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# CRE PERSPECTIVE

## JUST THINKING ABOUT IT IS ILLEGAL

by Arnold S. Tesh, CRE

Licensing of appraisers in most states has been around for a decade or more. It was inevitable. In view of the 1980's rash of developer insolvency and financial institution failures, appraisers were bound to be caught in the line of fire. It is at least a small miracle that those, whose value opinions can change the course of millions of lives, were ever allowed to *de facto* police themselves. There are few professional appraisers who now have difficulty with the licensing of their industry. The issue is the administration of such licensing. Also of critical importance, is where does one draw the line between appraising and consulting or counseling? This is an issue which all CREs will be facing in coming years. This is why it is important for us to understand what is happening to our professional cousins who appraise real property for a living. Normally, licensing is designed to protect the public while distinguishing those who have earned the privilege of being recognized as able to perform the required functions. This has not happened in the appraisal profession.

### THE PURPOSE OF APPRAISAL IS TO FIND VALUE

The appraisal process is consistent. The tools available to practitioners are limited and do not differ geographically. Through a well-defined and rather rigid process, certain approaches and techniques are chosen by the appraiser to arrive at a conclusion of value. The available choices are the same worldwide, and most certainly exist in all 50 states, as well as the federal district and the territories. It is not a matter of local or even federal law or regulation as to whether the income approach, or the sales comparison, or cost approaches are proper for finding market value—it is a matter of economics. It is a function of the type of property being valued and the type of data available for such valuation. An income producing property in Montana will likely be very different from one in New York, or another in New Mexico, but that has nothing to do with the methodologies available to the appraiser in carrying out the valuation assignment. The real question is

whether the appraiser is competent to serve the client in a particular location and for a particular type of property. Local licensing requirements rely on adherence to the Uniform Standards of Professional Appraisal Practice (USPAP) competency provisions and the states have no means, or apparent desire, to individually police or even test for local market knowledge or specific property-type familiarity. USPAP requires the appraiser to come forth and express any competency shortfalls that may exist for any given assignment. Whether the appraiser is the holder of one license, or 50, the same requirement exists.

### REAL PROPERTY IS NOT INTELLIGENT

It does not order appraisals or use the conclusions. Appraiser incompetence or negligence does not victimize the property, regardless of which state it is in. However, careless or incompetent appraising can harm humans. Requiring the appraiser to be licensed in the state in which the property is located does not prevent victimization in the form of financial loss or emotional distress. Is it a good idea to license professionals where they practice? Of course it is! Appraisers should be licensed wherever they domicile a practice. For example, attorneys are licensed wherever they practice. Laws differ, as do standards. Lawyers are licensed where they domicile a practice, or where they file or appear to present cases. They need not be licensed in states where they observe, do research, or where assets or liabilities in claims or defenses are simply located.

Barbers, beauticians, and medical doctors are also licensed in the locale in which they practice. Practice for them involves actual personal and physical contact with their customers. However, the fact that an MD licensed in the state of Utah proffers an opinion based on an x-ray examination done in Arizona, has no bearing on whether the patient is properly protected by licensing laws. Such a scenario is perfectly legal and there is no requirement that the doctor in question be licensed in Arizona. If you take this example and supplant the doctor with an appraiser and the x-ray with a site visit, then the appraiser *may be* subject to criminal penalty. Why? It is because the appraiser is looking at an inanimate object which is affixed to the earth in another state? *Just thinking about the value* of this property is illegal. Yes, this results from knee-jerking by those who do not understand the profession and its practice, exacerbated by those that do, but are either not thinking or are afraid to speak up.

*Practicing appraisal involves creating a professional product*, usually in the form of a written conclusion of value. The fact that third parties will rely on this product makes it important that the people performing the appraisal are qualified practitioners. Simply working towards that conclusion or thinking about it is not practicing appraisal. There is no good reason why appraisal should be treated so differently from other occupations or professions. Appraisal licensing laws are based on where property is located rather than where services are provided. It was a mistake from the outset, produced by a rapidly formed but conscientious group attempting to satisfy bankers and politicians who were covering up their own tracks in the Federal Savings and Loan Insurance Corporation fiasco. What was done, was done in haste, but with *presumably* good intentions. Perhaps appraisal was confused with brokerage—a transactional business where there is an actual transfer of interest in the inanimate object. After all, real estate is real estate, and if brokers need to be licensed where the property is located, why not appraisers? In brokerage, rights and assets are exchanged and the definition of the real property is usually changed. Also, brokerage is a function of local law and regulation. It has a prescribed and legally sanctioned methodology. Its practice is not primarily based on reasoning and opinion, but on selling property and administering a formal process, which varies by state.

Does it make sense that a surgeon licensed to practice medicine in Florida, performs an operation on a resident of New Jersey, while the patient is in Miami, and there is no requirement that the doctor hold a New Jersey license? Yes! Does it make sense that if when the patient returns to New Jersey he suffers

repercussions from a forgotten sponge, but cannot bring a complaint before the New Jersey licensing authority? Again, yes! Why? Simply because even though the subject is a resident of New Jersey, the service received and the resultant harm had its direct cause in Florida. What does society value more—real property that happens to sit in New Jersey, or the human being that resides in New Jersey with an errant sponge left by a Florida doctor? If the patient calls the doctor in Miami and asks about the pain, is the doctor prevented from thinking about or talking about the symptoms because the subject is located in another state? Of course not! If the real issue behind all this provincialism in licensing is state by state liability laws, or limitations, then it is a matter for the client or patient to consider when traveling away from home, or when retaining a professional. It just is not practical to stretch the meaning of “practice” so thin, as has appraisal licensing laws, so as to make it impractical—if not impossible—for good and honorable people to run a business. It also, in many cases, prevents the public from getting the best service available. It restrains trade.

*Current licensing goes well beyond where the practice is conducted* or where the services are contracted. Borrowing the theme from the prior section, is it right that an appraiser in Pennsylvania is asked by a client in New Jersey to appraise a property in Delaware and the license in question is Delaware? It is not the property in Delaware that is receiving the service, but the client in New Jersey that chose to do business in Pennsylvania. How about the lawyer presenting a case in New Jersey for a New Jersey corporation which owns that property in Delaware?

There is no requirement that this lawyer be admitted to the Delaware Bar, because the asset in question is located there. If valuing property located in Delaware was subject to a law that said, “regardless of what effect it may have on market value, the appraiser must use only that methodology prescribed by local authorities and the appraiser must call the result market value” than licensing on the basis of property location would be justified. Of course any such hypothetical law would not only be silly; it would produce *misleading results*—an unprofessional practice. It is another example of regulation gone amuck.

Someone can be criminally prosecuted for *thinking about value*, while looking at a property in a state where they do not hold an appraisal license. How about the place where the appraiser entered into an agreement with the client? How about focusing on where the appraiser accepted the client’s money with the understanding that competent work is expected and, by law, required? The concept of policing a profession is related to the belief that government has a role in protecting the public against incompetent or unscrupulous practice. Depending on where one looks they will find various definitions which all relate to a professional’s business as the practice and not to a thing which just happens to sit somewhere other than where the appraiser domiciles a practice.

#### **REAL PROPERTY DOES NOT KNOW WHICH STATE IT IS IN**

It does not have any awareness of jurisdictional boundaries. Neither does finance or economics—two disciplines that relate directly to the appraisal process. These disciplines are not legislated, except in despotic societies. Law or regulation cannot manipulate the truth. Value is value and that’s what most

appraisal clients are looking for when they do their hiring.

Let us consider the accomplished appraiser who is asked to value the portfolio of a Fortune 50 company with office and industrial sites throughout the United States. Perhaps the appraiser is located in Idaho, and the subject property is scattered throughout 25 other states. Has this appraiser violated the law if the portfolio is valued in the absence of holding 26 individual state licenses? One would hope not; but regrettably this *can be* the case! As we can see, not only is property a thing and not a person, it can be almost anything a person or persons wish it to be.

When multiple properties are involved the subject for valuation can be defined in any combination. Even a single property can be considered in partial interest or as part of a greater whole. For instance, a railroad can be valued in one hundred-mile segments or as an entire system going coast-to-coast. None of these *fundamentally* different scenarios are realistically feasible to analyze under current legislation. Also, none of the clients asking for conclusions based on these subject descriptions are in any way helped or protected by the invocation of an unworkable, poorly conceived, *Rube Goldberg* matrix of senseless state licensing.

*Is counseling in for the same nightmare* scenario that the bureaucracy has produced for appraisal. You bet! Only diligence on the part of our profession and The Counselors of Real Estate can prevent the same mindless crusaders from handing our livelihood over to a group of well-intentioned, but uninformed (as well as ununiformed) consulting-police. Just think about it! The number of states requiring licensing for counseling is expanding quickly. Counseling, as a profession, is not

just in danger — it already has a problem.

Many politicians and regulators think of consulting as being synonymous with counseling. They think of it as a branch or subset of appraising. Standards 4 & 5 of USPAP spell out the problem much better than I can. These standards dictate an exact procedure for counseling. Counselors are supposed to follow these unworkable procedures to satisfy a bunch of bureaucrats to the detriment of their profession as well as their clients. If we do not reverse the trend, we will find ourselves like a bunch of whirling durbishes spending most of our time applying for and renewing licenses. We will do this so that we will be allowed to produce sub-quality results for the few clients that will have the patience or the money to waste on our three-humped camel procedures. Welcome to multi-state counseling of the future. Truly, a career from hell!

**Imagine, for a moment, a CRE surrendering to local police and admitting,** *"While being licensed in another state, and while working for a resident of that state, a property has been viewed and the assessor's office has been visited for data collection in your county. I am not licensed in this state and know that I must face the consequences. Please be gentle and don't secure the handcuffs too tight. I waive my Miranda rights and surrender my HP12C financial calculator and my Elwood tables for state's evidence. I would like to exercise my rights for a phone call since it looks like I am going to have to cancel my reservation for The Counselors' annual High Level Conference."* ... The scenario sounds nuts but, unfortunately, it is based on a plausible set of circumstances. It is only so because government regulation makes it so. If it were not for reckless licensing legislation, the idea of someone going to jail for thinking in the United States

of America would be ridiculous. Unfortunately, this is for real!

*Aside from everything else let us be honest* and answer the real question. How does any state protect its residents by giving reciprocity to another state and requiring a fee from the appraiser? There is no testing. There is no competency threshold. Even more insane is that there may not even be a resident to protect! Remember, the licensing requirement is based on where the property is located—not the appraiser or the client. Is this just one of these local control for revenue, full-speed ahead and damn the Constitution issues, or is there just something so many of us thinking people simply do not understand?

#### THE FUTURE

Ultimately, it will take a high level legal challenge to show how truly unjust and unworkable multi-state licensing regulation is. Only this type of test will demonstrate how arbitrary and capricious enforcement is and how both consumers' and the practitioners' rights are being violated. Once again, it should demonstrate that individual rights are not to be trampled upon for the convenience of the bureaucracy. No state should be able to impede or prevent trade or commerce on the pretense that it is protecting its residents.<sup>REI</sup>

#### ABOUT THE AUTHOR

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