

# Appraisal Confidentiality Issues

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# USPAP Confidentiality

## USPAP's Ethics Rule re Confidentiality

“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 ...”



# Other Sources of Appraiser Confidentiality Duties

- Confidentiality obligations in client and AMC contracts (which may then also be defined as confidential information under USPAP). Example contract provision:

“Confidential Information shall mean and include . . . all analyses, compilations, summaries, documents or reports prepared by the Appraiser . . . the fact of Appraiser’s performance of Services . . . this Agreement and the amount of Appraiser’s compensation for Services, unless disclosure is legally required.”



# Other Sources of Appraiser Confidentiality Duties

- Professional organizations. Appraisal Institute:  
“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; . . .”
- Privacy laws, Gramm-Leach-Bliley Act and state law counterparts.

# When Do Confidentiality Issues Arise for Appraisers Performing Lending Appraisals?

Near time of appraisal performance:

- When responding to inquiries or demands of borrowers and real estate agents.
- When another party besides the “client” seeks to use the report.
- Potential future issues – if CFPB revisits “appraisal portability.” Will that happen?



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# When Do Confidentiality Issues Arise for Appraisers Performing Lending Appraisals?

Post-loan origination:

- When clients or other lenders/investors/insurers ask or demand appraisers to provide information (like contents from a work file) or assistance (like helping with a rebuttal) in connection with:
  - Repurchase demands,
  - Mortgage insurance denials, or
  - Litigation.
- When appraisers need to defend themselves against legal threats or disciplinary complaints by clients, borrowers, subsequent holders of the loan or other parties.



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# Frequent Points That Arise in these Situations

- “Client” means the client in the original report.
- Duty of confidentiality is owed to that client.
- When the client no longer exists, there is no client to provide authorization.
- Purchasing a loan does not create a “client.”
- Neither does insuring the loan or paying a loss.
- Confidentiality provision applies to communications even with identified intended users.



# Lender Frustration

- “We just want appraiser to defend his work”
- USPAP confidentiality sometimes serves as a shield or excuse to appraisers who would simply rather not.
- In my view, USPAP does not necessarily block such discussions with non-clients – “to third parties as authorized by due process of law.”
- Regardless, just changing USPAP’s rule would not really provide what lenders/investors want – which is cooperation, answers, defense.



# What Do Courts Says About USPAP Confidentiality Issues?

- Not much – only two published decisions touch on USPAP confidentiality.
- Neither decision relates to the lender concerns.
- Despite what lenders sometimes say, there are no published court decisions holding that an appraiser may or must discuss confidential assignment matters under USPAP with a party besides the client.
- The two cases addressing USPAP confidentiality are interesting anyway.



# U.S. v. 2,091.712 Acres of Land, U.S. District Court, E.D. North Carolina 2010

- Federal condemnation case.
- Government taking a restrictive easement over land adjacent to a Marine Corps air station.
- Government subpoenaed all appraisals by landowner's appraiser of similar properties near military air bases and civilian airports.
- Court ruled USPAP confidentiality did not provide basis for appraiser refusing to disclose appraisals.

“The 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.’ ”



# FDIC v. Broom, et al., U.S. District Court, Colorado 2013

- Professional negligence case re alleged overvaluation by two appraisers.
- Both appraised property for \$1.9 million.
- FDIC demanded all prior appraisals of the same property for different clients by one appraiser.
- Appraiser objected based on USPAP confidentiality.
- Court ruled appraisals must be produced.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

Civil Action No.

FEDERAL DEPOSIT INSURANCE CORPORATION  
AS RECEIVER FOR AMTRUST BANK,

Plaintiff,

v.

TERRANCE G. BROOM, an individual, B&B APPRIASAL, INC., a Colorado corporation,  
JOESPH S. PACE, an individual, and JSP PROPERTIES AND APPRAISAL, a Colorado  
company, and DOES 1 THROUGH 40, inclusive,

Defendants.

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COMPLAINT



# Violations of USPAP Confidentiality Can Lead to Big Liability for Appraisal Firms

## Negligence Action by Developer Against Appraiser Who Violated USPAP Confidentiality.

- Lender engaged appraiser for prospective loan to shopping center developer.
- Viability was based on a key retail tenant.
- Lender could not make the loan.
- Appraiser started talking about project and his appraisal to other lender clients.
- Emailed appraisal to another lender.



# Violations of USPAP Confidentiality Can Lead to Big Liability for Appraisal Firms

## Negligence Action by Developer Against Appraiser Who Violated USPAP Confidentiality.

- News leaked out and retailer became angry about the disclosure of its expansion plans.
- Withdrew from lease commitment.
- Developer now could not complete the project and filed suit against appraiser for negligence and breach of fiduciary duty.
- Alleged damages greatly exceeded appraiser's E&O.
- One of our largest settlements in 2013.



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# What Do State Boards Say?

LIA's experience:

- Appraisers who have asked state boards the common question “can I talk about the results of my appraisal with \_\_\_\_\_, who bought the loan from \_\_\_\_\_, which no longer exists,” have almost always been told “no.”
- However, from 1000's of disciplinary matters, we have never seen any appraiser regulator in any state seek to discipline an appraiser for providing information for his or her own defense in a situation like this or to rebut a negative review.
- My view – the generalized notion of "due process of law" as used in USPAP includes within it the right of an appraiser to communicate about confidential matters for the purpose of self-defense against threatened or filed legal actions and disciplinary complaints.



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# Unsettled USPAP Confidentiality Issues

- USPAP is vague in its phrase permitting disclosure to “persons specifically authorized by the client.”
  - Authorized by name?
  - Are classes of persons acceptable?
- USPAP doesn't define what the phrase “as authorized by due process of law” means and the ASB has not provided specific guidance.
  - Does it mean a subpoena?
  - Does it mean defending oneself against potential legal threat?
  - Does it mean preventing the filing of threatened complaint to a state appraiser board?



# Solutions – for Lender’s Problem

- Less about USPAP problem than about obtaining appraiser willingness to assist or cooperate.
- Even if confidentiality section were changed, USPAP would not force an appraiser to assist a lender or provide a rebuttal.
- Lenders can effectively remove the “confidentiality shield” by authorizing parties to whom disclosure is permitted in engagement letters.



# Solutions – for Lender's Problem

- Obtaining cooperation takes willingness on the part of the appraiser:
  - Contractual provisions may require cooperation/assistance after appraisal delivery; require work files to be kept longer; require production of files when needed.
  - Compensation can inspire cooperation.
  - As can overall better appraiser relationships.



# Solutions – for Appraiser’s Problem

- Appraisers need clarification of confidentiality to both assist lenders and fairly protect themselves.
- Even without USPAP change, appraisers can create a fix for themselves if they use engagement letters and address the issue:

“Client consents to and authorizes Appraiser to disclose information relating to the appraisal assignment(s), including information which may be considered confidential information, to third parties for the purpose of Appraiser’s response to or defense of threatened or actual legal or regulatory actions and for the purpose of seeking insurance coverage.”

# Solutions – Suggested USPAP Change

Replace: “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; . . .”

With: “third parties as authorized by the client or as reasonably necessary to defending against, or seeking legal counsel in connection with, an actual or threatened legal, regulatory or governmental enforcement complaint or action; . . .”

