



January/February 2015

From the Director

I hope you all enjoyed the holiday season. The majority of renewals are now in and the numbers are looking fairly good. As always with renewal, there are licensees who failed to complete their continuing education, didn't renew their errors and omission's insurance or didn't renew their license. It is very easy for the Commission staff to see if these licensees are actively practicing real estate. The Commission takes this very seriously and has sent a number complaints and fines to licensees who engaged in real estate activities without an active license. An agent that doesn't have any listings is still considered to be practicing real estate simply by being listed on the company's website as available for representation.

The Commission will be keeping a close eye on legislation being proposed this legislative session. It's always a good idea to talk to your legislators and keep an eye on bills that may be of interest to you and your business.

The Spring Caravan will be here before you know it. Registration will be in the next newsletter.

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[South Dakota Real Estate Commission](#)

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Save the Date – Spring Education Caravan

National property management expert Judy Cook will be the Spring Education Caravan speaker. Judy's presentation, "Property Management: Tips, Tricks, Tools, and Torts" will provide interesting insight into today's world of property management. Here are the dates and locations:

April 23 – Sioux Falls Ramkota
April 24 – Sioux Falls Ramkota
May 5 – Rapid City Rushmore Plaza Civic Center
May 6 – Pierre Ramkota
May 7 – Aberdeen Ramkota

Detailed course and registration information will be in the March/April issue of the Real Estate VIEW. Online registration will be available beginning in mid-March. Registration forms will also be mailed to brokerage/property management/home inspection companies.

Active Licenses Require Active Participation

As it was mentioned in the Director's Column, the SDREC office has sent a number of Consent Agreements to individuals who did not comply with the requirements to maintain active licenses.

The SDREC makes every effort to ensure that licensees understand their responsibility to maintain their licenses, including renewal, E&O insurance and education requirements. Notices for license and E&O insurance renewals were mailed in early October and are available on the website. The SDREC does not have any control over mail delivery. It is the licensee's responsibility to ensure that the license and/or E&O insurance is renewed in a timely manner, regardless of receiving or not receiving the renewal materials.

The requirements to keep an active license and the deadlines by which to meet them are not a surprise. The information is readily available from the SDREC office and staff are easily accessible to answer questions. Licensees must take ownership of the rest.

Property Manager Association Settles FTC Anti-Competition Allegations –

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The U.S. Federal Trade Commission (FTC) recently announced the finalization of a settlement agreement under which the National Association of Residential Property Managers (NARPM) will amend its Code of Ethics provisions that prohibit members from soliciting competitors' clients and criticizing other property managers.

The FTC is a federal agency whose broad statutory consumer protection mandate includes enforcement of Section 5 of the FTC Act [15 U.S.C. section 45], which prohibits, among other things, unfair methods of competition in or affecting commerce. NARPM is a non-profit professional association comprised of about 4,000 real estate agents, brokers, managers and their employees who are in the business of managing single and multi-family residential properties, condominiums, townhouses, and shortterm rentals. According to the FTC, some NARPM members also manage commercial and industrial properties, and homeowners' associations.

After an investigation, the FTC's Bureau of Competition earlier this year furnished NARPM with a draft administrative complaint, alleging that NARPM's Code of Ethics violated Section 5 of the FTC Act. In particular, the complaint alleged that NARPM "...acted as a combination of its members, and in agreement with at least some of those members, to restrain competition by restricting through its Code of Ethics, the ability of its members to advertise and to solicit the clients of their competitors." Specifically, the complaint focused on two Code of Ethics provisions with which members agreed to abide as a condition of membership:

- "The Property Manager shall not knowingly solicit competitor's clients", and;
- "NARPM Professional Members shall refrain from criticizing other property managers or their business practices."

The draft complaint alleged that the challenged Code of Ethics provisions unreasonably and therefore unlawfully restrained competition, injured consumers by discouraging and restricting competition, restricted truthful and non-deceptive comparative advertising, and deprived consumers and others of the benefits of free and open competition among property managers.

After a period of public comment, the FTC recently approved final orders settling the proposed allegations pursuant to a consent agreement under which NARPM must cease and desist from barring its members from the solicitation of property management work and restraining members from making statements about competitors' products, services, business or commercial practices. However, NARPM will not be prohibited from adopting and enforcing reasonable principles, rules, guidelines, or policies governing the conduct of its members with respect to representations that are reasonably believed to be false or deceptive within the meaning of Section 5 of the FTC Act.

Among the detailed terms of the agreed FTC orders, NARPM is required to amend its Code of Ethics accordingly; advise its members of and publish the order and related materials periodically; maintain an Antitrust Compliance Program and name an Antitrust Compliance officer, which for a period of time will be the association's president-elect; amend ethics education programs accordingly; submit periodic reports; and take other steps to ensure FTC Act compliance. Pursuant to the settlement, NARPM did not admit that it violated the law as alleged in the complaint or that the facts alleged in the complaint, other than jurisdictional facts, are true.

In a related press release the FTC said that the NARPM proceedings, along with a similar action taken against the Nation Association of Teachers of Singing, Inc., are the latest of its enforcement efforts challenging restraints on competition that are incorporated into the ethics codes of professional associations.

Disciplinary Actions

The following actions by the Commission have become effective since the last report in the newsletter. A **Consent Agreement** is an admission of violation and voluntary acceptance of the terms determined by the Commission in lieu of a formal hearing. **Findings of Fact, Conclusions of Law, and Order** are the result of a formal hearing.

Dena Sheets, Sturgis, Property Manager. Consent Agreement. Violation of 36-21A-71(1)&(32), and 36-21A-132(1)&(2) for failure to keep client's personal information confidential. Administrative fine of \$2500 and completion of six hours of License Law.

Martin Jurisch, New Underwood, Broker. Consent Agreement. Violation of 36-21A-71(1)&(32), and 36-21A-132(1)&(2) for failure to keep client's personal information confidential. Completion of six hours of License Law.

Trina Wheeler, Piedmont, Property Manager. Consent Agreement. Violation of 36-21A-28, 36-21A-71(1), and 36-21A-72 for advertising services that require a license and practicing property management without a license. Administrative fine of \$500 and completion of three hours of License Law.

Christle Robinson, Lead, Broker. Consent Agreement. Violation of 36-21A-71(1),(30),&(32), and 36-21A-140(1)&(2) for failure to exercise reasonable skill for her client, to perform the terms of a written agreement and for failing to present a real estate relationship disclosure for her real estate firm. Administrative fine of \$500 and completion of six hours of License Law and three hours of Agency.

Carmen (Bickford) Kuchenbecker, Rapid City, Broker. Consent Agreement. Violation of 36-21A-71(1),(30),&(32), and 36-21A-140(1)&(2) for failure to exercise reasonable skill for her client and to perform the terms of a written agreement. Administrative fine of \$500 and completion of six hours of License Law and six hours of Agency.

Matt Larson, Luverne, MN, Broker. Consent Agreement (#1). Violation of 36-21A-71(1), 36-21A-52, 36-21A-79 and 36-21A-141.1 for failure to properly appoint a broker associate as the client's appointed agent, to properly supervise associated licensees affiliated and to register a change of business location within ten days. Administrative fine of \$2500 and completion of the 15-hour Responsible Broker course. **Consent Agreement (#2).** Violation of 36-21A-71(1) and 36-21A-79 for failure to properly supervise associated licensees by allowing a property to be marketed after the expiration of the listing agreement. Administrative fine of \$500 and completion of six hours of Contracts.

Meredith Lee, Pierre, Broker. Consent Agreement. Violation of 36-21A-71(1), and 36-21A-80 for failure to reconcile trust account to the bank statement, trust ledger and/or check register at least monthly. Administrative fine of \$500.

Caleb Veldhouse, Sioux Falls, Broker. Consent Agreement. Violation of 36-21A-71(1), and 36-21A-52 for failure to register a new place of business or change of business location within ten days. Administrative fine of \$100.

Nicole Rozema, Hill City, Property Manager. Consent Agreement. Violation of 36-21A-71(1), and 36-21A-52 for failure to register a new place of business or change of business location within ten days. Administrative fine of \$100.

Carl Haberstick, Huron, Broker. Consent Agreement. Violation of 36-21A-71(1), and 36-21A-52 for failure to register a new place of business or change of business location within ten days. Administrative fine of \$100.

Ted Thoms, Sioux Falls, Broker. Consent Agreement. Violation of 36-21A-71(1), and 36-21A-52 for failure to register a new place of business or change of business location within ten days. Administrative fine of \$100.

Disciplinary Actions *(continued)*

Kari Bartling-Somsen, Webster, Broker. Consent Agreement. Violation of 36-21A-71(1), and 36-21A-52 for failure to register a new place of business or change of business location within ten days. Administrative fine of \$100.

Bruce Holmes, Oklahoma City, OK, Broker. Consent Agreement. Violation of 36-21A-71(1), and 36-21A-52 for failure to register a new place of business or change of business location within ten days. Administrative fine of \$100.

Kim Benning, Hill City, Broker. Consent Agreement. Violation of 36-21A-71(1), and 36-21A-55 for failure to notify the commission of any process or pleading to which the licensee is a party. Administrative fine of \$100.

New Licenses

Broker Associate

Beck, Jennifer C – Sioux Falls
Dawes, Kristi – Tea
Ewing, Kyle – Rapid City
Glaser, Shelley D – Sioux Falls
Grote Wolters, Joshua – Sioux Falls
Heupel, Kimberly A – Aberdeen
Konstant, Alexis P – Sioux Falls
Leboldus, Karen J – Sioux Falls
McIntosh, Gabrielle Y – Watertown
Nagel, Heather L – Harrisburg
Pluim, Monica E – Sioux Falls
Sabby, Holly E – Sioux Falls
Small, Cory R – Sioux Falls
Swenson, Bradley J – Sioux Falls
Thomas, Abigail L – Watertown
Wensing, David J – Florence
Widen, Nathaniel J – Sioux Falls

Christensen, Tara L – Sioux Falls
DeVillie, Corey L – Sioux Falls
Geffre, Ronda – Leola
Gordon, Devin J – Sioux Falls
Hall, Todd J – Rapid City
Johnson, Devon D – Sioux Falls
Larson, Shelly A – Rapid City
Martin, Michael B – Sioux Falls
Meyer, Beth E – Sioux Falls
Paysen, Amber M – Milbank
Quail, Christopher L – Rapid City
Simek, Elizabeth A – Tyndall
Solum, Sally J – Tea
Taylor, Heather A – Worthing
Thompson, Kayla M – Sioux Falls
White, Kent A – Brookings

Broker

Brendtro, Daniel K – Sioux Falls
Meyer Clarkson, Nici S – Mandan, ND
Schlosser, Gerald J – Bismarck, ND

McKillip, Tony B – Sioux Falls
Richardson, Arlene M – Irvine, CA
Trucano, James E – North Sioux City

Salesperson

Hoffman, Valorie J – Beardsley, MN

Residential Rental Agent

Blenner, Jami L – Sioux Falls
Kemmet, Kay – Sioux Falls
Meirose, Kristi J – Sioux Falls
Price, Daniel D – Sioux Falls

Carlton, Nancy L – Canton
Kjenstad, Julie – Watertown
Meyer, Ashly E – Sioux Falls
Wehrkamp, Stephanie R – Sioux Falls

Property Manager

Azinger, Robert Patrick – Hot Springs
Gleave, Damion S – Rapid City
Muller, Amber R – Aurora
Zigmond, Mandi J – Sioux Falls

Blau, Nicholas J – Larchwood, IA
Goodwin, Collin B – Box Elder
Wenzlaff, Sarah A – Madison

Registered Home Inspector

Cazer, Blair R – Tea
Rude, Justin – Stockholm

Hohn, Joshua K – Sioux Falls

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Appraiser Update

New Licensees – November/December 2014

Melissa A. Roe, State-Registered – Watertown, SD
Randy Seale, State-Certified General – Houston, TX
Darryl L. Risting, State-Certified General – Cedar Rapids, IA

Upgrades Issued November/December 2014

Deborah, Ellerton, State-Licensed – Rapid City, SD
Shandi McFarling, State-Licensed – Pierre, SD
Timothy O'Hara, State-Certified Residential – Yankton, SD
Michael Craven, State-Certified Residential – Rapid City, SD
Janis Culverhouse, State-Certified Residential – Caputa, SD
Kristine Juelfs, State-Certified Residential – Belle Fourche, SD
Angela Engebretson, State-Certified Residential – Watertown, SD
Beverly Luke, State-Licensed – Rapid City, SD
Jarrett Mackey, State-Certified Residential – Rapid City, SD
Kristine Rathjen, State-Certified Residential – Huron, SD

Review of Cases – January 1 - December 31, 2014

For the period January 1, 2014 through December 31, 2014, the Department has initiated six complaint investigations, sixteen upgrade cases and three new applicants claiming experience cases.

Complaints – four closed, two pending.
Upgrades – thirteen closed, three pending.
New With Experience – two closed, one pending.

Courting Good News Appraisers ride a wave of favorable court decisions

[Permission to reprint the following article from “Valuation – Third Quarter 2014” granted by the Appraisal Institute] By Peter Christensen (General Counsel, LIA Administrators & Insurance Services)

I must give credit to Bill Garber and Scott Dibiasio who handle government relations for the Appraisal Institute and who, in addition to all their legislative work, do a fantastic job of keeping abreast of court development that affect appraisers.

Earlier this year, they sent me an article on several New York court decisions that dismissed lawsuits by borrowers against appraisers who had performed appraisals for their loans. In one case, the plaintiff-borrower had purchased a Manhattan apartment. The bank's appraiser reported the unit as 451 square feet. A later appraisal by a different appraiser (for the purpose of refinancing) reported the unit as 376 square feet and concluded the value was \$100,000 lower. The borrower sued the original lender and the first appraiser, contending they were negligent and that their negligence caused him to make the now-regretted purchase. The trial court dismissed the lawsuit, finding that the borrower's alleged "reliance on the misrepresentation of the size of the apartment was not reasonable or justified. Plaintiff could have easily measured the apartment for himself" or hired his own appraiser. The decision was upheld on appeal.

Garber and Dibiosio suggested then that the favorable rulings in New York might be a trend. I couldn't see it – perhaps the unrelenting beat of litigation against appraisers over the last seven years made me wary – but now that we're well into the year I'm ready to say there is a trend.

Appealing Verdict

On balance, the last year has been very good for both residential and commercial appraisers in the courts, especially in the appellate courts where key case law is made. The trend has been to confine the parties to whom appraisers genuinely owe a legal duty of care and away from further expansion of the liability of appraisers to third parties other than those who are the intended users of the appraiser's work.

Earlier this year, the Arizona Court of Appeals considered three cases filed by a nonprofit housing developer against three different appraisers. The developer specialized in purchasing real estate-owned/foreclosed residential properties and flipping them after renovation. The appraisals for loans to prospective purchasers had come in lower than the contract prices on three properties. For example, the contract price for one of the properties was \$140,000 but the appraiser's opinion of value was \$127,000. The lenders decided against making the loans (at least, not at those sale prices), and so the purchasers canceled their transactions. The developer later sold each property to a different buyer for a lower sale price. The developer then sued each appraiser, alleging negligence and demanding damages for lost profits on the sales that did not close. The developer's basic allegations were closely similar in each complaint: The appraiser had "breached his duty to all parties to the transaction," thus "caus[ing] the lender to decline to underwrite the loan and effectively canceling the sale." On motions, the trial courts ruled against the developer, finding that the appraisers owed no legal duty to the developer/seller and therefore could not be sued for negligence by the developer. The developer appealed all three cases.

The Arizona appellate court affirmed each dismissal. In its decision, the appellate court summarized the relevant law in Arizona: "To state a claim for relief for negligent misrepresentation, including those presented here – that the defendants were negligent in their appraisals – a plaintiff must allege, among other elements, that he was owed a duty of care by the defendant." The court then found the appraisers owed no duty to the developer because appraisers only owe such a duty to "a limited group of persons or entities specifically intended to be benefited or guided by the appraiser" and, here the appraisers did not intend for their appraisals to benefit or guide the developer or any seller. The appellate court noted that to support a claim for negligence, the developer would have to show "the appraiser intended that the appraisal information would influence the seller."

This appellate court decision concluding that a seller could not sue appraisers over appraisals performed for lenders might not sound like a major victory, but it is – especially in Arizona where the courts previously have expanded the ability of borrowers to sue appraisers. There were fears that the court would open the door to sellers, as well.

No Legal Duty

In June, the Georgia Court of Appeals took up the issue of a negligence claim filed by an investor against a commercial appraiser and appraisal firm. A bank had earlier extended a mortgage loan to a borrower secured by 25 unfinished development lots. That loan was now in default, and the investor wanted to acquire the debt, foreclose on it and then own the lots so they could be developed and sold. To accomplish this plan, the investor obtained a new loan from the bank for which the bank obtained an appraisal from the defendant appraiser. The appraisal report stated, "This report is intended for use by ... [bank]. Use of this report by others is not intended by the appraiser. This report is intended only for use in providing data upon which the client may analyze the property as collateral for a mortgage loan." The report also noted a specific limiting condition, "This development was built over an abandoned landfill. This valuation assumes that all environmental issues have been or will be resolved."

Courting Good News - continued

The investor acquired the vacant lots and obtained a development loan from the bank but never completed the project because the cost of the environmental cleanup of buried trash became too expensive. The investor then sued the appraiser, and as with the other cases noted in this article, one of the sticky legal issues was whether or not the appraiser owed a legal duty to the investor. Without such a duty, a claim for negligence cannot exist under the law. The trial court ruled that the appraiser did not owe a legal duty to the investor, finding that the appraiser had no intention or knowledge that the investor would rely on the appraisal. Upholding that decision on appeal, the Georgia Court of Appeals pointed specifically to the face of the appraisal report with its language limiting use of the report to the client bank only.

Lessons to Be Taken

The recent wave of appellate court decisions confining the ability of third parties to sue appraisers is encouraging. For the last decade, claims by borrowers and sellers have made up a strong majority of claims, but when appraisers do a good job in their reports of appropriately and narrowly defining the intended users and uses of their reports, appraisers will often win these lawsuits. Take the time to address these issues thoughtfully and don't simply rely on the same common boilerplate. With borrowers and sellers accounting for so many legal claims, consider adding additional language in lending appraisals that gets right to the point: "No purchaser or seller of the subject property nor any borrower are intended users of this appraisal and no such parties should use or rely on this appraisal for any purpose. All such parties are advised to consult with appraisers or other professionals of their own choosing." The point can be made in many different ways, but of course, the clearer, the better.

Appraisal Standards Board - USPAP Q&A

2014-07: APPRAISAL REPORTING – USE AND FORMAT ISSUES

Explaining the Exclusion of Approaches

Question: The Comments to Standards Rules 2-2, 8-2, and 10-2 state that the exclusion of any of the three approaches to value "must be explained." In this context, what does "explained" mean?

If, for example, the cost approach is not developed:

- Is it sufficient to state that the cost approach was considered, but not developed?
- Is it sufficient to state that the appraiser does not consider the cost approach necessary for credible results, thus it has not been developed? If not, what should the appraiser do to comply with USPAP?

Response: Simply stating that an approach was not developed does not meet the USPAP requirement to explain why it was not developed.

Stating that an approach was not necessary, without providing some basis for that opinion, also fails to meet the definition of explain. The report must explain why an excluded approach is not necessary for credible results.

"Explained" is not a defined term in USPAP and therefore has no special meaning. A dictionary definition of explain is "to give the reason for or cause of."

The USPAP requirement to include an explanation for the exclusion of an approach to value from the analysis is necessary to provide the client and other intended users with insight into the appraiser's decision as to why the analysis was not performed.

2014-08: APPRAISAL DEVELOPMENT – SUBJECT PROPERTY SALES HISTORY

Value Conclusion Below Contract Price

Appraisal Standards Board - USPAP Q&A – cont.

Question: I recently submitted an appraisal report to an Appraisal Management Company (AMC). The value conclusion in the report was below the contract sale price. The AMC, acting on behalf of the client, sent me the following request:

“Discuss the lack of support for the contract price, considering the subject’s features, any changes in market conditions between the contract and effective dates, the details of the contract, etc., which you believe may have contributed to the issue. If there is no apparent reason for the lack of support of the contract price, state that within your report.”

Do I have to respond to this request to comply with USPAP?

Response: USPAP compliance does not specifically require the appraiser respond to this particular request, but it does require that the appraiser analyze the pending sale and summarize the results of that analysis in the appraisal report.

An appraiser is not engaged for the purpose of supporting a contract price, but rather to form an opinion of, in this instance, the market value of the subject property. The appraiser must comply with the Conduct section of the ETHICS RULE, which states, in part:

An appraiser must perform assignments with impartiality, objectivity, and independence, and without accommodation of personal interests.

Standards Rule 1-5(a) requires the appraiser to analyze all agreements of sale (if available in the normal course of business). The Comments to Standards Rules 2-2(a)(viii) and 2-2(b)(viii) state, in part:

When reporting an opinion of market value, a summary of the results of analyzing the subject sales, agreements of sale, options, and listings in accordance with Standard Rule 1-5 is required.

If the above requirements have been met, the client’s request may already have been addressed.

If the appraiser has not met the requirements, then the client’s request is valid in terms of lack of disclosure of the analysis of the agreement of sale. As previously stated, the appraiser’s opinion of value should be supported, not the difference between the contract and the opinion of value.

2014-09: ETHICS RULE – MANAGEMENT

“USPAP Certified” Advertisement

Question: I have seen numerous advertisements from individuals who may have completed a USPAP course, and describe themselves as “USPAP Certified Appraisers,” or their reports as “USPAP Certified Appraisals.” Is this an actual credential, and if not is that wording misleading?

Response: There is no such credential. The use of the expression “USPAP Certified Appraiser” is misleading. Completing a USPAP course does not entitle one to call oneself a USPAP Certified Appraiser.

One requirement for an appraisal or appraisal review is that the report include the appraiser’s certification that to the best of his or her knowledge and belief the work was performed “in conformity with the Uniform Standards of Professional Appraisal Practice.” The use of language such as “USPAP Certified Appraisal” could be taken by intended users to mean that there was some independent certification of compliance. If that could be inferred from the language used, this would also be misleading.

{The USPAP Q&A is posted on The Appraisal Foundation website (www.appraisalfoundation.org)}