expert reports may be considered “heresay evidence,” experts must be prepared to appear in court to provide in-person case-specific testimony.

3. Expert witnesses serve a critical role in maintaining the public trust. Within the legal system they teach jurors and judges about appraisal standards and methodology and help them decide cases. To fulfill this role, appraisers must have the knowledge and skills to objectively analyze and review appraisals against a set of established standards and to present those findings clearly in writing and in oral testimony in a manner that is defensible.

4. The field of appraisal is critical to the smooth functioning of the economy; logical and evidence-based appraisal reports are of critical importance for legal and professional reasons. Regarding these reports, users of appraisal services also need credible, consistent, and objective report reviews and critiques that depend upon rules-based standards to provide critical unbiased objective assessments of appraisal work.

**Course Objectives**

By the end of the course participants will have

1. *Explained* the different phases of a lawsuit and the role of litigation support professionals in the court system

2. *Analyzed* the qualifications requirements to be a litigation support professional relative to their experience and develop a plan to expand their experience

3. *Developed* a marketing strategy for their litigation support professional business

4. *Analyzed* administrative aspects of litigation support

5. * Compared and contrasted* the various ethics standard and how they relate to the court

6. *Analyzed* different types of correspondence with other parties and how those communication will be treated in the discovery process.

7. *Analyzed* the rules of evidence and how valuation services apply to a litigation assignment.

8. *Examined* how the USPAP Record Keeping Rule relates to the discovery process.

9. *Contrasted* the USPAP Competency Rule with Daubert and Fry Standards and how the difference will inform an appraiser's work product.

10. *Demonstrated* knowledge and skill in providing expert testimony by participating in practice sessions.

11. *Determined* which of the different roles of a litigation support professional they wish to pursue.

**Course Participants**

This class is written for appraisers, for those in the lending professions, for CPAs, auditors and tax assessors, and for appraisal review professionals in the insurance industry and with the IRS. In short, for anyone providing litigation support regarding any kind of valuation. Because appraisers are obligated to follow specific ethical standards of USPAP and whichever appraisal organization, such as ASA, to which they belong, this class will address how those considerations apply in the legal system. Regardless of the difference in valuation training and/or ethical regulations or the specifics of a particular situation, the mechanics of being a litigation support professional remains generally the same. This curriculum assumes that all participants have a working knowledge of appraisal review practice and are experienced in report writing.
Appraisers
We expect that most of the participants in the class are appraisers who wish to expand their professional education and expand their business to litigation support work.

Real Property (RP) – RP valuation is the oldest of the appraisal professions and therefore most appraisal standards have their roots in RP valuation. RP appraisers tend to focus on either commercial or residential properties. In the United States, RP appraisers are State regulated and required to get State certification. At this time, they are the only ASA appraisers who are truly “certified”, as all others are “accredited”.

Business Valuation (BV) – BV appraisers value a broad range of enterprises in every industry for various purposes including gift and estate tax, financial reporting, and litigation. Enterprise valuations may be prepared for controlling or minority interests and can be used for, among other things, estate planning, support for tax returns, pricing of stock for option and stock based compensation. Appraisers also value intangible assets including, but not limited to, technology (current and in-process), brand value, contingent consideration, intellectual property portfolios, customer relationships and workforce. BV appraisers tend to specialize in a practice area and have several industries in which they have concentrated expertise.

Machinery & Technical Specialties (MTS) – MTS appraisers value machinery and equipment and most are generalists. Though they are collectively part of the global personal property segment of the appraisal community, they have their own areas of specialization. The main areas of specialization are aircraft, marine vessels, regulated industries, mines and quarries, timber cruising and integrated properties. USPAP is the primary standard used in this area; however, a report prepared for use internationally may be prepared in compliance with International Valuation Standards (IVS). Many dealers and auctioneers without formal appraisal training issue appraisals referencing no standards.

Personal Property (PP) – PP appraisers value objects across a number of specialty categories, the most common of which are Fine Arts, Antiques & Decorative Arts, and Residential Contents. PP appraisers may also value highly specialized categories such as collectible automobiles, oriental rugs, antique firearms, sports collectibles, rare books & manuscripts, fine wines, and music memorabilia, etc. Appraisals are commonly used for obtaining insurance coverage, claims resolution, casualty loss, estate and trust planning, equitable distribution of decedent estates, dissolution of marriage, estate tax reporting, cost basis, and charitable contributions.

Gems & Jewelry (GJ) – GJ appraisers value gem stones and a wide variety of jewelry and items associated with the jewelry industry. The items can range from loose gems to gems mounted in precious metals to fashion and costume jewelry made of base metals and imitation stones. Jewelry ranges from intricate custom designs produced by master craftsman over the ages, to mass-produced designs produced to meet changing fashion in the global market place.

Appraisal Review and Management (ARM) – Regardless of the valuation discipline or the valuation standard used to prepare an appraisal report under review, if the appraiser is a member of the American Society of Appraisers (ASA), then the appraisal will be measured against USPAP using Standard 3. This will always be the case, since USPAP is the standard of care required by ASA.

Bankers, loan underwriters and lessors
Banks are required under the Dodd Frank Act to have internal appraisal review capability. This would primarily apply to reviewing RP, BV, and MTS appraisals. Internal audit staff would also
test for compliance with Dodd Frank and would therefore need ARM training to provide adequate compliance testing. However, these groups rarely testify in court and likely would not be interested in this class.

**Auditors and Compliance individuals**

County Tax Assessors often review RP and MTS appraisal reports for Ad Valorem tax appeal; these assessors are frequently involved in appeal hearings and occasionally must appear in court.

**Other industry professionals**

Professionals in a variety of other industries are also responsible for reviewing valuations and would benefit from being prepared to discuss their findings within the legal system. Some of these include:

- Insurance – reviewing appraisals for evidence supporting claims loss amounts
- CPA – performing forensic accounting and loss profit calculations
- Customs – reviewing appraisals to ensure that the proper import taxes are being paid
- IRS – reviewing USPAP compliance for estate & gift tax and charitable contribution filings
**Instructors**

**J. Mark Penny, FASA, IA, ARM-BV** is an accredited appraiser who lives and works outside of Philadelphia, PA. He has served in numerous capacities in ASA at the Chapter level, with the Business Valuation Committee and on the ASA’s Board. ASA was privileged to have him as the International President in 2013-2014 and he currently serves as Chair of the ARM Committee and as Treasurer of the ASA Education Foundation.

**Brian Peter Brinig, JD, CPA, ASA** has been practicing as a business appraiser for more than 40 years and estimates that he has given over 600 depositions in that time period. Brian is an accredited senior appraiser of the ASA. He holds a law degree, teaches at University of San Diego School of Law and is also a CPA. He has testified in more than 250 trials over the years.

**Denise Peterson, JD,** is a full-time professional neutral, focusing her practice exclusively on alternative dispute resolution services. She mediates both civil and probate cases and is on multiple arbitration panels. She is licensed in both the states of Texas and New York and she is a solicitor to the Senior Courts of England and Wales. Current fellow and past chair for the Chartered Institute of Arbitrators.

**Adam Massey, JD,** is a first-chair trial attorney with significant experience representing both plaintiffs and defendants in state court, federal court, and arbitration proceedings throughout Texas. His work focuses primarily on complex commercial and tort litigation, including matters involving contract and breach of warranty disputes, all aspects of the upstream oil and gas industry, construction defects, personal injury claims, and products liability claims South Texas College of Law, J.D., 2008, magna cum laude

**Jeffrey W. Brend, JD, CPA/ABV, ASA, CFE, CFF, AAML, IAFL, CDFA**

Principal of the nationally recognized family law, forensic accounting and business valuation practice Levin & Brend, P.C in Chicago, Illinois. Mr. Brend is the Past President of the American Academy of Matrimonial Lawyers, Illinois Chapter. Mr. Brend is a Forensic Divorce Attorney and CPA who is also an AAML Certified Family Law Arbitrator and Certified Divorce Financial Analyst.

**Jack Young ASA CPA** has served as Chapter President of the Northern California Chapter of the American Society of Appraisers. He is the Past Chair of the International Appraisal Review & Management subcommittee of the American Society of Appraisers.

Jack received his B.S. Accountancy, Arizona State University, in 1988. While in college, he worked at the local mid-sized regional CPA firm Price, Kong & Company preparing monthly financial statements and performing tax work. Upon graduation Jack joined the audit department of international CPA firm KPMG in their Sacramento, California office. As a senior auditor, he worked primarily in the industries of banking, insurance, manufacturing, food processing and distribution. Subsequent to KPMG, Jack was a financial analyst in the insurance and financial services industries.
Bibliography

Developing and Managing a Litigation Services Practice, Brian P. Brinig & Elena Gladson
Preparation for Trial, Jeffrey Brend, Levin & Brend PC, Chicago IL
How to be a Successful & Effective Expert Witness, customized ASA seminar, SEAK, March 2014
Thompson Reuters, Practical Law
Harold Feder, Succeeding as an Expert Witness, CRC Press 2008
USPAP
Review Theory and Procedures, Appraisal Institute
ASA Conduct and Harassment Policy

The American Society of Appraisers (“ASA”) values its reputation for integrity. ASA’s policy on conduct requires that its staff, members, volunteers, vendors, and others participating in ASA events and activities shall act in a professional, cordial, honest and ethical manner in all circumstances. ASA policy requires that no one participating in ASA operated, sponsored and/or affiliated events neither shall be discriminated against on the basis of race, color, religion, sex, sexual orientation, national origin, age, marital status, disability or other legally protected class of persons, nor shall be subject to any other harassment or discriminatory behavior of any kind. Any act of discrimination or harassment is unacceptable and will not be tolerated.

**Sexual Harassment**

No member, volunteer, attendee, vendor or ASA staffer should ever be subject to sexual harassment or unsolicited and unwelcome sexual overtures, nor should any member, volunteer, attendee, vendor or ASA staffer be led to believe that any benefit or favorable outcome will in any way depend upon “cooperation” of a sexual nature.

Sexual harassment is defined generally as including unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature whenever: (1) submission to the conduct is either an explicit or implicit term or condition of employment; (2) an individual's reaction to the conduct is used as a basis for employment decisions affecting that individual; (3) the conduct has the purpose or effect of interfering with the individual's work performance; or (4) the conduct has the purpose or effect of creating an intimidating, hostile, or offensive working environment.

Sexual harassment is not limited to demands for sexual favors. It also may include such actions as: (1) sex-oriented verbal “kidding,” “teasing,” or jokes; (2) repeated offensive sexual flirtations, advances, or propositions; (3) continued or repeated verbal abuse of a sexual nature; (4) graphic or degrading comments about an individual or his or her appearance; (5) the display of sexually suggestive objects or pictures; (6) subtle pressure for sexual activity; and (7) inappropriate physical contact.

Sexual harassment does not refer to occasional compliments of a socially acceptable nature or consensual personal and social relationships without a discriminatory employment effect. It refers to behavior that is not welcome and that is personally unwelcome, intimidating, hostile, or offensive.

**Other Unlawful Harassment, Discrimination or Conduct**

No member, volunteer, attendee, vendor or ASA staffer should ever be subject to discrimination on the basis of race, color, religion, sex, sexual orientation, national origin, veteran status, gender identity, genetic information, pregnancy, age, marital status or disability or any other legally protected classes of persons in any of its activities or operations. These activities and operations include, but are not limited to, the hiring and firing staff, the selection of volunteers and the selection of attendees and vendors.

Harassment and discrimination on other grounds, including race, color, religion, sexual orientation, national origin, age, marital status, or disability is also prohibited. Harassment may include such actions as: (1) jokes or verbal “kidding,” or “teasing;” (2) verbal abuse and epithets; (3) degrading comments; (4) the display of offensive objects and pictures; (5) conduct or comments of a lewd or lascivious nature; and (6) other conduct that the individual might reasonably find to be intimidating, hostile, offensive, coercive, threatening, or unprofessional.
Scope of Policy

This policy prohibiting harassment or discrimination, whether sexual or of another nature, is not limited to relationships between and among volunteers, but also extends to interaction with ASA staffers, attendees and vendors. No ASA international officer, governor or other volunteer shall subject any other volunteer, attendee, vendor or ASA staffer to sexual or other harassment or discrimination of any nature, including that conduct described above. Any forms of harassment or discrimination as described in this policy are reportable immediately to the ASA’s CEO. Any forms of harassment as described in this policy involving the ASA CEO are reportable immediately to ASA’s International President.

ASA will fully investigate all credible complaints and will maintain confidentiality to the extent possible. Anyone who is found to have engaged in harassment or discrimination will be subject to appropriate disciplinary action which may include the following: (1) a written reprimand or censure; (2) a request for resignation; (3) removal of such person from the individual’s volunteer position within ASA; (4) suspension or termination of membership in ASA; (5) termination of the individual’s employment, or engagement by ASA; and/or (6) being banned from participation in current and/or future ASA operated, sponsored and/or affiliated events. Discipline will be enforced by the CEO, International President, or Board of Governors as appropriate to the circumstances.

No individual will be retaliated against for making a complaint of harassment or assisting with the investigation of a complaint of harassment.
Review Course Prerequisites

See ASA LMS for links to the following assignments.

1. 2 days before class starts, **Introduce yourself** by answering the questions:
   a. What is your appraisal discipline?
   b. What is your experience with being an expert?
   c. Where do you live? (We especially need to know if you live and practice outside of the USA)
   d. What are your needs in this class?
   e. What do you do for fun?
2. 2 days before class starts, **Turn In** a copy of your most recent CV. If not turned in on time student cannot proceed with the class.
3. **Read** the SEAK blog Litigation support professional Requirements and watch the related video [https://seak.com/blog/expert-witness/expert-witness-requirements/](https://seak.com/blog/expert-witness/expert-witness-requirements/). Highlight key points in your reading
4. Watch the video Art of Testifying Remotely presents courtesy of the Houston ASA Chapter
   [https://us02web.zoom.us/rec/share/ydLlmnfDotRfrP2KEUk_rm0KGbFfedoB_8zbGWh4Qd8fKs9BmaJEY-il6Gjt698H.OiWiguDw1RTXUujV?startTime=1592503076000](https://us02web.zoom.us/rec/share/ydLlmnfDotRfrP2KEUk_rm0KGbFfedoB_8zbGWh4Qd8fKs9BmaJEY-il6Gjt698H.OiWiguDw1RTXUujV?startTime=1592503076000)
   List prepared to discuss in class at least five key points in testifying in a remote session.
5. **Turn In** to the instructor a redacted appraisal you prepared. If not turned in on time student cannot proceed with the class.
7. Video cameras MUST be turned on during the synchronous portions of the class
Task 1: Discuss Course Logistics

Student Centered Learning:
This course is taught in a “dialogue education” format. Dialogue education is based upon the premise that adults learn best when they are actively involved in the process. Be prepared to share your work with the group. The three guiding principles of dialogue education are:

1. Never tell an adult something they already know: have them tell you.
2. When new information is delivered have the student do something with the material.
3. Respect the different ways in which people learn?

You’ll notice that the table of contents lists “learning tasks.” The task-based format will involve a great deal of interaction with your peers and the instructor. Your feedback at the end of the class is very valuable in improving this training method.

This course presents an interesting challenge in that we likely have professionals from several different backgrounds with a wide variety of experiences. The challenge is to make the course relevant to all participants.

Content organization:
Although appraisers may have technical competence in appraisal methodologies, they typically lack knowledge in the two major areas this course covers:

1. Learning the mechanic of the legal system (types of experts, anatomy of a lawsuit, managing a litigation support practice, etc.). These sections are indicated by the gear symbol.
2. Developing the skills required to testify in depositions, direct testimony, and cross examination. These sections are indicated by a scale.

Topics on these two major areas will be interspersed throughout the class.

Course Technology

Class uses a blend of synchronous and asynchronous learning methods. Students get credit for the time spent in both areas to make up the 27-hours required by TAF.

Synchronous learning via zoom: (6) 4-hour (or less) sessions 2 – 3 times week with last session being shorter = 21 hours

1. The course will be taught live on Zoom technology. The ASA Education department can help you with technical support as needed. Please make sure you have
   a. working video camera connected to your computer,
   b. good internet speed,
   c. good lighting on your face (not back lighting) and a
d. quality microphone.
2. Welcome letter and harassment policy.
3. During the class you will be using the screen share, chat, polls, and breakout rooms to enhance the learning experience. All exercises using Zoom features are highlighted in bright blue.

Asynchronous leaning via on-demand webinars with ASA LMS follow-up: (3) 2-hour sessions with on-demand lectures followed by interactive content. = 6 hours
1. All course materials and assignments are managed on **ASA LMS** (best to use the Chrome browser).

2. You will need to sign into your **ASA LMS** account. After you join you will see a welcome from the instructor with assignments that are due the Friday before class starts. All **ASA LMS** exercises are highlighted **bright green** in this manual.

3. You will get classroom credit for on-demand webinars to watch between classes. Your presenters are:

   **Brian Peter Brinig**, JD, CPA, ASA has been practicing as a business appraiser for more than 40 years and estimates that he has given over 600 depositions in that time period.

   Brian is an accredited senior appraiser of the ASA. He holds a law degree, teaches at University of San Diego School of Law and is also a CPA. He has testified in more than 250 trials over the years.

   The interviews with judges and attorneys in these videos are Brian’s personal property and not available anywhere else. Brian has given the two webinars on direct testimony and cross examination webinars to ASA only for use in this AR202 class. Please respect Brian’s generosity and do no share these videos with others.

   **Denise Peterson** is a full-time professional neutral, focusing her practice exclusively on alternative dispute resolution services. She mediates both civil and probate cases and is on multiple arbitration panels. She is licensed in both the states of Texas and New York and she is a solicitor to the Senior Courts of England and Wales. Current fellow and past chair for the Chartered Institute of Arbitrators.

   **Adam Massey** is a first-chair trial attorney with significant experience representing both plaintiffs and defendants in state court, federal court, and arbitration proceedings throughout Texas. His work focuses primarily on complex commercial and tort litigation, including matters involving contract and breach of warranty disputes, all aspects of the upstream oil and gas industry, construction defects, personal injury claims, and products liability claims South Texas College of Law, J.D., 2008, magna cum laude

   **Jeffrey W. Brend**, JD, CPA/ABV, ASA, CFE, CFF, AAML, IAFL, CDFA 

   Principal of the nationally recognized family law, forensic accounting and business valuation practice Levin & Brend, P.C in Chicago, Illinois. Mr. Brend is the Past President of the American Academy of Matrimonial Lawyers, Illinois Chapter. Mr. Brend is a Forensic Divorce Attorney and CPA who is also an AAML Certified Family Law Arbitrator and Certified Divorce Financial Analyst.
Class Etiquette Agreement

1. Start and end on time
2. Limit background noise/mute yourself as necessary.
3. Turn off email and other notifications.
4. Come to class prepared. Read, watch and upload pre-assigned materials.
5. Be polite and respectful; when in disagreement, be clear about why and provide alternatives.
6. Speak to the point, stay on topic.
7. Corrections of terms, definitions, etc. will occur at all times, for using the appropriate terminology in our discussions. No one should take offense to these minor, educational corrections.

Course Schedule & Timing

See Table of Contents for daily schedule

Session Breaks are determined by participant agreement: 5 minutes every hour or 10 minutes every two hours. During breaks you will be placed in a zoom breakout room where you can have the option to hang out and chat informally with your colleges as if you were hanging out at the refreshment station at a live class. This helps build community with your fellow class members.
Lunch Breaks are generally 45-60 minutes
Task 2: Introductions, Voir dire practice, review CV’s

1. Using the Chat to everyone, share with the group what time it is where you are.
2. Using the Chat to everyone, share with the group What type of learner are you?
   i. Visual: images, spatial understanding
   ii. Verbal: linguistic, speech and writing
   iii. Physical: hands-on activities, tactile
   iv. Aural: auditory, musical, sounds
   v. Logical: mathematical, reasoning, systems, order
   vi. Social/interpersonal: prefer to work and learn in groups
   vii. Solitary/intrapersonal: self-study, prefer to work and learn alone
3. Take one short Poll on your learning style and basic personality.

   Would you most accurately describe yourself as
   A. Introvert
   B. Extrovert

Voir dire practice / Review CVs

Before reviewing everyone’s CV, Watch a short video of an expert being asked about her qualifications then join a class discussion:

From My Cousin Vinny: https://youtu.be/3nGQLOF1b6I

1. What was the attorney was trying to do?
2. What the expert did to be successful?

Voir dire practice session: The instructor will ask each student questions about their CV.
Being an Expert in the Legal System

Task 3: Who are experts & what do they do?

1. According to the prereading SEAK blog “Litigation Support Professional Requirements,” each student will explain to the class what areas they are qualified to be an expert witness in and what else they need to do to build their practice in this area.

2. Listen to a short lecture on the role and duty of different players in the court

**Trier of Fact:** The person (such as a judge) or group of persons (such as a jury) tasked with making factual findings based on the evidence in a trial or other court proceeding. The trier of fact must weigh the evidence to determine whether a given fact exists based on the persuasive burden that must be met (a balance of probabilities in a civil proceeding). A trier of fact will only be asked to consider evidence where the determiner of law first determines that the evidence meets the evidential burden.¹

**Determiner of Law** (Trier of Law–Commonwealth): The person tasked with making legal rulings (as opposed to factual findings) in a trial or other court proceeding. In a given proceeding, the trier of law must determine whether the evidence is admissible and can be considered by the trier of fact. The trier of law determines whether evidence proffered meets a threshold reliability so that it can be considered by the trier of fact; this is also known as the evidential burden.¹

1) **Judge (bench trial):** Judge is trier of fact and determiner of law.

2) **Jury trial:** Can only be the trier of fact, judge remains the determiner of law

**Attorneys** are officer of the court and have a fiduciary duty to zealously assert their client's position under the rules of the court.

**Litigants:** parties to the lawsuit

3) **Plaintiff / Petitioner:** an individual, company, or institution who brings a case against another in a court of law.

4) **Defendant / Respondent:** the individual, company, or institution being accused by the plaintiff.

**Witnesses** are someone who provides testimonial evidence.

5) **Percipient witness:** A witness who testifies about things they saw (perceived). For example, an eyewitness.

6) **Expert witness:** By virtue of their experience, knowledge, skills, training, and/or certification an expert witness may deliver an “expert opinion” (not an estimate) in the area of their expertise. Expert opinions are often admitted as evidence if allowed by the judge.

¹ [https://ca.practicallaw.thomsonreuters.com/](https://ca.practicallaw.thomsonreuters.com/)
Expert witnesses serve a critical role in maintaining the public trust. Within the legal system they teach jurors and judges about their areas of expertise in order to help them decide cases. To fulfill this role, experts in any area must have the knowledge and skills to objectively present information and data clearly in writing and in oral testimony in a manner that is defensible.

**Expert reports are only hearsay evidence** in a court. Unless both parties agree to let them in as evidence then the appraiser MUST testify to their opinions under oath in order for those opinions to be considered as evidence. Therefore it is critical that the expert be able to effectively communicate their findings to the trier of fact.

What is the definition of appraiser?

Why are reviewers used in court?

What are the two main types of trials and why does that matter?

3. Take 10 minutes to read the following. Highlight key points and underline areas where you have questions.

---

**Do You Need An Expert Consultant Or Expert Witness And What’s The Difference Anyway?**

by Jeanne L. Coleman, Posted on January 11, 2016 in Family Law


Divorce and post-judgment cases can involve complex issues that are beyond the expertise of even the most experienced family law attorney. Taxes, estate-planning, trusts, business valuations, vocational assessments, medical issues of a spouse or child, parental responsibility and timesharing, and financial planning needs are just a few of the areas that may call for the hiring of an expert consultant or expert witness in a family law case. What is the difference between the two?

First, let’s talk about how an expert consultant and an expert witness are alike. An expert, whether a consultant or an expert witness, is a person with advanced training and/or education, experience and skill in a particular field. Both consultants and expert witnesses are very knowledgeable in their particular area of expertise and both understand the basic dynamics of family law litigation as it applies to their field of expertise. The difference between consultants and expert witnesses is that a consultant is not a witness in your case, while an expert witness will testify in court hearings.

It’s a critical difference, because if an expert is strictly a consultant, all communication and information exchanged with the consultant is privileged. Your spouse and his or her attorney may never even know you have an expert consultant on your litigation team. But if your expert is hired to be an expert witness on your behalf, all communication is discoverable by your spouse and his or her attorney. This means that all communications between the expert
witness and you, your attorney, or others, must be disclosed to your spouse and his or her attorney if they request disclosure of this information.

Whether you want to use your expert as a consultant or as an expert witness can also play a role in your choice of expert. An expert witness, besides being an expert in his or her field, should also be proficient at testifying in a clear manner and capable of conveying a sense of professionalism and competence on the witness stand. On the other hand, your consultant needs only to be an expert in his or her field, capable of educating you and your attorney about a particular field of expertise, and proficient at advising you and your attorney in setting related litigation/settlement goals and how to best achieve those goals …. no special personality traits required!

Be aware that sometimes an expert hired as a consultant can later morph into your expert witness due to the shifts and changes in strategy that are common in family law litigation. This can be a problem if you have told the consultant “everything,” because now all of that information may very well have to be provided to the other side. Discuss the pros and cons of allowing your consultant to testify as your expert witness carefully with your family law attorney — sometimes its better to bite the financial bullet and hire another expert to be your witness in court, rather than allow confidential information to go to your spouse and his or her attorney.

The decision to hire a consultant or an expert witness can be a very important one in family law cases. It’s advisable to consult with an experienced family law attorney before making this decision. An experienced family law attorney will also know reputable expert consultants and expert witnesses in your community who are familiar with the special needs and demands of family law work. The local reputation of your expert witness, in particular, can be very important to your family law judge.

4. Imagine that an attorney has given you the report you selected and has asked you to be a consultant. He or she has asked you to develop a list of questions to ask the appraiser during the upcoming deposition. What is the potential ethics problem that could develop for you in such a case?

5. Join in a class discussion regarding the following questions:
   a. What is the role of the expert in the court for an appraiser and for a reviewer?

   b. What are the differences between an expert consultant and an expert witness?

   c. Are all expert are expected to appear in court?

   d. What activities do experts engage in?

   e. What are experts witnesses expected to have in order to qualify as such?
f. Does USPAP require an appraisal report to include the appraiser’s qualifications?

6. Listen to a summary of the main points.
Remote Testimony

Task 4: Testifying in the virtual world

1. In Adam Massey’s Art of Remote Testimony, what are the benefits of remote testimony?

2. What key points in the video struck you as the most important?

3. What things can you do to improve your virtual environment?
End of Session One

Session Review
1) Describe one thing useful from today.
2) Describe one thing to think more about.
3) Briefly summarize today’s main points.
   a. The purpose of Voir dire
   b. The role of the expert witness vis a vie the court
   c. Expert witness vs. a consultant
   d. What experts need to qualify as such
   e. Opinions vs estimate
   f. Improving your virtual office

4) Asynchronous homework:
   a) Remember to upload a redacted appraisal report in the ASA LMS Class Activities
   b) Make changes to your virtual office to improve the remote deposition environment.
      Watch the video - Law 101: How a Lawsuit Works in the ASA LMS Class Activities
   c) Watch the Brian Brinig on-demand webinar. The Effective Expert Deposition in the
      ASA LMS Class Activities
      The videos in this on-demand webinar were personally had made by Brian and are his personal property. Brian has given them to the ASA strictly for the AR202 class and no other use. The interviews you will see are NOT available to the general public and never will be. Please respect Mr. Brinig’s generosity and do not share these videos with others.
   d) Download and review ABC's: Preparing for Trial, by Jeff Brend in the ASA LMS handouts
Session Two

Session 1 review

Use Zoom Poll to answer the following question:

What are the differences between an expert consultant and an expert witness?

A. Expert consultants can become expert witnesses and then are subject to discovery including the time they were a consultant
B. Consultants must be disclosed to the court.
C. Consultants develop their own opinion of value
D. Consultants always develop an opinion as to the completeness of the work under review

Correct answer A

In all courts the Judge is always the trier of fact.

A. True
B. False

Correct answer B

Comments about videos you watched?

Follow-up questions on the voir dire process?

What they’ve done to improve their virtual office?
Task 5: Anatomy of Civil Case based upon Law 101 video

1. Students are placed into three breakout rooms for 10 minutes. Each group is assigned one of the three stages of a lawsuit (pleadings, discovery and trial). Each group writes a paragraph describing the stage assigned to them. Group appoints a spokesperson. After 10 minutes the breakout rooms end and the spokesperson reads there respective paragraph to the group.

   a. Pleadings:

   b. Discovery:

   c. Trial:

---

How a Civil Case is Processed

- Complaint/Petition Filed in Superior Court
- Complainant/Petitioner Served on Defendant
- Defendant Files Answer/Response
- "Discovery" (Information Shared Among Parties)
- Trial (Judge or Jury)
- Judgment Entered in Superior Court
- Settlement
- Dismissal
Instructor leads a discussion based on the following questions:

2. Should a potential expert ask to see the complaint and rebuttal (aka pleadings)?

3. What types of things might an appraiser need from the discovery?

4. At which phase of a civil lawsuit are appraisers / reviewers most likely to be involved?

5. How might appraisers / reviewers be involved in a case beyond issuing a report and testifying?

6. What is Voir Dire?

7. Listen to a summary of the main points.
Task 6: Depositions

1. Join in a group discussion about the role of depositions in the legal system. Why are depositions so important to the litigation process?

2. As a class, review the key points of the Brian Brinig on-demand webinar. The Effective Expert Deposition
   
3. Based upon the redacted reports turned in before class, a visiting attorney or the instructor will ask mock deposition questions of each student.

4. Ask students what questions they think should be asked.
End of Session Two

Session Review
1. Describe one thing useful from today.
2. Describe one thing to think more about.
3. Listen to a summary of the main points. Appraisers may be involved in all phases of litigation
   a) Stages of a lawsuit
   b) Pleadings: determining if there is a case and what are the damages, helping attorney understand the case
   c) Discovery: prepare appraisals, reviews, and deposition questions
   d) Trial: give testimony, help write final arguments
   e) Most cases settle based upon the deposition. Work with retaining counsel and be prepared.

4. Watch these videos of how attorneys look at expert witnesses and depositions:
   "Deposing an Expert Witness" by Bobby Schwartz parts 1 and 2
   https://youtu.be/QQWuIzDJSiw
   https://youtu.be/f7KVpKZ-vaU

5. Mock depositions will continue if some students haven’t testified.

6. Session 2 Homework
   a) Read USPAP AO-21, FAQ 353, FAQ 341 and consider how it relates to being an expert witness. Highlight key points and underline areas you have questions about. Be prepared to discuss your findings in small groups at the next session.
   b) Download and read ASA’s Principles of Appraisal Practice and Code of Ethics (in ASA LMS handouts);
Session Three

Review from Session 2
Which is not a part of the discovery process?

A. Depositions  
B. Exchange of appraisal reports  
C. Exchange of workfile  
D. Pleadings

Task 6: Depositions – continued

Mock depositions will continue if some students haven’t testified.


Class will discuss their thoughts about "Deposing an Expert Witness" by Bobby Schwartz

1. What struck you as interesting in learning about an attorney’s perspective of depositions
2. Why are depositions so important to the testifying expert?
3. Why are depositions so important to the consulting expert?
Task 7: How Does USPAP Apply to the Appraisal Expert?

1. What is the definition of an appraiser?

2. Listen to a lecture contrasting USPAP competency and competency under legal statute and participate in a discussion.

**Legal Competency:** FRE Rule 702. Testimony by Expert Witnesses

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

Courts tend to rely heavily on (a) and are often lenient about who they allow to be an expert witness. It’s up to opposing counsel to address reliable principles and methodology.

**USPAP competency:** USPAP Competency Rule

**BEING COMPETENT**

An appraiser must determine, prior to agreeing to perform an assignment, that he or she can perform the assignment competently. Competency requires:

1. the ability to properly identify the problem to be addressed;

2. the knowledge and experience to complete the assignment competently; and

3. recognition of, and compliance with, laws and regulations that apply to the appraiser or to the assignment.

Comment: Competency may apply to factors such as, but not limited to, an appraiser’s familiarity with a specific type of property or asset, a market, a geographic area, an intended use, specific laws and regulations, or an analytical method. If such a factor is necessary for an appraiser to develop credible assignment results, the appraiser is responsible for having the
Competency to address that factor or for following the steps outlined below to satisfy this COMPETENCY RULE.  

Competency under USPAP is more a function of HOW the work was done and the methodology used.

3. A volunteer will read the following. Afterward join in a class discussion on the key points of the reading.

---

The Rocky Road to Competency

The chief appraiser of a regional bank made it a practice to assign appraisals of certain property types to individual staff reviewers so that each reviewer would become the internal expert on that property type. He took it upon himself to handle the ordering and review of all appraisals of adult care facilities (e.g., nursing homes, assisted living facilities, and other related property types). He determined who the four or five most respected appraisers of those property types were nationwide and only used those individuals for assignments relating to those properties. In addition, he purchased books and attended seminars on adult care facilities. Over the years, he found the appraisal reports to be very detailed. In fact, he approved 100% of the reports and never had any questions for the appraisers.

Years later the chief appraiser had the opportunity to hire additional staff reviewers. Two of the new hires had expertise in adult care facilities and, in fact, had worked for the same appraisal firms that the chief appraiser was using. He turned the ordering and review of these assignments over to these reviewers because of their demonstrable competence. However, even though the same appraisers were being used to perform appraisals of the adult care facilities, instead of a 100% acceptance rate with no questions asked, the new reviewers were asking questions and requesting revisions on the vast majority of the appraisals. It immediately became clear to the chief appraiser that the competence he had obtained solely from reading books, attending seminars, and reviewing appraisal reports on this property type was insufficient. In this case, direct experience with the specialized property type was the most important factor in achieving true competency.

---

2 USPAP Competency Rule
3 Review Theory and Procedures, Appraisal Institute

29
4. Group discussion question for students: What is the differences between the three columns below? Give examples of then each column would apply.

<table>
<thead>
<tr>
<th>Appraisal Practice</th>
<th>Valuation Services performed by an individual acting as an appraiser</th>
<th>Other valuation services when acting as an appraiser</th>
<th>Valuation services when not acting as an appraiser</th>
</tr>
</thead>
<tbody>
<tr>
<td>Appraisal and Appraisal Review</td>
<td>(Development and Reporting)</td>
<td>All Rules apply. Standards apply. Which ones apply varies by assignment.</td>
<td>Three Rules apply: ETHICS RULE, COMPETENCY RULE, JURISDICTIONAL EXCEPTION RULE. No Standards apply in these assignments. Compliance with the RECORD KEEPING RULE and SCOPE OF WORK RULE is not required in these assignments.</td>
</tr>
</tbody>
</table>

**Examples**

<table>
<thead>
<tr>
<th>Appraisal and Appraisal Review (Development and Reporting)</th>
<th>Other valuation services when acting as an appraiser</th>
<th>Valuation services when not acting as an appraiser</th>
</tr>
</thead>
<tbody>
<tr>
<td>Appraisal with Appraisal Report</td>
<td>Researching market data (when acting as an appraiser)</td>
<td>Brokerage</td>
</tr>
<tr>
<td>Appraisal with Restricted Appraisal Report</td>
<td>Teaching appraisal courses</td>
<td>Consulting (when acting as an advocate)</td>
</tr>
<tr>
<td>Appraisal with oral appraisal report</td>
<td>Analyzing specific elements of value (e.g., reproduction cost of functional utility)</td>
<td>Ad valorem tax consulting (when acting as an advocate)</td>
</tr>
<tr>
<td>Expert witness testimony</td>
<td>Consulting (when acting as an appraiser)</td>
<td>Auctioning</td>
</tr>
<tr>
<td>Appraisal Review with report</td>
<td>Mechanical computation</td>
<td>Litigation support (when acting as an advocate)</td>
</tr>
<tr>
<td>Selecting comparable sales data</td>
<td>Developing educational texts</td>
<td>Property management</td>
</tr>
<tr>
<td><em>Calculation engagement</em></td>
<td>Ad valorem tax consulting (when acting as an appraiser)</td>
<td>Mortgage underwriting</td>
</tr>
<tr>
<td><em>Limited scope appraisal</em></td>
<td>Providing raw sales data</td>
<td>Leasing (agent)</td>
</tr>
<tr>
<td><em>Evaluation</em></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Purchase price allocation</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Valuation engagement</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

*Note: These terms are commonly used by appraisers to describe appraisals with a narrow scope of work. Regardless of the label used in the assignment, those opinions of value are appraisals as defined in USPAP. An appraiser may perform these assignments under USPAP by complying with the Rules and applicable Standards.*

**SUMMARY:**

- An individual must comply with USPAP when required by law, regulation, or agreement.
- An individual should comply with USPAP when choosing to represent oneself as an appraiser.
- Appraisal practice is a subset of valuation services. Since USPAP obligations apply to those who act as appraisers, USPAP applies to appraisal practice.
- The definition of appraiser and need for public trust establish the factor of "expectation" as the basis for the obligation to comply with USPAP.
- An individual's public identification as an appraiser establishes a justifiable expectation that valuation services will be performed in compliance with USPAP. Because of the need to preserve public trust and confidence.
5. Listen to a short lecture
Credible appraisals are critical to the smooth functioning of the economy. In the legal system the users of these reports need to understand the difference between credible and non-credible reports, creating demand for appraisal experts who can produce and present credible, consistent, and objective assessments and critiques of appraisal work. Experts who have the knowledge and skills to objectively analyze and review appraisals against a set of established rules-based standards in a manner that is defensible and to present those findings clearly in writing and in oral testimony are a critical component of a well-functioning legal system.

The reviewer’s main job in a court of law is:
1) Identify the Standard of Care
2) Opine on if Standard of Care was followed
3) If the Standard of Care was not followed what are the implications in the case.
4) Writing deposition questions (typical areas),
   a. Qualifications
   b. Bias
   c. Opinions
   d. Methodology
   e. Facts relied upon,

6. Other consulting services:
   A. Reviewing documents
   B. Conduct investigations & perform research
   C. Cross-examination questions
   D. Explaining answers, rebuttal questions, etc

7. The instructor will provide a choice of redacted appraisal reports. Alone, take 15 minutes to pick one of the reports and read over it. Highlight (3) area where you have questions and write-up (3) deposition questions for counsel to ask of the appraiser who prepared the WUR (work under review). Share your questions with the class.

Listen to a summary of the main points from task 7
Task 8.1: How does USPAP Apply to the Appraisal Ethics?

1. In Breakout Sessions of 2 or 3 people, take 15 minutes to discuss how AO-21 relates to being an expert witness. Discuss the key points and any areas you are unclear about. When coming back to the main session be prepared to discuss main point with the class.

   - Marie Vaughn has a diverse practice with a specialization in litigation services. She commonly aids attorneys in developing cross-examination strategies for expert witness testimony from appraisers. How does USPAP apply to Marie’s “litigation services”?

     Answer: In order to determine Marie’s obligation, it is necessary to understand the nature of her role. If she is acting as an appraiser, her litigation services are part of appraisal practice. The PREAMBLE, the DEFINITIONS, the ETHICS RULE, the COMPETENCY RULE, and the JURISDICTIONAL EXCEPTION RULE will apply to the assignment. As an appraiser, Marie cannot act as an advocate for any party or issue.

     If Marie’s services include providing an opinion of value, she must also comply with the appropriate appraisal standards (STANDARDS 1 and 2, 7 and 8, or 9 and 10). If Marie’s services include providing an opinion about the quality of another appraiser’s work, the appraisal review requirements of STANDARDS 3 and 4 apply.

     If the service includes providing analysis, recommendation, or an opinion to solve a problem where an opinion of value is a component of the analysis leading to the assignment results, then Marie must comply with the ETHICS RULE, the COMPETENCY RULE and the JURISDICTIONAL EXCEPTION RULE for the entire assignment, and she must also comply with any applicable Rules and Standards if she performs an appraisal or appraisal review as part of the assignment.

     On the other hand, if Marie provides litigation services as an advocate, then she is providing a valuation service outside of appraisal practice. When performing services outside of appraisal practice, Marie can act as an advocate and accept contingent compensation. The only USPAP obligation is that she not misrepresent her role. She must use care to distinguish her role from other roles that would carry an expectation of being impartial, objective, and independent, i.e., acting as an appraiser.

     Marie may provide litigation services by either acting as an appraiser or acting as an advocate for the client’s cause; however, she must not perform both roles in the same case.

2. Participate in a discussion on how USPAP relates to litigation services:
   a. Would providing deposition questions be acting as an advocate?

   b. Give an example of how an appraiser would work as an advocate and not be able to act in Appraisal Practice for the same assignment.

   c. When may an appraiser charge a contingency fee?

3. Question for Students:
   I recently completed an appraisal and forwarded the report to the client. After receiving the report the client called and stated that they have another appraisal that was recently completed and the values differ significantly. They asked if I would look over the other report and point out the primary differences. Does this assignment constitute an appraisal review?

   I am a state certified appraiser and recently performed an appraisal assignment for a client. The client subsequently had an appraisal review performed on my appraisal and the
reviewer brought up some issues that I do not agree with. My client has asked me to provide a written “rebuttal” explaining why I believe I’m correct. In “defending” my appraisal, I am concerned that I would be, at least indirectly, offering an “opinion on the quality of another appraiser’s work that was performed as part of an … appraisal review,” which could mean that I would be required to comply with STANDARDS 3 and 4. Furthermore, I am concerned that in this “rebuttal” I may not be able to be objective and unbiased, since I have an interest in defending my original appraisal. How can I perform this “rebuttal” without violating USPAP?

4. Listen to a summary of the main points.
Task 8.2: Expectation of Independence and Ethics

1. Listen to a short lecture on the importance of independence and ethical behavior.

An expert who operates unethically is subject to sanctions such as prosecution for perjury, civil suits, monetary court fines, professional discipline, which in the case of appraisers may include loss of accreditation, and at least loss of future referrals and damage to reputation. In addition to any ethical standards and codes of professional organizations and accreditation bodies such as the ASA, there are legal ethical considerations that experts must be aware of. An appraiser is defined in USPAP as one who is expected to perform valuation services competently and in a manner that is independent, impartial, and objective. As ASA appraisers, we are bound to USPAP Standard AO-21 [Task 7], which differentiates between standards applying to experts and consultants, especially regarding discovery; the ASA’s Principles of Appraisal Practice and Code of Ethics (in ASA LMS handouts); and any court/legal ethics. In the same way, attorneys are obligated to align with the American Bar Association’s rules of professional conduct. These rules have been adopted by the majority of states, although each state may also have additional rules. In order to maintain independence and avoid charges of defamation, a reviewer should, focus on the quality of the work under review, maintain an unbiased, objective tone, and base all presented findings on factual evidence.

2. Alone, read through this list of common ethical violations by expert witnesses4 and ASA Ethics issues and give specific examples of (4) errors in an appraisal or review. Give specific examples if you have them. Be prepared to discuss with the class.
   a. Investigation not done
   b. Data altered
   c. Conditional engagement undertaken
   d. False testimony
   e. Intentional ignoring of available data
   f. Assignment beyond competence
   g. Contingency fees when working as an appraiser
   h. Inadequate support or time to complete assignment
   i. Conclusion reached before research
   j. Conflicts of interest
   k. Contingency or percentage fees
   l. Advocacy

5. Listen to a summary of the main points.

---

4 Harold Feder, Succeeding as an Expert Witness, CRC Press 2008
Legal System: Structure and Process

Task 9: Understand the Structure of Court systems and other Expert Venues

1. Listen to a lecture on how federal court systems are structured

**Federal Court System**

- Bankruptcy
- Federal Tax
- International issues
- Patent law
- Interstate crimes
- Federal property

**District Courts**: Lowest level in the federal system. 94 districts in 50 states & territories. Original jurisdiction for more federal cases.

**Courts of Appeal**: Intermediate level, 12 regional ‘circuit’ court, including the D.C. circuit. No original jurisdiction only appeals.

**Supreme Court**: Highest court, nine justices, limited original jurisdiction.
2. Listen to a lecture on how state court systems are structured

**State Court System**

- Family law
- Contract law
- Civil
- State tax
- State crimes

**A Typical State Court System**

```
Supreme Court

Intermediate Appeals Court
(in populous states)

Trial Court
(of original general jurisdiction)

Family Court  Juvenile Court  Municipal Court  Probate Court  Criminal Court

Justice's Court
(the court of a Justice of the Peace)

Small Claims Court
```

3. Listen to a lecture on other testifying venues

**Other venues**

- Collaboration with opposing appraiser
- Settlement conferences
- Arbitration, mediation
- Administrative hearings, property tax

2. What court system are appraisers most likely to work in?
3. Listen to a summary of the main points.
End of Session Three

Session Review

1. Describe one thing useful from today.
   a. Describe one thing to think more about.
   b. Listen to a summary of the main points
      i. What is the definition of an appraiser?
      ii. AO-21 the three lanes
          1. Appraisal and review services acting as an appraiser
          2. Other valuation services acting as an appraiser
          3. Other valuation services NOT acting as an appraiser
      iii. Main courts

2. Session 3 Homework
   a. In the ASA LMS the Students watch Direct and Cross Testimony: a series of interviews prepared by Brian Brinig with judges and attorneys on giving court room testimony. PDF with links to several short videos.
   b. Read article in the ASA LMS handouts called “Why do Daubert and Frye Standards Matter to Expert Witnesses?” Highlight key points and underline areas where you have questions.
   c. Read the USPAP competency Rule or IVS statement on competence
Session Four

Session 3 review

Under USPAP AO-21 examples of “Valuation services when not acting as an appraiser” include all except:

A. Auctioning
B. Property management
C. Purchase price allocation
D. Litigation support

Which of the following cases would be heard in a federal court?

E. Contract law
F. Insurance loss claim
G. Family law
H. Bankruptcy

Under FRE Rule 702. A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

A. The expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.
B. The testimony is based on sufficient facts or data
C. The testimony is the product of reliable principles and methods; and the expert has reliably applied the principles and methods to the facts of the case.
D. All the above
Showtime

Task 10: Direct and Cross Examination

1. As a class, review the key points of the Brian Brinig on-demand videos. Effective Direct and Cross Examination

2. Based upon the redacted reports turned in before class, a visiting attorney or the instructor will ask mock deposition questions of each student.

More About Direct Examination (Optional Reading)

The courtroom is like a classroom. The attorney is the teacher, the judge and jury are the students, and the expert is the teacher's aide. Experts should answer the teacher's questions with class so the students in the class can become educated on the subject experts are testifying to and also trust the information given.

On direct examination, the lawyer will ask experts questions. Experts will explain the theories, research, methodology, and processes utilized. Ultimately experts will render an opinion.

Direct examination is the initial questioning of a witness or expert. In court cases, direct is generally performed by the attorney for the "plaintiff" (the person suing) The purpose of a direct examination is to get the witness to testify about facts that support the plaintiff's case. During direct examination, a judge will have some control over the scope and form of the questions. The judge can stop repetitive questioning and prevent a lawyer from asking leading questions, which imply, suggest, or prompt the witness to give a particular answer. However, a judge won't restrict questions unless the other attorney makes an objection. If the plaintiff's attorney is leading the witness, then the attorney for the "defendant" (the person being sued) can object to the question. After listening to the objection, the judge will either sustain (grant) or overrule (deny) it and allow the witness to answer the question.

Most of the direct examination questions will consist of who, what, where, when, how, and why. These questions are known as foundation questions. Experts must be able to lay a foundation, or they will not be allowed to testify about that aspect of the case. On direct, the attorney's use of leading questions (i.e., questions that suggest to the witness the answers the lawyer wants to receive) is very limited. Therefore, expert and attorney must coordinate the testimony in an orderly fashion. A basic understanding of the rules of evidence and the elements of the cause of action involved can aid experts in helping the attorney present the experts' testimony.
Because experts are witnesses, every word they state, whether in a deposition or trial, is documented, given extreme importance, and intensely scrutinized. Experts should avoid absolutes like "always" and "never." All the cross-examiner has to find is one exception to destroy their credibility.

**Exhibit Evidence**
An expert's report is a key part of both direct examination and cross-examination. [Review the Report]. On direct examination, the lawyer will attempt to put the expert's report into evidence as "exhibit evidence." The expert's report speaks just as if it were on the witness stand testifying; therefore, it must speak for itself. Because the report cannot answer cross-examination questions, experts have to endure cross-examination and attacks on their report. It is not an expert's job to be adversarial. Experts should merely answer the questions and remain professional. As mentioned, experts are making a record, so whatever they say will be documented.

**More about Cross Examination (optional reading)**
After the plaintiff's attorney completes the direct examination, the defendant's attorney will cross-examine the witness. Generally, cross-examination is limited to matters covered during the direct examination. The attorney may ask leading questions during cross-examination. Cross-examination is the most important and effective part of litigation. The experts have explained their theories, research, methodology, processes, and ultimately their expert opinion on direct examination. Now the opposing lawyer will use leading questions to pick and choose what to attack and highlight and how to challenge the experts' credibility. Experts should not interrupt the examiner or become argumentative. A qualified and experienced litigator will use leading questions, which, more often than not, can be answered with a yes or no. If experts can answer the question with a yes or no, they should do so and not try to elaborate. Experts can elaborate on redirect examination. Whenever possible, experts are better off explaining an issue with their attorney, not the opponent's attorney. They should resist that urge to explain the flaw in the cross-examiner's portrayal of their opinion during cross.

On cross-examination, attorneys will try to trap experts by using these tactics:
A. The lawyer will try to make the opponent's expert their witness and use the opponent's expert to reinforce their case by attempting to get them to agree to facts that support the lawyer's case without reexplaining the expert's theory.
B. The lawyer will attack an expert's facts, because the expert's opinions are based on his or her facts.
C. Experts need to beware of hypotheticals. The lawyer will change the facts that experts interpret to see how that would change their conclusion.
D. The lawyer will try to expose an expert's bias (i.e. money, friendship).
E. The lawyer will attack the expert's credibility based on treatises, books, or articles of well-known scholars.
F. The lawyer will attack the big and little mistakes in the report.
G. The lawyer will try to expose why the expert's thinking is wrong. (Usually this backfires, so experts need to be patient and calm.)

In response to these tactics, the job of experts is to take their time, answer the question asked, and stay calm. It is acceptable to answer "I don't know," but experts should not use this as an escape. Most important, experts should try to remain consistent with their previous testimony.
from their deposition. One of the easiest ways for an opposing attorney to lower an expert's credibility with the judge is to show inconsistencies with the expert's testimony from deposition and at trial. This process is called impeachment. At the deposition, the expert testified under oath, and a transcript of the proceedings was made. If the opposing attorney finds inconsistencies with the expert's testimony, although the transcript will not be admitted into evidence, the lawyer will use the transcript to attack the expert's credibility and try to impeach him or her.

To survive these tactics, experts must learn to think like litigators. Litigators are very paranoid, and they think of every angle or twist that a piece of evidence can present. They question what different perceptions exist from a sentence of testimony or in a report. Experts should also think of every way a litigator may twist their words.
Establishing yourself as an Expert Witness

Task 11: Expert Witness competence, qualifications, and methodology

1. From the homework in ASA LMS, participate in a conversation on the article “Why do Daubert and Frye Standards Matter to Expert Witnesses?” What are the key points and what do you have questions about.

2. How does the Daubert and Frye Standards relate to the USPAP competency rule?

3. Listen to a summary of the main points.
End of Session Four

Session Review
1. Describe one thing useful from today.
2. Describe one thing to think more about.
3. Listen to a summary of the main points
   a. What is the role of direct examination?
   b. What is the role of cross examination?
   c. What are the purposes of the Daubert and Frye standards?
   d. What are the international equivalents to Daubert and Frye

Session 4 Homework
1. In the ASA LMS Watch Video on Redirect: Jeff Brend - ABCs of Testimony: Start at 55:32
2. Task 13: Go to your LinkedIn page or Statement of Qualifications and improve it based upon what you’ve learned in this task. At the next session the instructor will call on class members to use Screen Share to share their Statement of Qualifications or LinkedIn page and discuss they would or have improve it. Other students are encouraged to make comments and observations.
3. Develop a and be prepared to present thier redacted appraisal to share with the group. Time limit 15 minutes per presentation.
4. Read the USPAP Record Keeping Rule, highlight key points and underline areas where you have questions.
5. Watch Denise Peterson’s on-demand webinar on mediation and arbitration.
   NEED NEW LINK
Session Five

In Cross Examination, which is NOT true:

A. The lawyer will try to make the opponent's expert their witness and use the opponent's expert to reinforce their case by attempting to get them to agree to facts that support the lawyer's case without reexplaning the expert's theory.
B. The lawyer will attack an expert's facts, because the expert's opinions are based on his or her facts.
C. Experts need to make as many hypothetical assumptions as possible to create wiggle room in their testimony.
D. The lawyer will try to expose an expert's bias (i.e. money, friendship).

Daubert and Frye standards apply to percipient witnesses.

A. True
B. False
Task 12: Redirect examination

1. As a class, review the key points of the Jeff Brends’s on-demand videos. Redirect Examination

2. Based upon the questions during cross regarding the redacted reports turned in before class, a visiting attorney or the instructor will ask mock cross questions of each student.

---

More about Redirect Examination (optional reading)

Following cross-examination of the witness, the plaintiff's attorney has an opportunity to ask the witness follow-up questions regarding topics discussed during the cross. After this, the opposing attorney can conduct a final recross examination of the witness, which is limited to the subjects brought up during the redirect.

The opposing attorney may not give experts an opportunity to explain why there are inconsistencies in their report or testimony, but that is okay. The experts' attorney will have an opportunity to "rehabilitate" them on redirect examination by asking questions either to clarify or expand on any answers that may have been damaging.

Experts should remain confident, knowing that they can rely on their attorney to clarify their position on redirect. However, it is highly unlikely that the experts' attorney has the financial sophistication to know that an expert needs to be rehabilitated. Therefore, experts should establish a signal to alert the attorney that they want to be asked on redirect a question that allows them to clarify their answer on cross-examination.

2. Listen to a summary of the main points.
Task 13: Developing a reputation as the Go-To expert

1. Listen to a short lecture and participate in a discussion about marketing your expert witness practice:

Attorneys are looking for expert witnesses and consultants who can help them win cases. All you need to do is make sure they can find you and that you have the qualifications they’re looking for.

**Marketing your Expert Witness Services**

1. Word of mouth, referrals
2. Networking
3. Publishing
4. Social media
5. Website
6. Advertising
7. Listing services

**Defining the type of work you do and don’t want to accept**

- Local / regional / national
- Types of cases
  - Family law
  - Property tax
  - Income tax (estate & gift)
  - Loss claims
  - Shareholder disputes
  - Diminution of value
  - Lost profits
  - Bankruptcy
  - Eminent domain
- Property types
- State court / federal court

**Expert witness website**

If you don’t have a website you are not in business

- Dedicated expert witness page
- Know the key word your target group uses
- About page: CV watermarked “not retained,” professional picture
- Blogs: long-tail theory

**Getting in front of target attorneys**

- Have a solid elevator pitch
- Local bar association sections: family law, real estate, business law, bankruptcy etc
- Targeted CE in the types of cases you are intersected in and participate
- Other trade associations i.e. Estate Planning Council, State CPA society section, IRWA, IAAO, Academy of Matrimonial Attorneys
- Fundraisers and other social events
- Target attorney listserves
### Social media, LinkedIn
- Give presentations i.e. most common appraisal mistakes
- Publish articles
- Direct contact and meeting

### Listen to a discussion about advertising:
- Expert listing services (Juris Pro, Experts.com vs. Expert Services, TASA, Round Table)
- Paid advertising in Bar Associations
- Direct letters
- Trade publications
- Social media

### Spotting an attorney you don’t want to work with
- Poor planning skills
- Needs to appoint an expert ASAP
- Poor communication skills
- Doesn’t return phone calls
- Doesn’t take your concerns seriously
- Doesn’t provide documents
- Doesn’t want the whole truth
- Wants you to do work without being retained
- Endless edits to professional services agreement
- Doesn’t read agreement or report
Task 14: Opportunities for an Appraisal Expert Witness

1. Group discussion on the types of expert witness areas appraisers might work in

- Family law
  - Family law court
  - Private judge
  - Settlement conferences
- Shareholder disputes
  - Minority shareholder buy out, i.e. CA § 2000
- Contract law
  - Losses due to failure to perform
- Insurance loss claims
  - Insurance company or Insured
  - Appraisal review / referee
- Bankruptcy
  - Exclusions
  - Buy / sell discussions
- Estate and gift
  - Tax
  - disputes
- Property tax
  - Discussion with assessor
  - Administrative hearings before a board
  - Court of law
- Eminent Domain
  - Settlement conference
  - Court

2. HOMEWORK: Write a paragraph of the areas where you could provide expert witness services and who specifically do you need to contact to learn more about how to gain access to that market?

3. Listen to a summary of the main points.
Task 15: Other Expert Witness Appearances

1. Students watch on-demand video by Denise Peterson, JD on mediation and arbitration.
2. Students discuss key point of Ms. Peterson’s webinar
3. Each student presents the findings in their redacted appraisal to the group. Time limit 15 minutes per presentation
End of Session Five

Session Review
1. Describe one thing useful from today.
2. Describe one thing to think more about.
3. Listen to a summary of the main points
   a) How to excel at redirect testimony
   b) Key points to the marketing a litigation support business
   c) Review other expert witness venues and areas of testimony.

Homework
1. In the [ASA LMS] Watch to Brian Brinig’s on-demand webinar "Managing an Expert Witness Practice" Video
2. Read the USPAP record keeping rule
3. Review all the past tasks from the course and write up two test questions for each task.
Session Six

Summary of Session Five

1. Complete confidentiality of what each client shares with the appraiser is best practices in a shared expert assignment.
   
   A. True
   
   B. False
   
3. Marketing for expert witness work should include all except
   
   A. Website with a dedicated expert witness page
   
   B. A CV watermarked “not retained
   
   C. Published articles
   
   D. Extensive “About Us” page listing all cases you’ve worked on
   
4. What must an expert disclosure include?

5. What type of communication is often not discoverable?

6. What is the penalty for willingly not adhering to the USPAP Record Keeping Rule?

7. When should you do a conflict check for a case?
Case Management

Task 16: Communications: Documents provided, Emails, Texts

Student participate in a discussion about how the following communications should be handled in a litigation setting.

1) Emails

2) Phone calls

3) Text messages

4) Privileged communication

5) Notes

6) Paper and electronic files

7) Drafts

Listen to a summary of the main points.
Task 17: Retention/Services Agreements

1. Based on webinar the "Managing an Expert Witness Practice" Video, participate in discussion regarding retention the following.

When first discussing a case with an attorney:

Participate a group discussion on the main points of Brian Brinig’s practice Mgt webinar
Many shareholder agreements, insurance policies, family law cases, and some state statutes require a “neutral third-party expert” or “shard expert” to be hired to resolve a dispute. When doing this, you usually have (2) clients which can put you in a vulnerable position. Best practices for being a “shared expert.”

- Put “neutral third-party expert” or “shard expert” prominently in agreement.
- Compete transparency is key to maintaining an objective position. Too much communication through all phases of the case is just enough.
- No privileged / secret communication. Keep all parties informed of all communications. I.e When one party leaves a voicemail about an issue answer with email to both parties.
- If one party is uncooperative inform both parties of the problem in a clear and even tone.
- If parties to the dispute are present at the site inspection be clear about expected professional conduct. If verbal or physical disputes arise do not be afraid leave the property and reschedule for another time when the parties can make arrangement for the such a problem not to arise again.
- Don’t release report until bill is paid in full.

2. Group discussion on other related topics:
   a. Appraisal vs. Testimony fees
   b. Billing and collections
   c. Travel and data fees
   d. E&O insurance

3. Listen to a summary of the main points.
Task 18: Records and Evidence Handling

1. Join is a class discussion about the key points of the USPAP record keeping rule.

2. How does the USPAP Ethics Rule relate the discovery process of a lawsuit?

3. Listen to a short lecture from the instructor on record keeping
   1. Document log: client provided information
      a) Date
      b) Sender
      c) File name
      d) Description
   2. Work paper and testimony
      a) Cross referencing to and from
      b) File on electronic documents (batch PDF labeler like SaintJohnny)
   3. Emails
      a) Print all emails to one giant PDF file (“save to email to pdf”)

4. Listen to a summary of the main points.

Best Practices for Expert Practice Management (Optional Reading)
Participate in a discussion on the best practices for expert practice management. A volunteer from the class will read the elements of each section and the instructor will lead the class in the related key points.
1. Responding to inquiries
   a) Collect information:
   b) Attorney & firm with contact info, references, how did they find you?
   c) The case: how big a case is it? What is the budget?
   d) Parties to the case: conflicts or potential conflicts? Location of trial?
   e) Issues: are you qualified? What other experts are already retained?
   f) Statement of Qualification up to date.
   g) Deadlines & schedules
   h) Initial correspondence/next steps: What do you need from the attorney? Retainer, signed agreement, more information? What does the attorney need from you? NDA, updated CV?
   i) Create a file/system for collecting/retrieving information (See more on filing to follow)
   j) Case name and number
   k) Retaining law firm / party
   l) Court/location
   m) Other
2. Accepting or Rejecting
   a) Acceptance: Do not do any work on the case or formally agree to work for the
      attorney without a minimum of retainer and a signed well-formulated agreement that
      includes counsel’s agreement to provide a replenishable, non-refundable retainer.
      Verify that all these items and whatever else you need has been provided before you
      begin any work on the case.
   b) Rejection: Let the inquiring attorney know as soon as possible when you determine
      not to take the case.

3. Pursuant to Federal Rule of Civil Procedure 26(2)(B), accepting a federal court case
   mandates you submit a report containing the items listed below. Note especially the last
   two items and consider maintaining and updating those lists on a regular basis rather than
   have to recreate upon demand.
   a) A complete statement of all opinions to be expressed
   b) Basis and reasons for the opinions
   c) Data or other information considered
   d) Any exhibits to be used in summary of the opinions
   e) Any exhibits to be used as support for the opinions
   f) Statement of Qualifications of the witness
   g) Amount of compensations to be paid for the study and testimony
   h) List of all publications authored by the witness in the proceeding 10 years (including
      blogs)
   i) List of any cases in which the witness has testified as an expert at trial or by
      deposition within the proceeding four years

4. Documents: Receiving & Filing
   Your files, electronic or paper, need to be complete, well-organized, easily accessible, and
   free of irrelevant information.
   a) Create and use a system of filing all documents received; it may be useful to keep a
      spreadsheet that records dates received/sent.
   b) Action requests regarding documents, such as requests for a report or a notice of a
      deposition, should be immediately noted in your calendaring system.
   c) Have a standard cross-referencing system for your workfile and use it in both
      directions. Cross-referencing system should be effective for electronic and paper work
      papers such that they can be easily accessed while giving testimony.
   d) Keep files in the appropriate folders & label them intelligently using as many words
      as necessary. Well-organized workpaper files bolster your image, increase your
      confidence, reduce non-billable time and make your & retaining counsel’s life easier.
   e) Keep irrelevant information out of the file. Review the file periodically, and especially
      before responding to a subpoena, to make sure nothing has been inadvertently saved
      to it. This is especially easy to do with electronic files.
   f) Not complying with USPAP recording keeping rules: Experts other than appraisers
      are often encouraged to clear their records of the case, transferring everything to the
      retaining attorney, including reports, exhibits, correspondence, deposition transcripts.
      The retainer agreement is a good place to state age that you will keep records to
      comply with USPAP standards.
   g) Come to depositions prepared with ONLY the materials that were asked for in the
      subpoena.
5. Billing and payment
   a) Get a sufficient and reasonable retainer relevant to the Scope of Work.
   b) Track time in an accurate and well documented manner. This is especially true for phone calls. Consider using Toggl or some other time tracking app.
   c) Do periodic invoicing so your client is not surprised by a large invoice.
   d) Pre bill for any large expenditures like travel.
   e) Generally deposing counsel pays the deponent for their reasonable standard hourly rate. Know in advance the regulations in your jurisdiction for who is paying for deposition time and how you are to be paid. Clarify this with retaining counsel to make sure everyone is clear. Note that the attorney’s may make other arrangements whereby the retaining firm pays deposition fees for their own experts. For example CCP § 2031.430(b):
      http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=CCP&sectionNum=2034.430
   f) Come to depositions with a blank invoice and W-9.
   g) Have a clause in your agreement whereby your client is responsible for any unpaid deposition fees.

6. Staff training & etiquette
   a) Poorly trained or uneducated staff can destroy an expert. If you have staff, you’ll want to take the time to get them on board with appropriate systems, policies and procedures when dealing with attorneys. This is especially true for areas of etiquette and confidentiality. I.e. referring to attorney’s by “counselor” opposing counsel, experts and client by Ms or Mr..

7. Listen to a summary of the main points.
End of Session Six

Session Review

1. Describe one thing useful from today.
2. Describe one thing to think more about.
3. Listen to a summary of the main points
Task 19: Course Review

1. Students divide into small groups and gather in zoom break out rooms. The tasks in the table of contents are divided up between the groups. Each group develops three questions for each task. When small groups return to the large group, they ask the large group their questions.
Additional Training Opportunities

1. Listen to a summary of other continuing education opportunities.

Working as an expert witness requires that you stay current on the best practices in your area. Here are areas you may consider helpful for that purpose.

- Retake ASA POV and other specialty classes as they are rewritten and new material is added.
- Take word processing and spreadsheet classes to ensure that your reports look professional.
- Study and read books on the best way to present complex information so that it is understandable to those outside your profession.
- Take speaker training classes to become comfortable and more effective speaking to groups.
- Hire a speaking coach.
- Join your local Bar Associations and offer to prepare presentations for them.
- Join the FEWA (Forensic Expert Witness Association [https://forensic.org/](https://forensic.org/)) and go to their annual conference.
- Take advanced expert witness training classes from organizations like SEAK [https://seak.com/](https://seak.com/).