



November/December
2014

From the Director

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The end of the year will be here before you know it and with that, all active licensees renewing in 2014 should have met all the requirements to maintain an active status. Failure to do so results in either the license being placed on inactive status or not being licensed at all. If a licensee continues to practice real estate in those instances, they will be sent a complaint/consent agreement and no less than a \$100 penalty. The penalty can also be assessed against a responsible broker who continues to be associated with a licensee who does not hold an active license. Responsible brokers — please check the licenses of your associates to make sure they are licensed to do business in 2015.

Another reminder, if your errors and omissions insurance expires on December 31st and you haven't renewed your errors and omissions insurance, or provided the Commission a certificate of coverage, you cannot be on active status effective January 1st. I suggest to those of you who are responsible brokers that this would be a good time to make sure all the licensees in your office will be able to remain active on January 1st.

The SDREC Forms Task Force has made changes to the Buyer Agreement (now called Agency Agreement – Purchaser), Listing Agreement (now called Agency Agreement – Owner) and Real Estate Relationship Disclosure form. They are posted on the SDREC website. The changes to the Real Estate Relationship Disclosure and Agency Agreement forms were made to better explain agency relationships.

I wish you a wonderful holiday season!

New Forms Available Online

The Forms Task Force has completed its work on revising some of the SDREC forms. These new forms are now available on the SDREC website. The revised forms are the Real Estate Relationship Disclosure and the Buyer/Listing Agreements.

Licensees can continue to use the old forms and/or forms provided by their local REALTOR Association. These forms are considered to be substantially similar to what is prescribed by the SDREC.

Changes to the SDREC forms include:

- The Real Estate Relationship Disclosure Form now includes an option to provide the consumer with an electronic version of the Consumer Guide.
- The Listing Agreement is now called “Agency Agreement – Owner”.
- The Buyer Agreement is now called “Agency Agreement – Purchaser”. Instead of separate forms for Exclusive and Non-Exclusive, there is just one agreement form with a check-box option to indicate either Exclusive or Non-Exclusive.
- The Agency Agreement Addendum, which was always a part of either a Listing Agreement or Buyer Agency Agreement, has been eliminated as a separate form. The language has been incorporated into the Agency Agreement-Owner and Agency Agreement-Purchaser forms.

[South Dakota Real Estate Commission](#)

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Important Renewal Reminders

It's getting down to the last minute for licensees who are due to renew their licenses in 2014. Here are a few reminders to make the process go smoothly:

To Renew Online

After logging into the licensee information, please pay careful attention to the Renewal Tabs.

- ✓ The first tab is to renew the E&O Insurance only. This tab is for people who ONLY need to renew their E&O Insurance.
- ✓ If renewing both the license AND E&O Insurance, we highly recommend using the second tab to renew both at the same time. If the licensee chooses the first tab and renews only the E&O Insurance, the licensee will then have to wait for that transaction to be approved before the license can be renewed.

Active licenses can only be renewed online if all of the education has been completed AND RECORDED on the licensee's education report.

- ✓ It may take several days from the time an education course is completed for the information to be recorded on the education reports. The SDREC office is inundated this time of year with completion rosters from the education providers. Faxing, emailing and repeated calling by the licensee to the SDREC office to report or inquire about course completion reporting does not speed up this process. The courses will be recorded as soon as possible by staff.
- ✓ Licensees who are still completing education in late November are advised to renew by mail as the SDREC office cannot guarantee the courses will be recorded in time to use the online system before the December late fee takes effect.

To Renew by Mail

- ✓ Licensees do not have to wait until the education is completed to renew by mail. Simply answer "no" on the question regarding education. This indicates to SDREC staff that the licensee is aware the education is not yet completed and he/she is still working on the hours.
- ✓ "N/A" and "No" are NOT the same. Most of the questions in Part III on the renewal form need to be answered either Yes or No. N/A means that the question is "not applicable", which is not the same as answering the question. For example, when asking licensees if they have been convicted of a felony, that question is most certainly applicable to everyone and must be answered with either a yes or a no.

General Reminders

- ✓ Deadline to Renew is November 30. THIS IS NOT A POSTMARK DEADLINE. Late fees will be assessed beginning December 1.
- ✓ If combining the renewal fee and insurance premium into one check, make sure the amount is calculated correctly.
- ✓ The SDREC office strongly suggests that education be completed by November 30. This allows sufficient time for the renewal to be processed and the new license issued.
- ✓ A person whose license is on inactive status that is due to renew in 2014 must pay the renewal fee to keep the license on inactive status. Otherwise, the license will expire and the person will become unlicensed!

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.

James W. Peterson, Hill City, Broker, License Suspension. License was suspended from 9/12/14 to 10/1/14 for non-compliance with the terms of a previous Consent Agreement.

HUD Order Resolves Allegations that American Bank Discriminated Against Loan Applicant with Disabilities

The U.S. Dept. of Housing and Urban Development (HUD) announced that it has entered into an Initial Decision and Consent Order with American Bank, resolving HUD's charge that the Rockville, Maryland-based lender discriminated against applicants with disabilities when it allegedly required applicants to provide documentation regarding their disabilities and attempted to obtain information about the nature and extent of those disabilities.

The Fair Housing Act makes it illegal to discriminate in the terms and conditions of a loan to an individual based on a disability, including imposing different application or qualification criteria. The Fair Housing Act also makes it illegal to inquire about the nature or severity of a disability except in limited circumstances.

The Initial Decision and Consent Order was entered after HUD charged the lender with unlawful discrimination based on disability. A Pierpont, South Dakota, couple filed a complaint with HUD alleging that the bank required the husband, who has a permanent disability, to provide Social Security Administration documentation proving his disability-related income for the past two years. The letter the man provided had no end date, and stated that his disability income would continue unless the man's medical condition improved. However, the bank, and its senior mortgage banker, allegedly required such loan applicants with disabilities to provide additional medical documentation proving that they would continue to receive disability income for at least three years.

The couple's complaint further alleged that the bank required the husband to provide the name and phone number of his physician so it could inquire about the status of the husband's disability and whether or not he would get better. The man's doctor subsequently provided a letter stating that the man's condition is a "permanent condition" and that he "will suffer from the effects of this condition for the remainder of his life."

During its investigation leading to the charge, HUD determined that at least five other loan applicants with disabilities had faced similar barriers when applying for mortgage loans with American Bank. A complaint by HUD Assistant Secretary Velasquez was filed on behalf of other families and is also resolved by the Order.

Under the Initial Decision and Consent Order, American Bank will pay the couple \$25,000, adopt a written policy addressing the income verification requirements for home mortgage loan applicants who receive disability income, and provide fair lending training, including training regarding disability income, to newly hired employees. The Bank will also identify the approximately 2,900 applicants that applied for a loan to purchase or refinance a home between 1/1/2011 and 12/31/2013, and listed Social Security Disability Insurance, Social Security, and/or short-term or long-term disability insurance as a source of income. A third-party administrator hired by the bank will review each application file and identify everyone the bank required to provide information about their medical conditions for income verification purposes. Those applicants may be eligible to receive up to \$5,500 in compensatory damages.

New Licensees

Auctioneer

Koupal, Daniel - Dante

O'Dea, Michael D - Philip

Broker

Aranda, Justen E – Sugarland, TX
Longtin, Terry L – Grand Forks, ND
Pluim, David – Hull, IA
Taylor, John E – Sioux Falls
Todd, Daniel J - Pierre

Chohon, Tyson P – Pierce, NE
Marx, Jeffrey D – Arlington Heights, IL
Stein, Jennifer D – Irvine, CA
Thaemert, Dennis K – Omaha, NE

Broker Associate

Anderson, Jimmie L – Gann Valley
Baloun, Sharon K – Sioux Falls
Bell-Thomas, Lorenzo C – Box Elder
Cuka, Melissa K – Yankton
Dark-Smiley, Darby – Rapid City
Ford, Marsha A – Sturgis
Henderson, Kimberly – Rapid City
Hocke, Alicia M – Rapid City
Johnsen, Lisa R – Miller
McConnell, Sandra M – Sioux Falls
Oakland, JoyAnna L – Lennox
Peskey, Melissa A – Hartford
Popova, Olga – Spearfish
Roberts, John B – Rapid City
Schmeling, Bradley J – Watertown
Swenson, Steven L – Watertown
Weishaar, Seth A – Belle Fourche
Williams, Stephanie – Sioux Falls

Anderson, Roger C – Rapid City
Bartholow, Foster W – Rapid City
Buchanan, Lauren E – Piedmont
Dagel, Kellie L – Sioux Falls
Dominiack, Stacy L – Sioux Falls
Geiken Teresa J – Sioux Falls
Hewitt, Tanner A – Newell
Hyde, Brady C – Sioux Falls
Lee, James M – Bruce
Natz, Steve R – Sioux Falls
O'Dea, Michael D – Philip
Pifer, Robert S – Grand Forks, ND
Riedmann, Jr., G. Patrick – Sioux Falls
Romanowski, Holly M – Sioux Falls
Schmidt, Ann M – Watertown
Thomason, Richard L- Sioux Falls
Wetsch, Anita M – Sioux Falls
Young, Alexander J - Mitchell

Licensed Home Inspector

Shoberg, Robin F - Hettinger

Property Manager

Block, Julie M – Watertown
McDonald, LeeAnn – Custer
Rieffenberger, Jennifer – Watertown

Carey, David C – Sioux Falls
Pahl-McColley, Misty – Rapid City
Thomas, Mindy J - Hartford

Registered Home Inspector

Jerke, Douglas C - Watertown

Residential Rental Agent

Abouelkheir, Mohamed – Mobridge
Freet, Scott A – Sioux Falls
Lester, Catherine L – Deadwood
Ruiz, Staci L – Aberdeen

Fahey, Kerri E – Mitchell
Harms, Stephanie – Estelline
Mensink, Kristyn D – Harrisburg

Salesperson

Emery, Michael L – Sioux Falls

Kellen, David S – Sioux City

Appraiser Update

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New Licensees – September/October 2014

Richard E. Kalvoda, State-Certified General – Irvine, CA
Allen D. Smith, State-Certified Residential – Parker, CO
Rose M. Hoefs, State-Certified General – Fargo, ND
Albert N. Allen, State-Certified General – Houston, TX
Dawn Rasmussen, State-Registered – Kadoka, SD
Joshua C. Allison, State-Certified General – Dallas, TX
Michael G. Knight, State-Certified Residential – Palos Heights, IL

Upgrades Issued – September/October 2014

Joe Holler, State-Certified Residential – Sioux Falls, SD
Brandon Woudstra, State-Certified Residential – Rock Valley, IA
Mary Houk, State-Certified Residential – Rapid City, SD
Travis Shaykett, State-Certified General – Sioux Falls, SD

Review of Cases – January 1 – October 29, 2014

For the period January 1, 2014 through October 29, 2014, the Department has initiated six complaint investigations, twelve upgrade cases and three new applicants claiming experience cases.

Complaints – three closed, three pending.

Upgrades – seven closed, five pending.

New With Experience – two closed, one pending.

Moment of Truth

[Permission to reprint the following article from “Valuation – First Quarter 2014” granted by the Appraisal Institute]

By Peter Christensen (LIA Administrators & Insurance Services’ general counsel)

In a popular courtroom movie, the county prosecutor questions the qualifications of the defendant’s proposed expert witness:

Lawyer: Ms. Vito, being an expert on general automotive knowledge, can you tell me what the correct ignition timing would be on a 1955 Bel Air Chevrolet, with a 327 cubic-inch engine and a four-barrel carburetor?

Witness: It’s a (expletive) question.

Lawyer: Does that mean that you can’t answer it?

Witness: It’s impossible to answer.

Lawyer: Impossible because you don’t know the answer?

Witness: Nobody could answer that question.

Lawyer: Your Honor, I move to disqualify Ms. Vito as an expert witness!

Judge: Can you answer the question?

Witness: No, it's a trick question!

Judge: Why is it a trick question?

Witness: 'Cause Chevy didn't make a 327 in '55; the 327 didn't come out till '62. And it wasn't offered in the Bel Air with a four-barrel carb till '64. However, in 1964, the correct ignition timing would be four degrees before top dead center.

Lawyer: Well, um, she's acceptable, Your Honor.

Do you recognize that exchange from the 1992 film "My Cousin Vinny," starring Joe Pesci and Marisa Tomei?

There are entire litigation courses for would-be trial lawyers based on courtroom movie clips, and some lawyers ask their witnesses to watch this movie in particular as part of their pre-trial preparation. When it comes to the topic of examining expert witnesses, "My Cousin Vinny" ranks as one of the best on film.

Spoiler alert: The movie ends in acquittal for Vinny Gambini's (Joe Pesci) client after Ms. Mona Lisa Vito (Marisa Tomei) expertly explains to the jury the difference between cars with a regular differential and ones with "positraction." Marks left in the mud at the crime scene led to a conclusion that the suspect's car had positraction while the defendant's car had a regular differential – and it's Ms. Vito's expert testimony to this opinion that clinches the acquittal.

What can be learned from the movie is that Mona Lisa Vito makes a great witness because she speaks to the jury, is enthusiastic about her subject and knows it inside and out. It's also reflective of many real-life cases, in that it shows how winning a case usually isn't the result of a lawyer's over-the-top theatrical performance, but rather credible witnesses, including experts, testifying to good facts and presenting convincing and supported opinions. Winning real cases is more like "My Cousin Vinny" than "A Few Good Men."

While movies can be surprisingly educational – and certainly entertaining – there are plenty of teachable moments found in everyday questions and testimony from actual cases involving appraisers. The following questions (some paraphrased or simplified) were put to appraiser expert witnesses in real cases involving valuation testimony, and there's a lot to learn from their answers.

Are you licensed as an appraiser in this state? This question is common on cross-examination of any appraiser expert who is testifying outside of a state in which they are licensed – mostly to try to influence the judge or jury to give the expert's testimony less weight. Recently, a well-regarded appraiser had flown across the country to offer testimony in support a lender's claim regarding alleged overvaluation of a residential property. The question about whether she was licensed unsettled her. She was not licensed in the state in which she was testifying and in which the property in question was located. An awkward "no" was her answer.

If you are going to testify in a state where you are not licensed, be prepared with a thoughtful response. Being licensed to appraise in the relevant state usually is not required by most state or federal courts in order for the appraiser to qualify as an expert witness or for the appraiser's testimony to be admissible. However, if not handled properly, the lack of a license may cast doubt on the expert's testimony. Recommended responses to this question can include an explanation of your highly specialized expertise in certain property types or your special qualifications in appraisal review.

Although a court likely will find an appraiser's testimony admissible despite the lack of a relevant license, the finding does not mean an appraiser will be absolved of responsibility from having a license by the relevant state appraiser licensing authority. The two issues are separate. The Tax Court of New Jersey, for example, noted in a recent decision that, "despite misgivings about whether the expert complied with statutory and regulatory obligations regarding appraisal licensing in this State...the court is not bound by the licensing requirements when determining whether a witness qualifies as an expert pursuant to N.J.R.E. 702."

Can you locate the property on this map? This is another common question and another one for which you should be prepared, especially if the territory is unfamiliar.

In one case, the cross-examining attorney grabbed a large mounted map of the community that had been intended for use later in the case and kindly asked the appraiser expert to locate the property. It was a clean map with no pre-markings indicating the location of the subject or any comparables. Unfamiliar with that particular map – and also with the area in general – the expert took a few minutes to locate the property. The courtroom waited in silence as she did so.

When you're testifying as an appraiser expert – even one whose testimony may not relate directly to a property's location – you should become an expert in locating and identifying the property, whether it's on a road map, a parcel map, in a satellite depiction or on a street photo. In general, you also should take the time to visit the property and relevant comparables – again, even if not directly related to the subject of testimony.

Does the 2014-2015 edition of the Uniform Standards of Professional Appraisal Practice apply to your appraisal work in this case? Have you taken the required USPAP update class for the current edition? The USPAP edition that will apply to an appraisal assignment is the edition in effect on the date of the report, not the effective date of the appraisal. (See Appraisal Standards Board, USPAP Q&A 2014 1-6, appraisalfoundation.sharefile.com/download.aspx?id=s04d7da1babc462e8.) That means that even if you're preparing an appraisal with a valuation date months or years before your report, it's the current USPAP edition that governs your work. I've seen expert appraisers get that basic issue incorrect in testimony, which affects their credibility.

Fortunately, most appraisers correctly answer the question. The real lesson, then, is from the follow-up question about the USPAP update class. When testifying as an expert, part of your credibility depends on your education. If you're going to be an expert, it's advisable to take the required USPAP update class as early in the cycle as possible – you can look less credible when you have to explain that “no,” you haven't yet taken the time to update your USPAP training. While this issue may only be a minor one for many experts (who may be USPAP experts or instructors), taking the class early prevents any issue.

Would a renter typically rent a one-bedroom unit for the same amount of money as a two-bedroom unit in the same location and of the same quality? This is not meant to be a trick question, and the only credible answer should be “no.” In a recent property tax appeal case in Oregon, the county's appraiser presented a collection of comparables in connection with an appeal concerning 20 two-bedroom duplex units and one three-bedroom unit. The appraiser's first selected comparable was a one-bedroom unit that the appraiser offered without any adjustment. On cross-examination, the appraiser was asked whether a renter typically would pay the same rent for a one-bedroom unit as a two-bedroom unit. He tried to dodge the question, but finally responded that “he did not know.” The court later wrote in its opinion:

“The court found that testimony striking for its lack of either knowledge or credibility (meaning that [the county's appraiser] either actually had no knowledge of whether a person would rent a two-bedroom unit for more than a one-bedroom unit, or that he was simply unwilling to acknowledge the obvious – that a two-bedroom unit would indeed rent for more than a one-bedroom unit).”

An appraiser expert confronted by an obvious issue should be forthright. If there's no credible explanation, acknowledge that point and then reconsider how it might or might not affect the appraisal. Don't risk your credibility by standing your ground when faced with the obvious.

The same advice holds when it comes to actual mistakes. In order to maintain credibility, you should acknowledge a mistake and then explain how it may or may not affect your opinion. At the same time, any appraiser providing testimony in litigation should be aware of the acute need for accuracy.

In one recent case, an expert testified that the original appraiser had committed USPAP violations because of a cumulative series of “mistakes” in his report. In cross-examination

during his deposition, the expert had no choice but to concede there were some problems in his own review report. The expert had stated the wrong site size for the subject and used the wrong address on one comparable, stated the wrong square footage on another, and for this third comparable, used a sale that did not close until after the date of the original appraisal. When questioned about these problems, the expert testified they were “errors” not “mistakes.”

In your earlier appraisal of the property [for a different use], you didn't mention any access problems and also described the property as having “excellent dramatic lake and mountain views.” In your present appraisal for this tax case, you now report that access is a significant problem and describe the views as “distant.” Why the difference in your two appraisal? Federal Tax Court cases provide some of the most educational writing from judges about factors that make or break the credibility of appraiser expert testimony and valuation (in terms of evidence, not USPAP). Last year, in what may be the longest court opinion analyzing appraisals (114 pages!), Tax Court Judge Robert Wherry Jr. resolved the valuation of a more than 2,000-acre property near Lake Tahoe for the purposes of gift and estate taxation in *Estate of Giovacchini v. Commissioner*, T.C. Memo. 2013-27. In his decision, Judge Wherry wrote:

There are other reasons to question the probative value of [taxpayer's appraiser's] reports. [The appraiser's] view of High Meadows' accessibility changed considerably between 1990 and 2007 even though conditions on the ground did not. In 1990 he made no mention of access problems across Federal land. In contrast, in his valuation report for purposes of this case, access across USFS land, particularly with respect to utility easements, is a significant problem. In 1990 [the appraiser] characterized the views of Lake Tahoe from portions of High Meadows as “excellent dramatic lake and mountain” views. He now characterizes those views as “distant.” He loosely attributes the contradictions, at least in part, to his former associate, an English literature professor with flowery writing tendencies. See *Laureys v. Commissioner*, 92 T.C. 101, 129 (1989) (“In the context of valuation cases, we have observed that experts may lose their usefulness (and credibility) when they merely become advocates for the position argued by a party.”)

Clearly, the valuation rendered by the taxpayer's appraiser lost some of its weight as evidence because Judge Wherry believed the appraiser had crafted the description of the property in his report for the tax case to advocate the taxpayer's desired lower valuation. To be fair, none of the appraisers involved as experts in the case came through unscathed. Indeed, with a little sarcasm, the Tax Court observed the following with respect to the IRS's appraiser's valuation: “Although no diamonds, gold or oil was found on High Meadows between June 27, 2000, and October 8, 2001, inexplicably [the IRS's appraiser] concludes the value increased by a little more than 44% in slightly more than 1 year, despite the tragic events of 9/11.

In all, the Tax Court considered the valuation work of some 10 appraisers and one university economics professor. Some were designated as experts; others were percipient witnesses. For the date of death valuation, the taxpayer's appraiser opined a value of \$8 million, while the IRS proffered \$36 million based on its appraiser's work. All of them took their lumps in the opinion, and at the end of day, Judge Wherry decided that the most credible indication of value was a post-valuation-date sale that occurred 16 months after the gift tax valuation date and 31 months after the estate tax valuation date. He adjusted this sale price down based on market conditions, differences in the exact acreage sold and legal access issues.

Other than the change in your opinion of value, is there anything different between your draft report and this report? In this particular case, there was no real difference between a draft version of an appraisal report and the final version, so the appraiser could only answer “no.” To make matters worse, he was next asked about a short handwritten note he'd made on the draft. The note recorded a request from his client to the effect that the client “needs a bigger number.”

The lessons to be learned from this example are numerous, among them: know that your prior appraisal work – even drafts of your reports – may be discovered in connection with expert assignments and be prepared to be questioned about inconsistencies between your prior and current appraisal. And make sure that your expert testimonial work doesn't cross into territory where you become an advocate for a party's position.