After ending August with heat and humidity across the state and very much looking forward to the fall season and of course, what comes with fall… renewal time!

Please keep in mind that if you have an active license expiring on December 31, 2013 and fail to complete your continuing education and/or fail to have errors and omissions insurance covering you on January 1, 2014, your license will be placed on inactive status. This means you are not allowed to engage in any activities requiring licensure by this agency. Don’t let this happen to you. And the best way to not let this happen is to submit your license renewal application with continuing education completed, along with your errors and omissions insurance form by the November 30th deadline. Renewals received after that date will be returned for a late fee.

If you do not know the number of education hours you currently have, you can find this information in the ‘Licensee’ section on the Commission’s website.

Please remember you can renew online. If you are having any problems please give us a call as we would be happy to help.

New License Law books are now available.

From the Director

Biggert Waters Flood Insurance Reform

In 2012, the U.S. Congress passed the Biggert Waters Flood Insurance Reform Act of 2012 which calls on the Federal Emergency Management Agency (FEMA) and other agencies to make a number of changes to the way the National Flood Insurance Program (NFIP) is run. Some of these changes have already been put in place, and others will be implemented in the coming months. Key provisions of the legislation will require the NFIP to raise flood insurance rates to reflect true flood risk, make the program more financially stable, and change how Flood Insurance Rate Map updates impact policyholders. The changes will mean premium rate increases for some – but not all -- policyholders over time.

Hear from FEMA Flood Insurance Experts on what you and your clients need to know about this important piece of legislation by participating in a webinar on October 15th. If you have any questions please contact Marc Macy from South Dakota Office of Emergency Management at: Marc.Macy@state.sd.us

October 15, 2013
11:00-12:00 CST
https://fema.connectsolutions.com/sdrealtorsbw12/
Conference # 800-320-4330
Conference Code: 758514
This webinar is limited to 50 participants.
2013 Fall Caravan – Natural Resource Issues in Modern Real Estate Deals

The SDREC strives to offer its real estate licensees cutting-edge continuing education with relevant course material presented by instructors who are experts in their field. The Fall Caravan course is no exception!

The Commission is delighted to feature Mr. David L. Ganje, Esq. of Ganje Law Offices as the caravan presenter. His biography information may also be found in this issue of the newsletter. Mr. Ganje is an expert in environmental law and has tailored this course specific to issues in South Dakota.

Environmental issues may arise in all types of real estate transactions, from the sale of personal residences to the transfer of large commercial and industrial facilities. Managing the risks associated with the transfer of property with known and unknown environmental issues is almost always possible with the proper investigation, communication, and mitigation planning. The biggest challenge is typically identifying the environmental issues early enough in the process so that they do not delay the progress of the transaction. Failure to identify and address such issues may result in parties unknowingly assuming substantial liabilities. This course will explore environmental compliance and identify liability concerns for licensees and their clients. Mineral/water rights, storage tanks, soil/groundwater contamination are just a few of the topics to be discussed. Don’t miss this opportunity to attend a unique and informative course!

Caravan Dates/Locations (Please note – the Pierre and Spearfish dates have been changed from the schedule previously posted on the Commission website and in the last issue of the Real Estate View)

Wednesday, October 30 - Spearfish Holiday Inn
Thursday, October 31—Rapid City Ramkota (Rushmore Room)
Friday, November 1 – Pierre Ramkota
Monday, November 4 - Aberdeen Ramkota Convention Center
Tuesday, November 5 – Watertown Ramkota Event Center
Wednesday, November 6 – Sioux Falls Ramkota (Washington Room)
Thursday, November 7 – Sioux Falls Ramkota (Washington Room)

Check-In/Walk-in Registration begins at 8:15 a.m. The class begins at 9 a.m. and will conclude at 4 p.m. Please arrive on time and schedule other appointments accordingly to avoid a conflict with the class schedule for the day.

Registration Fee: $60 online or postmarked no later than Friday, October 18;
$70 After Oct. 18 and on-site

(The Commission will retain $10 of any refunded registration fee.)

Licensees are encouraged to register online at the SDREC website. A printed registration form has been mailed to each real estate office and is also available to print from the website.

This course is approved for 6 Hours REQUIRED Continuing Education. Broker Associates in Postlicensing Period 1 will receive 6 hours education in Fiduciary Duties. Broker Associates in Postlicensing Period 2 will received 6 hours education in Property Issues.
2013 Fall Caravan Presenter – David L. Ganje, Esq., Ganje Law Offices

David L. Ganje is a commercial law and commercial litigation attorney and also maintains a natural resources practice. He has grounded his legal experience as a practicing attorney, a former commodity arbitrator, a member of the board of directors of an S&L and an adjunct professor to hone his skills in these areas of practice.

Ganje, who was born and raised in Aberdeen, South Dakota, handles matters related to mineral law, oil and gas law, energy law and water law in his natural resources practice. The practice includes representation before local and federal regulatory bodies.

In his commercial law and commercial litigation practice, Ganje represents businesses and individuals in transactional and business litigation matters as well as serving as local counsel for individuals and institutions.

In the transactional arena, Ganje provides confidential legal analysis and opinions and counsel in commercial and natural-resources acquisition and sale agreements as well as due diligence representation as both lead counsel and co-counsel. He represents clients in the sale and purchase of business interests, legal and title examinations, banking law matters and related financing transactions.

Ganje’s clients include businesses, institutions and individuals across practice areas.

Commission Actions

The following actions by the Commission have become effective since the last report in the newsletter. A Stipulation and Assurance of Voluntary Compliance is a settlement agreement between a licensee and the Real Estate Commission and constitutes neither an admission nor a denial of any violation. A Consent Agreement and Order 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. A suspension held “in abeyance” is one where the Commission has set aside the suspension provided the licensee comply with all of the other terms of the agreement.

**David Kneip, Brookings, Broker. Consent Agreement.** Violation of 36-21A-79 for failure of broker’s responsibilities for activities of affiliated licensees as the Responsible Broker for Mark Norgaard. Administrative fine of $1000 and completion of the 15-hour Responsible Broker course.

**Mark Norgaard, Brookings, Broker. Consent Agreement.** Violation of: 36-21A-71(19) for failure to promptly give a copy of an offer to purchase to the purchaser; 36-21A-74 for failure to preserve for four years all listings, offers to purchase, closing statements and other records relating to any real estate transaction; 36-21A-136 for failure to promote the interest of the clients by not presenting a written offer from the client in a timely manner; 36-21A-147 for failure to present the relationship disclosure, the agency agreement and agency agreement addendum at first substantive contact. Administrative fine of $2500 and completion of three hours of education in license law, three hours in contracts, and six hours in agency, with all education to completed in a classroom setting.
E&O Insurance/License Renewal Reminders

Renewals forms will soon be arriving in the mail!

As a reminder to licensees who are on the SDREC’s group E&O Insurance policy through Rice Insurance Services Company, this renews annually, regardless of whether the license renews this year or next. Each year the SDREC places several licensees on inactive status January 1 simply because they forgot to renew their insurance. Be sure to submit the premium to the SDREC office no later than November 30.

Licenses expiring December 31, 2013 must also be renewed by the November 30 deadline. To ensure a smooth renewal, it is recommended that all education be completed prior to the renewal deadline. A license cannot be renewed on active status until all education and insurance requirements are met. The renewal forms for active licensees will be mailed to the brokerage office address where the license is associated. For inactive licensees who need to renew this year, the renewal form will be mailed to the home address on file with the SDREC office.

Online renewal will again be available at the SDREC website. It is important to note that active licensees can only use the online renewal option if all of the education hours necessary for renewal have been recorded with the SDREC office! It is also recommended that the license renewal fee and the E&O insurance premium be paid at the same time. Online renewal will be available beginning in early October.

New Licensees

Broker Associate

Allen, Nicholas – Sioux Falls
Bickford, Carmen – Rapid City
Bye, Jana E – Vermillion
Daniels, Samantha J – Aberdeen
Ferguson, Rebekah L – Belle Fourche
Hackler, Miriam – Brandon
Hess, Alan – Brookings
Johnson, Fern Y – Rapid City
Kuntz, Leslie – Yankton
Nelson, Rachel M – Sioux Falls
Pederson, Craig A – Harrisburg
Rasmussen, Shannon R – Elkton
Rolfing, Tiffany M – Harrisburg
Stansbury, Patricia – Canton
Waldner, Tyler J – Henry
Zepp, Brenda E - Virgil
Arnold, Lynn M – Rapid City
Burlage, Tyler N – Tea
Clavel, Colleen T – Sioux Falls
Engels, Tara M – Arlington
Geppert, Rodney – Fort Pierre
Herzog, Cliff – Watertown
Hughes, Elizabeth "Betsy" – Vermillion
Kulmala, Steven C – Rapid City
Lemon, Michael E – Yankton
Oleson, Jeffrey A – Sioux Falls
Petit, Kim M – Sioux Falls
Roers, John E – Sioux Falls
Schwarz, Lynn B – Sioux Falls
Vis, Leanne D – Sioux Falls
Young, Cameron – Sioux Falls

Broker

Tamilo, Brenda A – Deadwood

Salesperson

Hoak, Eric – Sioux City, IA

Residential Rental Agent

Fischbach, Julie A – Warner
Spencer, Tammy A – Sioux Falls
Pearson, Ashley – Sioux Falls

Registered Home Inspector

Reuter, Robby K - Crooks
Appraiser Update

New Licensees – July/August 2013
Brandon J. Stelling, State-Registered – Vermillion, SD
Melissa K. Cuka, State-Registered – Yankton, SD
Jaret D. Sievers, State-Registered – Sioux Falls, SD
Mariano S. Borges, State-Certified General – Phoenix, AZ
Wade M. Bachmeier, State-Certified General – Bismarck, ND
Michelle D.M. Koeller, State-Certified General – Minneapolis, MN

Upgrades Issued July/August 2013
Jon Beitelspacher, State-Licensed
Adam Lalim, State-Certified Residential
Brian Schmidt, State-Certified Residential

For the period January 1, 2013 through August 19, 2013, the Department has initiated ten complaint investigations and three upgrade reviews.

Complaints – Five closed and five pending.
Upgrades – Three cases pending.

Appraisers – 2013 Renewal
NOTICE! The 2013 appraiser renewal applications were mailed the first week in July. The applications were due in the Appraiser Certification Program office by August 17, 2013 for renewal of certificates for state-certified general, state-certified residential, state-licensed and state-registered appraisers.

If you have not submitted your 2013 renewal, please do so as soon as possible to avoid a late renewal penalty fee and lapse in authority to appraise.

Supervising Appraiser – 2013 Renewal
NOTICE! The 2013 supervisory appraiser endorsement renewal applications were mailed the first week in July. The applications were due in the Appraiser Certification Program office by August 17, 2013 for renewal of the supervisory appraiser endorsement.

Appraisers Required to Report AMC Registration Number
Pursuant to ARSD 20:14:06:01.02, an appraiser who performs an appraisal for an appraisal management company shall assure that the company is properly registered by the secretary pursuant to SDCL 36-21D and include the company’s registration number in the appraisal report.
According to SDCL 36-21D, if you are solicited to provide appraisal services by a company that performs any of the following, the company is an appraisal management company:
1. Recruit, select, and retain appraisers.
2. Contract with licensed or certified appraisers to perform appraisal assignments.
3. Manage the process of having an appraisal performed, including providing administrative duties including:
   a) Receiving appraisal orders and appraisal reports;
   b) Submitting completed appraisal reports to creditors and underwriters;
   c) Collecting fees from creditors and underwriters for services provided; or
   d) Reimbursing appraisers for services performed.
4. Review and verify the work of appraisers for compliance with the Uniform Standards of Professional Appraisal Practice.

Pursuant to ARSD 20:77:05:01(9) an appraisal management company shall disclose its certificate of registration number within its engagement document with each utilized appraiser.

Appraisers must insist that a company disclose the South Dakota AMC Registration number in the engagement document soliciting appraisal services before accepting an appraisal assignment and the appraiser must include the number in the appraisal report. If a company is unable to provide the South Dakota AMC Registration number, the appraiser must report the company immediately to the Appraiser Certification Program. [AMC Registration numbers may be verified at the Appraiser Certification website: http://dlr.sd.gov/appraisers.]

If a company claims it is not an AMC or is exempt from registration, contact the Appraiser Certification Program immediately to verify.

Silence Is Golden
Advice for Avoiding Breaches of Confidentiality

By Peter T. Christensen - General Counsel, LIA Administrators & Insurance Services
(The following article from the Appraisal Institute Valuation publication, Second Quarter, 2013, reprinted with permission of the Appraisal Institute)

A commercial appraiser, defended by his E&O insurer, agreed to settle a contentious lawsuit over an alleged breach of confidentiality regarding one of his appraisals. The damages paid to the plaintiff were significant.

What happened and how can this situation be avoided?

According to the plaintiff's complaint, a lender had engaged the appraiser to perform an appraisal for a construction loan for the developer of a shopping center. Some of the information received by the appraiser included lease commitments from prospective tenants – including a well-known retailer as the anchor tenant. The appraiser completed the assignment, but for reasons unrelated to the appraisal, the lender declined to make the loan.

It was at this point that the appraiser made his alleged error. Without authorization, he mentioned the project to a different lender-client and asked if that bank would be interested in funding the developer's loan. He also emailed his lender contact a copy of the appraisal, which included information about the anchor tenant. Word spread about the project and the well-known retailer’s move to that location. However, the retailer was very sensitive about the move and allegedly became so upset about the disclosure of the information that it terminated its lease commitment. The developer was thus left without his key tenant and allegedly could not obtain other funding for the project.

The developer filed a lawsuit against the appraiser, asserting that his alleged failure to keep the appraisal information confidential constituted professional negligence and a breach of fiduciary duty. Blaming failure of the project on the appraiser, the developer demanded damages well beyond the limit of the appraiser's insurance policy.

The appraiser’s alleged confidentiality transgressions were difficult to defend. Although arguments in favor of the appraiser certainly existed, the appraiser was anxious to settle
because of the risk of a judgment in excess of his policy limit for which he personally would be liable. Accordingly, the case settled before trial for several hundred thousand dollars. Unfortunately, a damages payment of that size usually will have a long-lasting impact on an appraiser’s ability to secure affordable professional liability insurance.

There’s an obvious lesson from this case regarding the importance of the confidential nature of appraisal work: Breaches of confidentiality can just as easily result in lawsuits for damages as can appraiser’s valuation error.

**Ethics and Confidentiality**

Of course, the principal source of an appraiser’s confidentiality responsibilities is found in the Uniform Standards of Professional Appraisal Practice’s Ethics Rule:

“An appraiser must not disclose: (1) confidential information; or (2) assignment results to anyone other than: The client; persons specifically authorized by the client; state appraiser regulatory agencies; third parties as may be authorized by due process of law; or a duly authorized professional peer review committee.”

An appraiser also may have other confidentiality obligations. For consumer-related transactions, for example, the appraiser has a duty to safeguard nonpublic personal information under the Gramm-Leach-Bliley Act and its state law counterparts. An appraiser also may have contractual responsibilities for handling confidential information under engagement agreements or in vendor agreements with lenders, government agencies or appraisal management companies. Lastly, Appraisal Institute professionals have responsibility under Ethical Rule 4-1:

“It is unethical to disclose confidential information or an analysis, opinion, or conclusion specific to a service…to anyone other than: (a) the client and those persons specifically authorized by the client; and (b) third parties, when and to the extent that the Member is legally required to do so by statute, ordinance, or court order; and (c) the duly authorized committees of the Appraisal Institute.”

**Subpoenas and Confidentiality**

Cases involving alleged “loose lips” (and resulting sizeable damages) fortunately are rare – and avoidable with good judgment. Much more common are confidentiality issues that arise from the subpoenas, which may require testimony in a deposition, arbitration or trial, or may require the appraiser to produce documents such as reports and work files.

A typical subpoena situation may involve a dissolution proceeding case. An appraiser will have performed a valuation for a lender regarding a property owned by a business partnership (or perhaps by a married couple), and then the next year, the partners are in court fighting about the value of the property. One partner’s attorney, in an attempt to obtain evidence of value, serves a subpoena on the appraiser for the deposition testimony and the work file.

Our office hears from many appraisers in this position, and their first query often is, “I don’t have to respond to the subpoena because of USPAP’s confidentiality rule, right?” Well, they probably do have to comply with the subpoena’s demand and probably will have to provide testimony as a percipient witness and produce the file. Their next question: “My appraisal report contains a statement that my services do not include testimony, so the attorney has to pay me, right?” The attorney probably only will have to pay the appraiser as a percipient witness what the normal daily witness fee is in their state (here in California, that would be $35), plus mileage. Limiting conditions don’t form a contract.

It’s important for appraisers to know that, as a general matter, the legal effect of a valid subpoena trumps USPAP’s confidentiality rule. In the words of one federal court, “[t]he law does not afford an evidentiary privilege to professional appraisers. Moreover, the USPAP rules themselves explicitly contemplate the production of such documents to ‘third parties as may be authorized by due process of law.’” U.S. v. 2,091.712 Acres of Land, Case No. 4:09-CV-88-BO, E.D. North Carolina (2010).
Accordingly, if an appraiser has been served with a valid subpoena, the appraiser generally will have to comply, unless the appraiser or another party in the case files a motion to quash the subpoena or limit the appraiser’s obligations on a stronger basis than that of USPAP’s confidentiality rule. For example, the appraiser may have valid ground to limit the subpoena if the appraisal documents contain “trade secrets” or when an attorney’s work product protection applies to the work of a non-testifying expert appraiser. Nevertheless, even though it may not be the prevailing view, individual judges sometimes can be persuaded that an appraisal for one client simply is not the business of an unrelated third party and might still excuse an appraiser from compliance. The bottom line is still that appraisers simply can’t ignore a subpoena.

Unless you’ve agreed to provide expert witness testimony, any obligations you have for testimony under a regular subpoena are limited to percipient (or factual) witness testimony in court, arbitration or deposition, which means two things:

1. You still have the duty of confidentiality under USPAP outside those settings and should not talk about confidential appraisal matters outside of your testimony; and
2. You only should have to answer factual questions, such as your prior opinion of value in the appraisal report. As a percipient witness, you should not be asked to give a new opinion of value or to guesstimate what the property might now be worth. These are the province of “expert testimony” and further would require that you comply with USPAP in developing and reporting them.

As a practical matter, I usually advise appraisers who have received a subpoena to first inform their client and then call the attorney responsible for the subpoena and find out why their testimony or documents are requested — and I stress that they not disclose anything confidential to the attorney. Based on that discussion, an appraiser may be able to dissuade the attorney from calling them as a witness (if so desired).

How can this power of persuasion be used? If, for example, an attorney plans to call an appraiser in order to bolster value based on a prior lending appraisal, the appraiser might say something along the lines of, “I don’t think my testimony will be very helpful to your client because the copy of the report you’re looking at is more than a year old and was prepared solely for my client’s lending use. If I testify, I’m going to have to make it really clear to the court that my report shouldn’t be considered because of its age, because the market has changed and because the report was prepared only for that prior purpose.”

If the appraiser is a persuasion pro, they might even be able to turn the call into a business development opportunity: “Would you like me to perform a current, credible appraisal for your intended use?”

PROTECTIVE PROVISION - Clarify your rights

Some appraisers and commentators — but not this author — hold the opinion that confidentiality rules for appraisers may bar an appraiser from providing confidential appraisal information to the appraiser’s own legal defense counsel without specific client authorization. That position would leave the appraiser in that untenable position of having to ask for a client’s authorization to provide information to defense counsel while being threatened or sued by that same client, or leave the appraiser unable to obtain authorization when the client no longer exists, as in the case of a bank failure.

The confidentiality rules for appraisers are less detailed than confidentiality rules for medical and legal services, which typically expressly recognize the professional’s right to provide information to legal counsel. If they wish, appraisers can clarify such a right for themselves by including a provision in their engagement agreements such as “Client specifically authorizes Appraiser to disclose information relating to the appraisal assignment(s), including information which may be considered confidential, to third persons as reasonably necessary to Appraiser’s response to or defense of threatened or actual legal or regulatory actions.” Note that the engagement agreements must be signed by the client in order for authorization to disclose information to be effective.