

Federal and California Laws and Regulations for Appraisers – with Real World Relevance

Real Estate Appraiser Continuing Education

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Slide 2

About Your Instructor

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Attorney-Principal



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I'm an attorney – licensed in California since 1993 when I graduated from U.C. Berkeley's Law School.

My legal practice is entirely focused on valuation services. My clients are primarily appraisal firms, AMCs and financial institutions.

My book ***Risk Management for Real Estate Appraisers and Appraisal Firms*** was published by the Appraisal Institute in 2019.

I also serve as a member of the Montana Board of Real Estate Appraisers.

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Here's the Map for Our Legal Adventure into Federal and California Laws and Regs

- ✓ We're going to cover key federal and California laws that apply to appraising.
- ✓ We'll cover subjects BREAs wants to make sure you know – and also subjects that I think, as an attorney focused on valuation services, you should know.
- ✓ There is a required test at the end. It tests conceptual content – not code sections and titles. I want you to understand the content of the laws.
- ✓ The test is 20 multiple-choice questions. There are two options for the test: (1) online, instantly graded, or (2) PDF – send me your answers by email.
- ✓ It's open book. It's about learning.
- ✓ **If you see something highlighted yellow, it's probably on the exam.**

- Part 1 An appraiser negligence lawsuit will get us thinking about some of the key subjects, and we'll talk about where USPAP fits in.
- Part 2 The appraiser regulatory structure and key federal laws and regulations.
- Part 3 California appraiser laws and regulations you should know.
- Part 4 BREAs enforcement and a case to learn from.
- Part 5 Federal and California anti-discrimination laws – and a look at a real-world discrimination lawsuit.
- Part 6 Key AMC laws with examples of appraiser independence violations.
- Part 7 Other important laws relevant to appraisers in California – for example, independent contractor law.

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<https://www.valuationlegal.com/lawsregs/>

Federal and California Laws and Regulations Course Materials

Presentation Slides, Federal and California Laws and Regulations – with Real World Relevance, 1 23 24

Download

Federal and California Laws and Regulations for Appraisers – with Real World Relevance

Real Estate Appraiser Continuing Education

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There are two options for the required open-book exam:

1. Download the PDF exam below, take it at your convenience, email me just your answers (e.g., 1-D, 2-D, etc.) peter@valuationlegal.com. PDF of exam is here: [link to exam](#).
2. Be adventurous. Take it online. If you pass, get for CE certificate immediately. To do this, login at: <https://training.valuationlegal.com/>. Your ID is your email. You can recover your password on the login page.

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Part 1: Let's Start with an Unfortunate Legal Situation Let's Hope It's Not You Someday (it's based on a real case)

- Mr. and Mrs. Tindell were looking to buy a home in Susanville, CA in late 2004.
- Their offer to purchase the home for \$320,000 was accepted.
- An appraiser was retained by their lender to appraise the home – her appraised value equaled the purchase price.
- She reported the home as being of “modular” construction built in 1979, and the loan went through.



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A Legal Situation Faced by an Appraiser

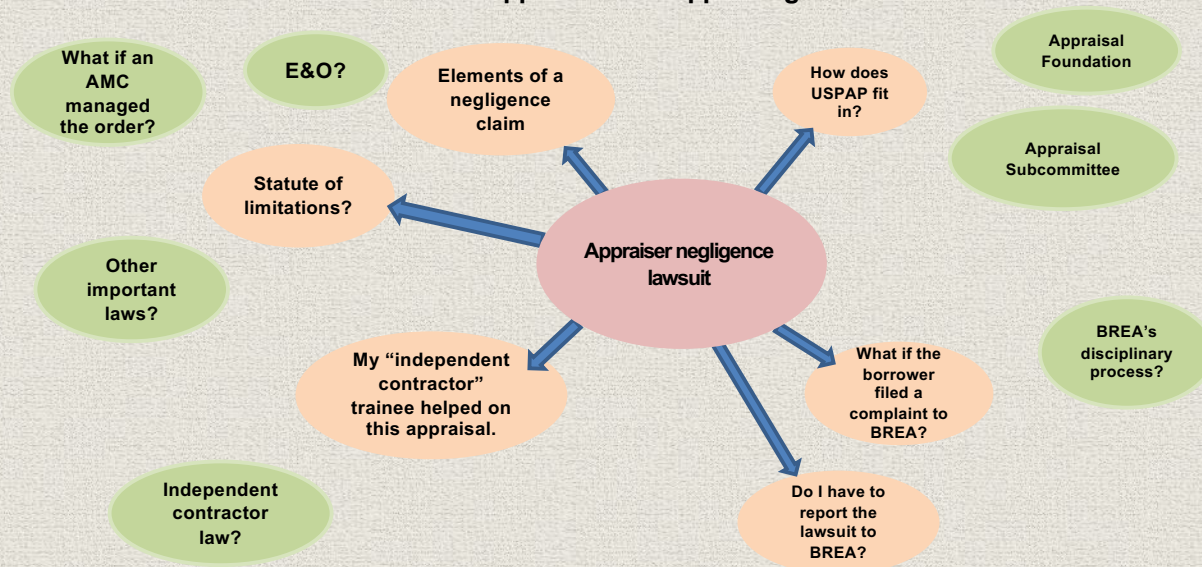
- In 2009, the Tindells tried to refinance, but could not. A different appraiser had determined and reported that the home was actually a manufactured home placed on the property in 1976 that had been remodeled over the years. It was evident that the home was essentially not financeable with regular financing.
- In 2011, the Tindells sued various parties on their attorney's advice, including the seller, the real estate agent, the loan broker, and also the original appraiser.
- That's the situation – your colleague has been sued by a borrower for negligence over a 7-year old appraisal, and the borrower is demanding over \$150,000 in damages.



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This situation raises a lot of issues. We'll use them to explore various federal and California laws and regulations that apply to appraisers and appraising.



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The Basic Elements of an Appraiser Negligence Claim – Where Does USPAP Fit In?

- The Uniform Standards of Professional Appraisal Practice (USPAP). These are, of course, the standards that appraisers are required to follow when performing appraisals.
- As we'll see, they have the force of law and regulation in California.
- They're also a key to the situation we've been talking about – when an appraiser is sued for professional negligence.
- **They form a substantial part of the "standard of care."**
- So, it's important that we understand where USPAP comes from, and how USPAP is applied and enforced.
- To do that, we'll look at the appraiser regulatory system.
- Oh, are you curious about whether the appraiser in our situation will get the case dismissed based on the statute of limitations? We'll cover that California law at the end of the course.

What Is a Professional Negligence Claim?

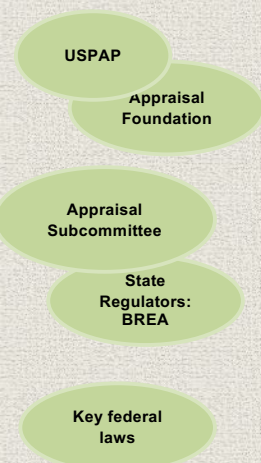
The key legal elements of a negligence claim are:

- 1) a duty on the part of the defendant to conform his or her conduct to a **standard of care** arising from a relationship with the plaintiff,
- 2) a failure of the defendant to follow the standard of care required by the relationship, and
- 3) an injury to the plaintiff proximately caused by the breach.

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Part 2 – The Appraiser Regulatory System



- Where USPAP comes from – and The Appraisal Foundation.
- Appraisal Subcommittee.
- State appraiser regulatory agencies

How do they fit together?

Then we'll cover some key federal laws, regulations and guidelines.

Overview of Appraisal Regulatory System

Before 1991 in California, there was no requirement for an appraiser to have a license.

That changed as a result of the Savings and Loan crisis.

After hundreds of S&Ls failed and after some of the blame was placed on not having any uniformity in the valuation of their real estate loan collateral, Congress passed what we call **FIRREA – the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 – the primary law responsible for our current appraiser regulatory system.**

Overview of Appraisal Regulatory System

Part of FIRREA, referred to as "Title XI," created a new regulatory system for appraisers and appraisals for any "federally related transactions."*

Title XI requires financial institutions to obtain appraisals for "federally related" transaction by state-licensed or certified appraisers in conformity with professional standards.

To accomplish that, Title XI also recognized USPAP (maintained by the Appraisal Standards Board) as the required appraisal standards and required the states to license/certify appraisers in accordance with the minimum qualifications set by the Appraiser Qualifications Board.

The Appraisal Foundation is not a government agency. It's an independent non-profit corporation.

Both of these boards – the ASB and AQB – are part of The Appraisal Foundation.

* 12 U.S.C. 3331-3356.

Brief History of Appraiser Regulation

FIRREA – Title XI also created the **Appraisal Subcommittee (ASC)** – which has the primary federal financial institution regulators as committee members. The ASC's key responsibilities are to:

- Oversee the state appraiser licensing agencies in their credentialing and discipline of appraisers (and now AMCs also). It reviews the licensing agencies every 2 years, giving them grades – BRE's appraiser program was last rated "excellent."
- Maintain a registry of appraisers (and AMCs) who are eligible to perform appraisals in federally related transactions.
- Monitor and review the actions of The Appraisal Foundation and its two boards, the AQB and the ASB.
- Manage an appraisal complaint national hotline.



Source: ASC Presentation 2020.

Member federal agencies:



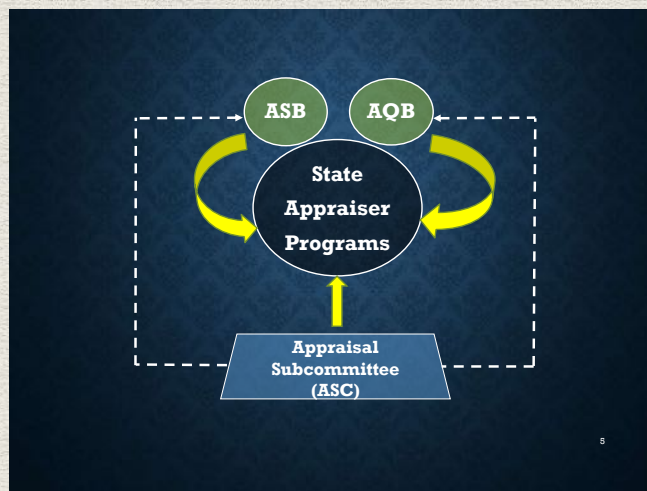
* 12 U.S.C. 3332.

Overview of the Appraiser Regulatory System Provided by the ASC

The result of FIRREA's Title XI was the creation of a "public-private partnership" of sorts.

Three principal parts:

1. **Appraisal Subcommittee**
2. **The Appraisal Foundation**
3. **State appraiser regulatory agencies**



Source: ASC Presentation 2020.

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Dodd-Frank Act Changes to Federal Appraisal Laws

In 2010, in response to the financial/mortgage crises, the Dodd-Frank Act passed.

It made many changes to the regulation of financial services.

Here are the key changes it created with respect to appraising:

- It amended Title XI of FIRREA to require that states also register and regulate AMCs (if the states want to allow AMCs to manage appraisals for consumer credit lending secured by the consumer's principal dwelling).*
- It established "appraisal independence requirements" within the federal **Truth in Lending Act (TILA)** (we'll address these when we get to California's AMC laws).
- It also required the payment of "customary and reasonable fees" to appraisers by creditors and their "agents" (AMCs) in connection with appraisals for loans to consumers secured by the consumer's principal dwelling (this requirement is also in TILA).

* 12 U.S.C. § 3353 (part of FIRREA).

** 15 U.S.C. § 1639e (part of Truth in Lending Act).

The regulations issued to carry out the appraiser independence requirements are now maintained by the CFPB. They're referred to as Regulation Z. They're enforced by the FTC.

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Another Important Federal Law: The Gramm Leach Bliley Act (GLB)

Have you ever been asked to sign or accept an engagement or contractor agreement with something like this in it:

5. Confidentiality and Privacy. Appraiser will maintain the confidentiality and privacy of client and consumer information obtained in the course of performing services under this Agreement and, if such information is received or developed, of any “nonpublic personal information” about “customers” and “consumers” as those terms are defined in the Gramm-Leach-Bliley Act (“GLBA”) and/or in any other applicable privacy laws (collectively, all such information shall be referred to as “Confidential Information” in this section). Appraiser represents and agrees that he or she will not use or disclose any Confidential Information . . .

Let’s talk about why that is often (and should be) a requirement in such agreements.

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Another Important Federal Law: The Gramm Leach Bliley Act (GLB)

Congress enacted the **Gramm Leach Bliley Act** (“GLB”) in 1999.

The GLB provides a framework for regulating the privacy and data security practices of a broad range of financial institutions. Among other things, the GLB requires “financial institutions” to:

- 1) Maintain security safeguards pertaining to nonpublic personal information **about consumers (not businesses)**, and
- 2) Provide certain notifications to consumers of the institution's privacy policies and practices with respect to information sharing.*

* 15 U.S.C. 6801(b), 15 U.S.C. 6805(b)(2)

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Gramm Leach Bliley Act (GLB) – a High Level Summary of its Application to Appraisers

This law applies to you as an appraiser because, as the regulations published by the FTC and CFPB explain:

(h)(1) Financial institution means any institution the business of which is engaging in an activity that is financial in nature or incidental to such financial activities . . .

(2) Examples of financial institutions are as follows: . . .

(iii) A personal property or **real estate appraiser is a financial institution** because real and personal property appraisal is a financial activity listed in 12 CFR 225.28(b)(2)(i) and referenced in section 4(k)(4)(F) of the Bank Holding Company Act, 12 U.S.C. 1843(k)(4)(F).

It also applies to AMCs – here's another listed example:

(x) An entity that provides real estate settlement services is a financial institution because providing **real estate settlement services is a financial activity** listed in 12 CFR 225.28(b)(2)(viii) and referenced in section 4(k)(4)(F) of the Bank Holding Company Act, 12 U.S.C. 1843(k)(4)(F).

* 16 CFR 314.2 Definitions.

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Gramm Leach Bliley Act (GLB) – a High Level Summary of its Application to Appraisers

For appraisers, the GLB's application can be summarized in these very general rules:

An appraiser cannot distribute nonpublic personal information about consumers and customers to nonaffiliated third parties unless such consumers and customers have been given a privacy notice (by the lender, if it's their consumer/customer or by you if it's your direct consumer/customer) and the opportunity to opt-out of such distribution.

For appraisers, nonpublic personal information would be things like:

- Name of borrower.
- Loan/case/application number.
- Interior details; photos of personal items.
- Opinion of value.

A "consumer" is a person who has sought or received a single or incidental service from you for personal, family or household purposes. A "customer" is consumer who has an ongoing relationship with you – such as purchasing appraisals from you on a routine basis.

Who enforces
these
requirements?
FTC and CFPB

Can a borrower
sue for violation?

Are there any real
cases involving
appraisers?

* 16 CFR 314.2 and 16 CFR 314.3.

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Gramm Leach Bliley Act (GLB) – a High Level Summary of its Application to Appraisers

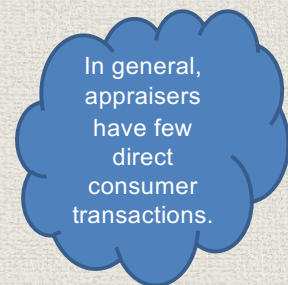
Do appraisers need to give “privacy notices” under the GLB to their consumers and customers? Almost never!

In sum, a real estate appraiser needs to provide a privacy notice to a consumer if:

- The appraiser has performed an appraisal **directly** for that consumer, **and**
- The appraiser wants to disclose nonpublic personal information about the consumer to nonaffiliated third parties. (Why would you want to do that?)

If you want to do that, please research the requirements for privacy notices carefully.

If you routinely perform appraisals for an individual, then you probably have a “customer” relationship with that person and you **must** give a privacy notice to the customer (if you want to comply with the law).



* 16 CFR 314.2 and 16 CFR 314.3.

Gramm Leach Bliley Act (GLB) – a High Level Summary

➤ **Safest Privacy Advice re GLB:**

Regardless of how you receive the information and regardless of whether you have a “consumer” or “customer” relationship with the borrower or another party, don’t disclose nonpublic personal information to third parties, who are not necessary to your performance and delivery of the appraisal.

Please also remember that you have additional confidentiality duties under USPAP:

CONFIDENTIALITY:

An appraiser must protect the confidential nature of the appraiser-client relationship. An appraiser must act in good faith with regard to the legitimate interests of the client in the use of confidential information and in the communication of assignment results. An appraiser must be aware of, and comply with, all confidentiality and privacy laws and regulations applicable in an assignment.

An appraiser must not disclose: (1) confidential information; or (2) assignment results to anyone other than:

- the client;
- parties 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 except when such disclosure to a committee would violate applicable law or regulation.

➤ **In recent BREA discipline reports, there have been a number of USPAP confidentiality violations. Example:**

Certified Residential Licensee	8/18/2020	\$1,000 fine and 4 hours Appraiser Self Protection: Documentation and Record Keeping.	Violations of USPAP Confidentiality section of the Ethics Rule and Record Keeping Rule: disclosed confidential information to a third party without client authorization and did not maintain a compliant work file.
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Gramm Leach Bliley Act (GLB) – a Privacy Claim



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Another federal law – it's the second to the last: RESPA

Can you, as an appraiser, give a \$100 gift card to a chief appraiser at an FDIC-insured bank for every 5 residential mortgage appraisal assignments she sends you?

In other words, can you pay or compensate someone for sending you residential lending work?

The short answer is "No!" (for most lending appraisals). The reason why is the federal **Real Estate Settlement Procedures Acts (RESPA)**.

RESPA Section 8(a) prohibits kickbacks for business referrals related to or part of settlement services involving federally related mortgage loans.

The definition of **real estate settlement services in RESPA includes appraisals**. To be a violation, however, the referral must be related to or part of a settlement service involving a federally-related mortgage loan.

* 12 USC § 2602 and 2607(a); 12 CFR § 1024.2 and 1024.14.

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Who owns your appraisal? One last federal law.

Copyright Law.

Title 17 of the *United States Code*

What does copyright law say about owning an appraisal report?

Has an appraiser ever sued for copyright violations?

What if you copied a narrative report template from another appraiser?

7	UNITED STATES DISTRICT COURT	
8	EASTERN DISTRICT OF WASHINGTON	
9	TIM VINING REAL ESTATE	
10	APPRAISER AND CONSULTANTS,	
11	INC., a Washington corporation,	
12	Plaintiff,	
13	v.	CAUSE NO. CV-04-3110-RHW
14	CLARK JENNINGS & ASSOCIATES,	JUDGMENT
15	INC., a Washington corporation; STEVE	
16	WEBER, and his marital community;	
17	HENRY JOHNSON, and his marital	
18	community; SCOTT ANDERSON, and his	
19	marital community; and JIM O'CONNOR,	
20	and his marital community,	
21	Defendants.	
22	Plaintiff having timely accepted Defendants' Offer of Judgment, and	
23	the Offer of Judgment and Plaintiff's Acceptance having been filed by the	
24	Plaintiff, it is hereby:	
25	IT IS HEREBY ORDERED, ADJUDGED AND DECREED that	
	Plaintiff owns a valid, existing copyright under U.S. Registration No. TX 5-	
	455-482 for the work entitled, <i>Self-Contained Appraisal Report, A & B Hop</i>	

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Who owns your appraisal? One last federal law.

Copyright law.

What does copyright law say about owning an appraisal report?

Has an appraiser ever sued for copyright violations?

1	<i>Farms, Inc., Agricultural Properties, Grant County, Benton, County, and</i>
2	<i>Walla Walla County, Washington.</i>
3	IT IS FURTHER ORDERED, ADJUDGED AND DECREED that
4	Defendants are permanently enjoined from imitating, copying,
5	counterfeiting, or making any unauthorized use of Plaintiff's copyrighted
6	Appraisal Reports, or engaging in any activity constituting an infringement
7	of Plaintiff's copyrights, or to assist, aid, or abet any other person in copying
8	or infringing Plaintiff's copyrights.
9	AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED
10	that Plaintiff shall have a judgment against the Defendants on all claims and
11	counterclaims in this action in the total amount of \$50,000.00, inclusive of
12	costs.
13	DATED: September ^{October} 3, 2005.
14	
15	<i>[Signature]</i>
16	for Clerk of the Court
17	

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Why might you no longer own the copyright to your appraisal? Because you assigned it.

Example AMC Clause.

Ownership and Use of Work Product; Recordkeeping. All work product, information, data, materials, works of authorship, documents, appraisal reports and all embodiments of such items (in whatever form or media), in whole or in part, produced by Appraiser under this Agreement (collectively "Work Product") and all intellectual property rights, including copyrights, trademarks, authors' rights, trade secrets, rights of attribution and other proprietary rights (collectively "Intellectual Property Rights"), to such Work Product shall be the property of AMC, and Appraiser hereby assigns to AMC all Intellectual Property Rights to Work Product, whether such rights are existing now or in the future. However, AMC acknowledges that certain portions of Work Product, such as for example MLS listing information or photos, may be subject to third-party licensors' Intellectual Property Rights ("Pre-Existing Rights"). AMC does not claim any such Pre-Existing Rights nor are such rights included within the meaning of Intellectual Property Rights to Work Product. Appraiser grants AMC a perpetual, worldwide, irrevocable, non-exclusive, royalty-free sublicense to AMC to use, import, reproduce, distribute or make derivative works containing such Pre-Existing Rights.

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Or, you licensed it.

Uniform Residential Appraisal Report

File #

21. The lender/client may disclose or distribute this appraisal report to: the borrower; another lender at the request of the borrower; the mortgagee or its successors and assigns; mortgage insurers; government sponsored enterprises; other secondary market participants; data collection or reporting services; professional appraisal organizations; any department, agency, or instrumentality of the United States; and any state, the District of Columbia, or other jurisdictions; without having to obtain the appraiser's or supervisory appraiser's (if applicable) consent. Such consent must be obtained before this appraisal report may be disclosed or distributed to any other party (including, but not limited to, the public through advertising, public relations, news, sales, or other media).

Next URAR:

24. The lender/client may disclose or distribute this appraisal report to: the borrower; ... data collection or reporting services; ... Any person or entity who receives this appraisal report in accordance with the foregoing may choose to store, copy, reproduce, analyze, use and distribute this appraisal report in whole or in part in any format for internal or external purposes without having to obtain the appraiser's or supervisory appraiser's (if applicable) consent. . . .

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Part 3: California Appraiser Laws and Regulations You Should Know



- We're now going to talk about California's laws and regulations specifically pertaining to appraisers and AMCs.
- The laws (statutes) are found in California's **Real Estate Appraisers' Licensing and Certification Law**, which was enacted in 1990 and created the Office of Real Estate Appraisers (OREA) – but which has been renamed the Bureau of Real Estate Appraisers (BREA).
 - This collection of statutes is, in fact, titled the "Real Estate Appraisers' Licensing and Certification Law." We'll refer to it here as the "Appraiser Law" for short.
 - The Appraiser Law also applies to appraisal management companies. We'll talk about some of those specific laws later.
 - We'll also talk separately about the parts concerning investigations and enforcement.

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Part 3: California Appraiser Laws and Regulations You Should Know

- California's **Real Estate Appraisers' Licensing and Certification Law** (which we are calling the "Appraiser Law" in this class for short) is part of California's Business and Professions Code (Sections 11300 through 11424) and is found in the division of that code that concerns real estate licensing, which applies to agents, brokers and appraisers.
- You can find a complete copy of the law on BREA's website:
https://brea.ca.gov/pdf/BP_Codes.pdf
- The "Appraiser Law" covers both appraisers and appraisal management companies. It has a Preamble and 9 chapters:
 - Preamble
 - Chapter 1: Definitions
 - Chapter 2: Administration
 - Chapter 3: Scope of Practice
 - Chapter 4: Licenses and Certification Application
 - Chapter 5: Reciprocity of Licenses and Certifications
 - Chapter 6: Continuing Education
 - Chapter 7: Fees
 - Chapter 8: Real Estate Appraisers Regulation Fund
 - Chapter 9: Miscellaneous

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Part 3: California Appraiser Laws and Regulations You Should Know

- The **regulations** we'll discuss are issued by the Bureau of Real Estate Appraisers (BRE) to implement the laws in the Real Estate Appraisers' Licensing and Certification Law – to establish the details necessary to carry out the law and for appraisers to comply with the law.
- Unless exceptions apply, the regulations – like other state regulations – are created under the rule-making process in the Administrative Procedure Act.
- BRE's regulations are organized into **15 "Articles,"** each addressing a different subject.
- These regulations are part of what is called the California Code of Regulations and are found in Chapter 6.5 (Real Estate Appraisers) of Title 10.

The 15 articles in BRE's regulations are:

- Article 1 – definitions
- Article 2 – general requirements for licensure
- Article 3 – experience and education requirements
- Article 4 – application process
- Article 5 – fees charged by BRE
- Article 6 – change/conversion procedures
- Article 7 – examinations
- Article 8 – issuance procedures
- Article 9 – basic and continuing education accreditation
- Article 10 – renewal procedures
- Article 11 – rules of professional conduct
- Article 12 – discipline
- Article 13 – investigations and hearings
- Article 14 – personal information
- Article 15 – conflict of interest code (for BRE)

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Let's look at 10 key California Appraiser laws – here's #1.

Key Law #1 – BRE's primary purpose is protection of the public.

Section 11310.1 (in Chapter 2 – Administration) provides

“Protection of the public shall be the highest priority for the Bureau of Real Estate Appraisers in exercising its licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount.”

- BRE is not an appraiser advocacy organization.
- Its **primary purpose is protection of the public.**

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* Cal. Bus. & Prof. Code § 11310.1.

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Key Law #2 – USPAP is adopted as law in California and applies to all appraisal activity of appraisers.

Section 11319 (in Chapter 2 – Administration) provides

“(a) Notwithstanding any other provision of this code, except as provided in subdivision (b), the Uniform Standards of Professional Appraisal Practice constitute the minimum standard of conduct and performance for a licensee in any work or service performed that is addressed by those standards. . .”

- USPAP has been adopted by the Appraiser Law.
- Any appraiser licensed or certified in California must follow USPAP if USPAP by its terms applies to the work or service. This means, of course, appraisals and appraisal reviews, but other parts of USPAP – such as the Ethics Rule – also apply per USPAP when a person is “acting as an appraiser.”

Key Law #3 – Non-licensed individuals may assist you in federally-related transaction appraisals but the final value conclusion is yours – the assistant and nature of assistance must also be disclosed.

Section 11324 (in Chapter 3 – Scope of Practice):

“An individual who is not a licensee may assist in the preparation of an appraisal in a federally related transaction under the following conditions:

- (a) The assistance is under the direct supervision of an individual who is a licensed appraiser and the final conclusion as to value is made by a licensed appraiser.
- (b) The final appraisal document in a federally related transaction is approved and signed, with acceptance of full responsibility, by the supervising individual who is licensed by the state pursuant to this part, identifies the assisting individual, and identifies the scope of work performed by the individual who assisted in preparation of the appraisal in a federally related transaction.”

- Let’s ponder assistance for other appraisals?

Key Law #4 – An appraisal license is required in California (only) for “federally related” real estate appraisal activity.

Section 11320 (in Chapter 3 – Scope of Practice):

“No person shall engage in federally related real estate appraisal activity governed by this part or assume or use the title of or any title designation or abbreviation as a licensed appraiser in this state without an active license as defined in Section 11302. Any person who willfully violates this provision is guilty of a public offense. . .”

Important definition: “Federally related real estate appraisal activity” means appraising for real estate-related financial transactions that a federal financial institution’s regulatory agency engages in, contracts for or regulates and that requires the services of a state licensed.

- In California, persons who are not licensed or certified as appraisers may appraise or value properties – unless the appraisal/valuation is required by federal financial institution regulators (aka “federally related transactions.”)
- This means that non-appraisers, for example, may perform evaluations and BPOs.
- However, when an appraiser does a valuation, the appraiser must follow USPAP in all cases.

* Cal. Bus. & Prof. Code § 11320.

Key Law #5 – BREAA may request, and you must provide, engagement letters, appraisals, other USPAP work product, and all supporting documentation and data.

Section 11328 (in Chapter 3 – Scope of Practice):

“To substantiate documentation of appraisal experience, or to facilitate the investigation of illegal or unethical activities by a licensee, applicant, or other person acting in a capacity that requires a license, that licensee, applicant, or person shall, upon the request of the director, submit copies of the engagement letters, appraisals, or any work product that is addressed by the Uniform Standards of Professional Appraisal Practice, and all supporting documentation and data to the bureau. This material shall be confidential in accordance with the confidentiality provisions of the Uniform Standards of Professional Appraisal Practice.” * Cal. Bus. & Prof. Code § 11328.

- We’ll see the relevance of this section when we discuss enforcement and investigations.
- **Make sure you keep engagement letters in your workfile**, even for assignments via electronic portals.

Discipline example

Certified Residential Licensee	6/23/2020	\$1,000 fine, 4 hours Appraiser Self-Protection: Documentation and Record Keeping.	Violations of USPAP Standards 1 and 2, Conduct section of the Ethics Rule, and Record Keeping Rule: failed to develop a credible opinion of site value, removed trademark/logos from third-party photographs of comparable sales without providing alternate citation as to their true source, and failed to maintain a copy of the engagement letter in the work file.
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Key Law #6 – You have a duty to notify BREa of convictions, felony charges, or other license discipline.

Section 11318 (in Chapter 2 – Administration): requires all licensees to inform BREa in writing within 30 days any of:

- (1) “The bringing of an indictment or information charging a felony against the licensee, applicant for licensure, . . .”
 - (2) “The conviction of the licensee, applicant for licensure, . . . of any felony or misdemeanor. As used in this section, a conviction includes an initial plea, verdict, or finding of guilty, plea of no contest, or pronouncement of sentence by a trial court even though that conviction may not be final, the sentence may not be imposed, or all appeals may not be exhausted.”
 - (3) Cancellation, revocation or suspension of a license, other authority to practice, or refusal to renew a license or other authority to practice in any occupation or licensed profession (not just appraising) or as course provider, by any other regulatory agency.
- What’s not on the list? E&O claims and civil lawsuits (e.g., for negligence).

Key Law #7 – Criminal convictions can impact your license.

Section 11319.2 (in Chapter 2 – Administration):

This section concerns the impact of convictions for crimes. Here's a summary:

- Appraisal license is automatically suspended during incarceration for a felony.
- If after a hearing, it is determined that the felony is substantially related to the qualifications, functions, or duties of an appraiser, then BREa's chief may order a longer suspension or other action.
- A conviction of a charge of violating any statute or regulation “regulating dangerous drugs or controlled substances”, or a conviction of Section 187, 261, 288, or former Section 262, of the Penal Code, shall be conclusively presumed to be substantially related to the qualifications, functions, or duties of an appraiser and a hearing is not needed.

Key Law #8 – Appraisers may not be paid based on the value.

Section 11323 (in Chapter 3 – Scope of Practice):

“No licensee shall engage in any appraisal activity if his or her compensation is dependent on or affected by the value conclusion generated by the appraisal. . . .”

- That’s pretty clear – an appraiser can’t charge a fee for an appraisal that is based on the value.

Key Law #9 – CE requirements have been revised effective January 1, 2023.

Section 11360 (in Chapter 6 – Continuing):

New class



(a) . . . [C]ontinuing education requirements, which shall be reported on the basis of a four-year continuing education cycle, and, for each licensee renewing on or after January 1, 2023, include at least **two hours of elimination of bias training**, either individually or as part of a broader course.

New class



(b) . . . [S]hall be required to take a minimum of four hours of **federal and California appraisal related statutory and regulatory law** every four years.

(c) . . . Beginning January 1, 2023, as part of the continuing education required by this section, a licensee shall complete at least **one hour of instruction in cultural competency** every four years.

(d) The cost of any educational course required by this section shall not be borne by any client served by a licensee.

(e) For purposes of this section, "cultural competency" means understanding and applying cultural and ethnic data to the process of providing services that includes, but is not limited to, information on the appropriate services for lesbian, gay, bisexual, transgender, and intersex communities, ethnic communities, and religious communities.

Key Law #10 - California Appraiser Law now specifically prohibits a broad array of discrimination.

Section 11424 (in Chapter 9 – Miscellaneous):

“(a) Licensees shall not base, either partially or completely, their analysis or opinion of market value on the basis of race, color, religion (creed), gender, gender expression, age, national origin (ancestry), disability, marital status, source of income, sexual orientation, familial status, employment status, or military status of either the present or prospective owners or occupants of the subject property, or of the present owners or occupants of the properties in the vicinity of the subject property, or on any other basis prohibited by the federal Fair Housing Act.”

- We’ll come back to this new anti-discrimination section in the Appraiser Law when we talk about fair housing laws.
- This law is broader than the federal Fair Housing Act, because it prohibits discrimination in all types of appraisals, not just appraisals for the financing of housing.
- It also should be covered in any Elimination of Bias course that you attend.

* Cal. Bus. & Prof. Code § 11424.

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Let’s look now at some key California regulations

BREA’s regulations are part of what is called the California Code of Regulations and are found in Chapter 6.5 (Real Estate Appraisers) of Title 10.

The regulations in Chapter 6.5 cover both appraisers and AMCs.

You can find them in a PDF on BREA’s website:

https://brea.ca.gov/pdf/OREA_Regs_full.pdf

* Cal. Code Regs. tit. 10 § 3500.

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Let's look now at some key regulations

Key Regulation #1 – The definitions of “residential property” and “non-residential property.”

Regulation Section 3500

“Residential property” means real property containing, and land suitable for, four or fewer residential units.”

“Non-residential property” means all other property except one to four unit residential structures and land suitable for one to four unit residential use.

* Cal. Code Regs. tit. 10 § 3500.

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Key Regulation #2 – You must notify BREa of name, address and contact information changes within 10 days – and there is a form for it.

Regulation Section 3527(a) (in Article 2 – General Requirements of BREa's regulations)

“(a) All applicants for and holders of a license, temporary practice permit or course provider approval permit shall submit written notice to BREa of any change to the following within 10 days on the Change Notification and Miscellaneous Requests Form REA 3011 (Rev. 04/01/2020), which is herein incorporated by reference:

- (1) Name;
- (2) Residence telephone number;
- (3) Business telephone number;
- (4) Business name; or
- (5) Mailing address. . .”

Form 3011
https://brea.ca.gov/forms/REA_3011.pdf

- The requirement to notify BREa of address and contact information changes is truly key – it often comes up when BREa is trying to notify an appraiser of an investigation.

* Cal. Code Regs. tit. 10 § 3527.

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Key Regulation #3 – USPAP must be followed by appraisers for any work to which USPAP applies (under its terms) and is incorporated by reference.

Regulation Section 3701 (in Article 11 – Rules of Professional Conduct of BREAs regulations)

“Every holder of a license under this part shall conform to and observe the Uniform Standards of Professional Appraisal Practice (USPAP) and any subsequent amendments thereto as promulgated by the Appraisal Standards Board of The Appraisal Foundation which standards are herein incorporated into these regulations by reference as if fully set forth herein.”

Key Regulation #4 – Signing a report means full responsibility for the content, including when you sign in a supervisory capacity.

Regulation Section 3705 (in Article 11 – Rules of Professional Conduct of BREAs regulations) (with emphasis added)

“(a) **Every appraisal report** subject to the Uniform Standards of Professional Appraisal Practice upon final completion **shall bear the signature and license number of the appraiser and of the supervising appraiser**, if appropriate. **The affixing of such signature and number constitute the acceptance by the appraiser and supervising appraiser of full and personal responsibility for the accuracy, content, and integrity of the appraisal under Standards Rules 1 and 2 of USPAP.**

(b) Every **review** appraisal report upon final completion shall bear the signature and license number of the reviewer. The affixing of such signature and number shall constitute acceptance by the reviewer of responsibility for the review under Standard Rule 3 of USPAP.

(c) The **license number** of the appraiser, and of the review appraiser if the report is a review, **shall appear with each signature** throughout the appraisal or review document.”

Key Regulation #5 – An out of state appraiser does not need a temporary license to assist you with an appraisal but needs one for federally related transactions if they perform an appraisal on their own.

Regulation Section 3525 (in Article 2 – General Requirements of BREA’s regulations)

“(a) In lieu of obtaining a license, a person with a currently valid unrestricted appraiser license issued by another state may be issued a Temporary Practice Permit to perform a single appraisal assignment.

(b) A Temporary Practice Permit is not required if a person from another state associates with an appraiser licensed in California and the work is limited to assisting in the preparation of an appraisal under the conditions specified in Business and Professions Code Section 11324.

...

(e) A Temporary Practice Permit is required when any person licensed in a state other than California enters California to conduct an appraisal in a federally related transaction and the person is not licensed in California.”

* Cal. Code Regs. tit. 10 § 3525.

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Key Regulations – License Renewal Summary Points

Licenses can be renewed online at www.brea.ca.gov

A mail-in paper application is required if you

- live out of state,
- have a license that is suspended, resigned, revoked or was surrendered, or
- are subject to enforcement monitoring.

BREA recommends submitting your renewal application at least 3 months prior to expiration but cannot accept an application more than 6 months prior to expiration.

Renewal pointers:

- Don't wait for a renewal application in the mail.
- It's the licensee's responsibility to submit a timely renewal.
- Applications are considered late if not completed or postmarked by the expiration date – but don't wait until then!
- Applications are also late if any of the required CE is completed after the expiration date.

* Cal. Code Regs. tit. 10 § 3681.

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Key Regulations – Renewal Not Possible After Two Years

Late Renewals

If an appraiser fails to renew his or her license prior to its expiration, it may be renewed within two years after expiration by satisfying all of the requirements for renewal of the license and by payment of additional fees.

Appraisals in federally related transactions may not be performed during the “grace period” – that is not permitted by federal law.

After two years, an appraiser cannot revive a lapsed license – the appraiser must go back to the very beginning.

* Cal. Code Regs. tit. 10 § 3682.

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Key Regulations – Continuing Education Requirements Summary Information

All license levels have the same Continuing Education requirements.

There are two types of renewals:

- “USPAP Only Renewal” – taking the 7-hr USPAP Update course is required at the 2-year mid-point in the 4-year CE cycle. (Tip – take it early in the USPAP cycle.)
- “Full CE Cycle Renewal” – taking the current 7-hr USPAP Update and 42 additional CE Hours. (A total of 56 hours in 4 years.)
- **A 15-hour USPAP class does not count as taking a 7-hour update but it can be an elective.**

Let’s look at the additional specific class requirements next.

* BREa Website: <https://brea.ca.gov> and Cal. Code Regs. tit. 10 § 3543.

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Key Regulations – Continuing Education Requirements Summary Information

New course requirements. For license renewals due on or after January 1, 2023, you must comply with the new continuing education (CE) requirements of 1 hour of Cultural Competency and 2 hours of Elimination of Bias.

- Licensees who are on their Full CE Cycle (very 4 years) are mandated to take the courses.
- Licensees who are on USPAP Cycle (every 2 years) can take the courses now, but do not have to until their 4 year renewal cycle.
- The 6-month renewal notice sent by BREa (make sure your contact info is up-to-date) indicates whether licensees have a USPAP renewal or Full CE Cycle renewal. It also indicates whether licensees need the new courses.

• **General Requirements.** Licensees must obtain 56 hours of required CE within a 4-year Full CE Cycle. At least 3 of those hours must be in Elimination of Bias and Cultural Competency, as stated above. And, appraisers must also complete a 4-hour Federal and California Law and Regulations class (this class!).

➤ **CE education can only be completed after the date on which the previous license was issued – there is no “carry over” of surplus CE credit.**

* BREa Website: <https://brea.ca.gov>, and Cal. Code Regs. tit. 10 § 3543.

Key Regulations – Supervising Trainees, Summary of Regulation 3568

At a minimum, a supervisor must . . .

- Be licensed at the certified level,
- Be in good standing with the Bureau,
- Not supervise more than three trainees at one time, and
- Not be subject to any disciplinary action within the last two years that affects the supervisor's legal eligibility to engage in appraisal practice

Supervisors also must . . .

- Personally inspect subject properties with trainee until the trainee is competent,
- Review a trainee's appraisal reports.
- Accept responsibility by signing and certifying that reports comply with USPAP,
- Review and initial each page of the trainee's Log of Appraisal Experience (Form REA 3004),
- Verify work was completed under his/her supervision, and
- Maintain workfiles in compliance with USPAP.

Both supervisor and trainee must take the supervisor/trainee training course before beginning the experience hours!

Key Regulations – Supervising Trainees, Summary of Regulation 3568

It is critically important for supervisors to pay attention to the details of their responsibilities, particularly the log. The ramifications for a trainee including not getting licensed or delays in proper completion of the experience.

- BREA is concerned that the seriousness of a supervisor's responsibilities are not reaching many supervisors (and trainees).
- Every year, there are trainees who do not receive credit for their experience hours.

Here are several issues that BREA has identified as common deficiencies in supervisor/trainee matters:

We'll cover these:

- a. Business and Professions Code, § 11319. Minimum standards for conduct and practice
- b. California Code of Regulations, § 3721 (a)(2) and (5)
- c. Uniform Standards of Professional Appraisal Practice Standard Rule 2-3, Certification
- d. Appraisal Certification Requirements (Directions on Forms)

Here are several issues that BREA has identified as common deficiencies in supervisor/trainee matters:

Issue 1: No Supervisor Training – a **Licensed Trainee (AT)** will not receive credit for work experience before completion of the supervisor/trainee course. The trainee and supervisor **must** take the course before the hours can be credited for experience.

Hours of work experience only count after the supervisor has taken the training. Any hours/appraisal prepared prior to the supervisor taking the course will not count.

(To be clear, this requirement **only applies to the AT level trainee appraiser**. BREA, however, notes, that the Supervisor Appraiser and Trainee Appraiser training would be beneficial for supervisors who are training licensed appraisers.)

Here are several issues that BREA has identified as common deficiencies in supervisor/trainee matters:

Issue 2: False Certification – **Licensed Trainees, other licensed level appraisers, and/or unlicensed trainees** will not get the work experience hour credit:

False certification also causes the trainee and/or other licensed appraiser(s) named in the appraisal report to not receive credit for the work hours for licensure.

For work experience to count, the trainee must be properly named in the appraisal or sign the appraisal report that actually goes to the client. The supervisors must properly identify their own contribution to the appraisal. Location of the signatures (left side) generally has specific meaning/intent, such as indicating that the signatory person certifies they inspected the property. Every appraiser needs to read the certification requirements before signing to ensure trainees receive proper credit, and to ensure supervisor is conforming to USPAP requirements.

Here are several issues that BREA has identified as common deficiencies in supervisor/trainee matters:

If the trainee wants to ensure that their experience will qualify as acceptable experience credit toward a license, it is their responsibility to ensure that these certifications in each appraisal report on the log are true.

For example: the individual who signs as "APPRAISER" on the left side of page 6 of a URAR (Fannie Mae form 1004 March 2005) certifies the following:

2. *"I performed a complete visual inspection of the interior and exterior areas of the subject property..."*

In summary, the appraiser who signs on the left side of a URAR must perform a complete visual inspection of the interior and exterior areas of the subject property or they are not in compliance with their certification. The URAR does allow the supervisor to sign the report without having performed an inspection but only on the right side of page 6, only if the "did not inspect" box is checked and only if the client is agreeable.

"It is imperative for those under supervision for training that the supervisor know and comply with all requirements to ensure trainees have the greatest use of their time and opportunity for experience to be credited." -- BREA

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Here are several issues that BREA has identified as common deficiencies in supervisor/trainee matters:

Issue 4: Proficiency of Experience – Licensed Trainees, other licensed level appraisers, and/or unlicensed trainees will not get work experience hour credit:

An applicant's experience must demonstrate proficiency in appraisal principles, methodology, procedures, and reporting conclusions in order to receive work experience hours credit.

For example: Can an applicant claim experience credit for the time they spent inspecting a property?

If the scope of the applicant's participation in that assignment included using and performing appraisal principles, methodology, procedures, and reporting conclusions, then "yes." If an applicant's participation in the assignment did not include analysis and valuation of the subject property, then "no." In that case, the applicant's participation in the assignment did not involve anything that would demonstrate the aforementioned items.

Citations:

- a. Business and Professions Code, § 11319. Minimum standards for conduct and practice
- b. California Code of Regulations, § 3541(e)
- c. Uniform Standards of Professional Appraisal Practice Standard Rule 1, 2, and 3

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Let's Talk about Appraiser Experience Requirements (Regulation section 3541)

The subject of hours-based, supervised experience is a big topic currently among fair housing groups.

What impacts do requirements for supervised experience have on the ability of people to enter the profession? Whom do they impact most?

What is "Practical Applications of Real Estate Appraisal" (PAREA)? How is BREA permitting PAREA to be used?

LICENSE LEVELS	EDUCATION REQUIREMENTS*	EXPERIENCE REQUIREMENTS	SCOPE OF PRACTICE
Trainee (AT)	150 hours, covering specific modules, including the 15-hour National USPAP course (or its equivalent as determined by the Appraiser Qualifications Board (AQB)). Trainee applicants must also complete an approved Supervisory/Trainee Appraisers course prior to obtaining a Trainee Appraiser license. All initial applicants must complete an approved California state and federal laws course prior to obtaining a license.	None	Any property the supervising appraiser is permitted to appraise.
Residential (AL)	150 hours, covering specific modules, including the 15-hour National USPAP course (or its equivalent as determined by the AQB). All initial and reciprocal applicants must complete an approved California state and federal laws course prior to obtaining a license.	1,000 hours and encompassing no less than 6 months of acceptable appraisal experience.	Any noncomplex 1-4 family property with a transaction value up to \$1 million; and nonresidential property with a transaction value up to \$250,000.
Certified Residential (AR)	200 hours, covering specific modules, including the 15-hour National USPAP course; and meeting the criteria of one of the options listed under College Level Education Options for Certified Residential allowed by the AQB. All initial and reciprocal applicants must complete an approved California state and federal laws course prior to obtaining a license.	1,500 hours and encompassing no less than 12 months of acceptable appraisal experience.	Any 1-4 family property without regard to transaction value or complexity; and non-residential property with a transaction value up to \$250,000.
Certified General (AG)	300 hours, covering specific modules, including the 15-hour National USPAP course; and a bachelor's degree or higher from an accredited college or university. All initial and reciprocal applicants must complete an approved California state and federal laws course prior to obtaining a license.	3,000 hours and encompassing no less than 18 months of acceptable appraisal experience, of which 1,500 hours must be non-residential.	All real estate without regard to transaction value or complexity.

Source: BREA Spring/Summer 2020, *The California Appraiser*.

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Part 4: BREA Discipline and Investigations

What if the borrower files a complaint to BREA?

In this section, we'll cover:

- BREA's disciplinary process.
- How it relates to civil liability.
- At the end, we'll look at a real-world legal case with a tie to a BREA complaint.

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BREA Disciplinary Investigations – the Beginning

- Any party may initiate a complaint to BREA against an appraiser or AMC.
- Complaints to BREA are only for administrative discipline – no party can be awarded damages or compensation by BREA.
- Complaints don't have to, but can, specify the laws, regulations or parts of USPAP alleged to have been violated.
- A complainant does not have to be a client or intended user of an appraisal to file a complaint.

The image shows the first page of the BREA Complaint Form. It includes sections for:

- INFORMATION ABOUT YOU (Complainant):** Name, Telephone Number, E-mail Address (optional), and Address.
- 5. You Are:** Seller, Buyer, Those Seeking to Refinance, or Other.
- Authorizer's Information:** Name, Address, Telephone, and Email Address.
- INFORMATION ABOUT THE APPRAISER OR APPRAISAL MANAGEMENT COMPANY:** Name and Appraiser License Number or Appraisal Management Company Registration Number.
- INFORMATION ABOUT THE PROPERTY:** Address of Property Appraised.
- GENERAL INFORMATION:** Whether the complaint is related to an action filed in court, and whether there are any witnesses.

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BREA Disciplinary Investigations – the Beginning

- The complainant's name is on the complaint form and the form must be signed, but the actual complaint form is not given to the appraiser or the complainant's identity is kept confidential by BREA during the investigation.
- Only if a case reaches the administrative hearing stage (before the Office of Administrative Hearings) will the responding appraiser receive a copy of the complaint or learn the complaining party's identity.
- As the result of AB948 regarding discrimination, the complaint form now collects information about any protected classes to which the complaining party may belong?

Statute of limitations for BREA complaints?

There is no "statute of limitations" for the filing of a BREA complaint, and BREA may consider a complaint without regard to how long after the appraisal it is filed.

The image shows the second page of the BREA Complaint Form. It includes sections for:

- 11. Do you believe the opinion of the value of the real estate is below, at, or above the market value?** Below market value, At market value, Above market value.
- 12. Are you a member of one or more of the following protected classes?** Race, Sexual Orientation, National Origin, Age, Color, Marital Status, Source of Income, Other, Religion, Medical Condition, Ancestry, Disability, Prefer not to disclose, Gender, Military or Veteran Status, Genetic Information.
- 13. Indicate the documentation you are submitting in support of this complaint.** Complete Appraisal Report(s), E-mails/Correspondence pertinent to your complaint, Legible copies of any other evidence to support your allegations, Appraisal order form or contract, Other.
- 14. In the form of a brief statement, please give the full details of your complaint.** A large text area for the complainant to describe the complaint.
- 15. Certification Statement:** A section for the complainant to certify the truth of the information provided and sign the form.

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BREA Disciplinary Investigations – the Beginning

- BREAA cannot award money, damages or restitution to the complainant.
- It also cannot enforce agreements or contracts.
- Those are claims that have to be pursued in court.
- However, it is important to understand, that discipline imposed by BREAA can have a big impact in a civil court case against the appraiser for professional negligence or other alleged conduct.

While BREAA will not enforce a contract or award damages for breach, the failure to perform an appraisal as agreed has been the subject of disciplinary proceedings.

From a recent BREAA Accusation:

6	<u>SECOND CAUSE FOR DISCIPLINE</u>
7	(Failure to Demonstrate Qualifications of an Appraiser)
8	39. Respondent is subject to disciplinary action under California Code of Regulations,
9	title 10, section 3721, subsection (a)(7) for violating California Code of Regulations, title 10,
10	section 3702, subsections (a)(1) and (a)(3). Respondent failed to demonstrate the qualifications
11	of an appraiser, such as honesty, candor, integrity, and/or trustworthiness, when he consistently
12	made false representations to L.D.K regarding the estimated time of transmission of the appraisal
13	report. Paragraphs 27 to 37 are re-alleged as if fully set forth herein.

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Who Files Complaints to BREAA?

Per BREAA:

Complaints filed against Appraisers:

- 45% of Complaints are filed by Lenders, AMCs, and Government Agencies (FHA, Fannie Mae, Freddie Mac, FDIC, OCC, etc.)
- 20% of Complaints are filed by Homeowners and/or Borrowers
- 20% of Complaints are filed by Appraisers
- 15% of Complaints are filed by "Others" (Realtors, Lawyers, Law Enforcement, etc.)

Complaints filed against Appraisal Management Companies:

- 90% of Complaints are filed by Appraisers
- 10% of Complaints are filed by Homeowners and/or Borrowers

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BREA Investigation Process

- Once a complaint is received, BREA will send an acknowledgement letter to the complainant.
- An investigator will then screen the complaint package.
- The screening process will take into account the allegations, BREA's authority, and the potential harm to the public. The investigator may contact the appraiser, AMC, or other market participants.
- Screening will result in either closing the case or assigning the case for an extended investigation.
- If the case is closed at screening, BREA will not contact the appraiser.
- If the case is assigned for extended investigation, a "demand letter" will usually be sent to the appraiser.

Demand Letter

BUREAU OF REAL ESTATE APPRAISERS
1102 G STREET, SUITE 400, SACRAMENTO, CA 95811
P 916.552.9000, F 916.552.9807, www.brea.ca.gov

2017

Dear Mr. [REDACTED]:

The Bureau of Real Estate Appraisers (BREA) will be investigating you for potential violations of the California laws and regulations and/or the Uniform Standards of Professional Appraisal Practice (USPAP). BREA, in accordance with California Business and Professions Code, Section 11328, is therefore requesting that you provide us with true copies of the appraisal report(s), as submitted to the client, and complete copies of the workfile(s) that you have maintained, with respect to the following assignment(s):

Property	Report Date
[REDACTED] CA [REDACTED]	[REDACTED] 2017

- **Remember:** You're required to have a copy of the engagement letter in your workfile. So, if you're getting assignments electronically, be sure you're saving the engagement documents and placing them in your file.

Lets' Look at a Sample BREA "Demand Letter"

Please provide the appraisal report(s) and workfile(s) for the assignment(s) indicated AND report(s) and workfile(s) for all other services you performed involving the specified Property(ies), whether reported on the specified Report Date or another date. For services outside of Appraisal Practice (as defined in USPAP) for the specified Property(ies), please provide a written description of the service(s) performed.

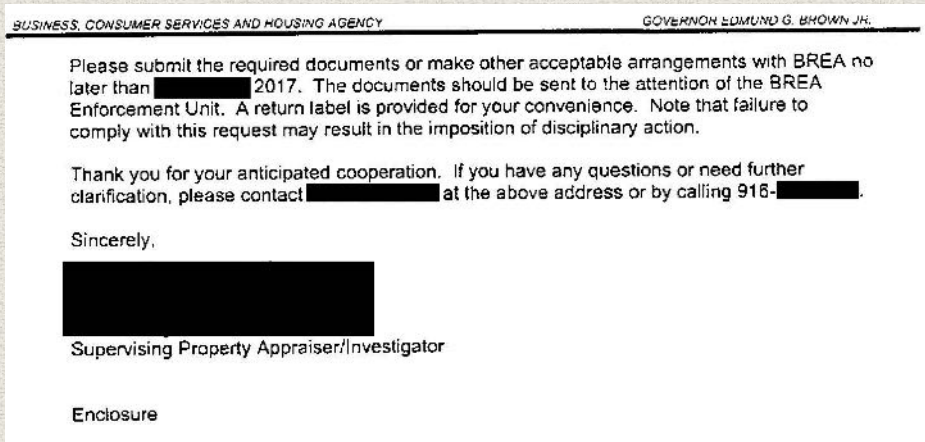
Please certify that the information you are providing to BREA is correct and complete by filling out and signing the enclosed *Penalty of Perjury* statement and attaching it to the items requested.

During the investigative process, the investigator assigned to your case may contact you to schedule an informal telephone interview to discuss your case. This informal telephone interview is an opportunity for you to present to the investigator any further information you believe is relevant to your case. Note that Title 10, Chapter 6.5, Section 3527, of the California Code of Regulations requires written notice to the BREA of contact changes within 10 days.

205-Demand Letter

Comparison to other states: In other states, the appraiser is usually asked to respond to specific allegations in the complaint. In California, the appraiser does not see the complaint. But the appraiser will usually be asked to respond to potential problems in the appraisal in an interview.

Lets' Look at a Sample BREA "Demand Letter"



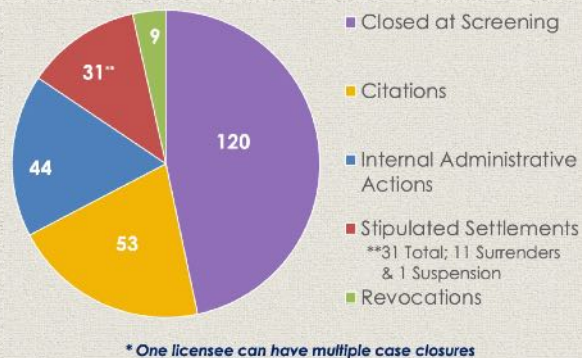
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BREA Complaint Process

- After the demand letter, the appraiser may also be contacted for an interview.
- When the investigative process is complete, an examination of the facts will be made to determine if a violation(s) has occurred and disciplinary sanctions will be imposed, when appropriate.
- The appraiser will be notified by BREA of the outcome of the case.
- The appraiser may contest BREA's determination or sections by filing a Notice of Defense.
- If a such a notice is submitted, a hearing will be held before an Administrative Law Judge of the Office of Administrative Hearings (OAH) and prosecution of the case will be handled by the Attorney General's Office.

Some Statistics:
BRE Closed 257 Enforcement Cases,
April 1, 2018 – March 31, 2019***



*** Source: BRE Presentation to San Diego Chapter of the Appraisal Institute, 2019.

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BREA Complaint Resolutions

- Case closed at screening
- Advisory letter
- Dismissal
- **Citation** – appraiser may accept or contest (by filing notice of defense and pursuing a hearing)
- Stipulated settlement
- **Accusation** (Prosecuted by Attorney General’s Office)

The range of sanctions in decisions or settlements include:

- Public reproof;
- Additional education requirements;
- Fine;
- Probation;
- Suspension;
- Revocation;
- Special license conditions.

- What types of discipline are published on BREA’s website? (Cal. Bus. & Prof. Code § 11317 and 11317.2.)

If you have a citation requiring education, be sure to complete the course(s) within the time required! Failure to do that means automatic suspension of your license as of that date, per Bus. and Prof. Code section 11315(d)(2)(D).

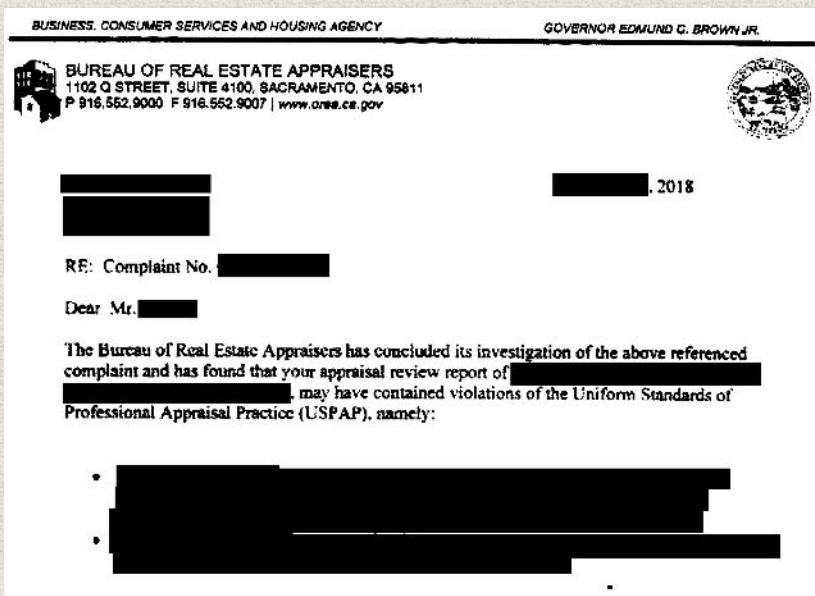
Failure to pay fines, may result in additional punishment.

If a citation is not contested and fine not paid, the balance will be added to the amount due at license renewal.

* Cal. Code Regs. tit. 10 § 3721; Cal. Bus. & Prof. Code § 11315(d).

Source: BREA website: <https://brea.ca.gov/html/EnforcementInfo.html>.
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Example BREA Non-Disciplinary Warnings



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Example BREA Non-Disciplinary Warnings

Please be reminded that you are required to comply with USPAP as well as California laws and regulations regarding the appraisal of real estate. You are strongly urged to take immediate measures to avoid similar deficiencies in the future.

This letter is not considered disciplinary action. However, it will remain on file and does not preclude future action based on facts and evidence. If you have questions or need additional information, please contact me at the above address or by calling (916) [REDACTED].

Respectfully,



Senior Property Appraiser Investigator
Enforcement Division

Example BREA Non-Disciplinary Warnings

Other Warnings from Different Letters:

- The sale of the subject property was described as an arm's-length transaction which was being sold to the tenant of the subject property. However, a sale between an owner and tenant which had not been exposed to the open market would not be an arm's-length transaction; and
- **Care should be taken to be consistent in the report. It was reported on page one that property values were increasing but no time adjustments were made in the Sales Comparison Approach. This apparent discrepancy should have been explained.**
- The box in the Neighborhood section of the appraisal report was checked indicating property values as being stable. However, the comments addendum described increasing prices in the past 12 months while the Market Conditions Addendum checked the box indicating stable prices. All areas of the appraisal report should be consistent.

Example BREA Non-Disciplinary Warnings

Other Warnings from Different Letters:

- All comparable sales were reported as being on level one, like the subject, which was not the case. Careful proofreading would have avoided this error.
- The report did not adequately or accurately describe the parking arrangement at three of the comparable sales or the street address of Sale 2. The report also did not include an adequate analysis for some of the adjustments applied to the comparable sales, or an adequate reconciliation of the value indicators presented in the Sales Comparison Approach.

Common Allegations in Complaints to BREA? But remember – once an investigation begins, BREA may consider any issues with the appraisal.

Per BREA, most common **residential appraisal** allegations:

- Misrepresentation of subject property characteristics
- Inaccurate reporting of zoning
- Misrepresentation of market conditions
- Failure to support Highest and Best Use
- Inadequate verification of data
- Inappropriate comparable sales and or misrepresenting condition of comparable sales
- Failure to develop and support Cost Approach
- Failure to analyze and reconcile current listing or past sales history
- Signing the report when someone else inspected
- Failure to acknowledge professional assistance

Most common **non-residential appraisal** allegations:

- Misrepresentation of subject property characteristics
- Improper application of extraordinary assumptions
- Misrepresentation of market conditions
- Failure to disclose and analyze impediments to subject property development
- Failure to develop and support Highest and Best Use
- Misrepresentation of comparable sales or failure to include information about the comparable sales
- Lack of analysis of subject property leases
- Failure to support projections of subject property income and expenses
- Client advocacy

One more disciplinary issue I've seen reported in a number of recent cases:

The appraiser "used third-party photographs that were altered to remove logo/trademarks when originals were required per the engagement."

Common Record Keeping Issues

- No real workfile, at all.
- Incomplete workfiles with respect to:
 - Support for adjustments
 - Support for site value
 - Support for Replacement Cost estimates
 - A "True Copy" of appraisal report as submitted to Client
 - Copy of the engagement letter

Advice for Avoiding Complaints – this advice come from BRE

- Appraisers and AMCs are responsible for knowing and abiding by State and Federal laws.
- Although BRE can never provide absolute assurance that a complaint will not be filed, both Appraisers and AMCs may better protect themselves from complaints by avoiding miscommunications and ensuring professional communications with the appropriate parties.
- Additionally, consider the following:
 - Use written engagement documents that include all terms, including but not limited to (as applicable): delivery date, fees, assignment conditions (clearly defined), and the subject property address.
 - Maintain and retain all documentation in compliance with all applicable laws. Current Laws and Regulations are available on the BRE website.
 - Conduct all business in a professional and courteous manner

Real World Case: Let's Look at the Interplay between an Appraiser's Mistakes, a Complaint to BREa, and a Lawsuit – and See What We Can Learn

It's a story about an appraiser's divorce assignment that didn't go so well.

SUPERIOR COURT OF THE STATE OF CALIFORNIA COUNTY OF LOS ANGELES	
██████████, an individual	Case No.: 19STCV24366
Plaintiff,	COMPLAINT FOR:
vs.	(1) NEGLIGENCE
██████████, an individual and DOES 1 to 20, inclusive,	(2) NEGLIGENCE MISREPRESENTATION
Defendants.	(3) FRAUD
	(4) VIOLATION OF B&P CODE SEC. 17200 ET. SEQ.

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Appraiser's Divorce Assignment Goes Bad

- In 2017, wife and husband are in a contentious divorce.
- They own two properties: their home in West Covina and a 4-unit rental in La Puente.
- Appraiser runs into husband who says he needs an appraiser for his divorce case.
- **Mistake #1 happens – no engagement agreement.**
- Appraiser values both properties - \$835k for the home, and \$850k for the rental property, for which he later issues a new report at \$900k.

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Appraiser's Divorce Assignment Goes Bad

- **Mistake #2** – appraiser reports both appraisals on standard Fannie Mae pre-printed report forms.
- **Mistake #3** – appraiser doesn't do a good job identifying his client/intended user in either report and just puts the last name.
- Wife agrees to a divorce settlement in court with the husband and claims she relied on the appraiser's reports in making the settlement.

Appraiser's Divorce Assignment Goes Bad

- The wife soon has regrets about the property settlement she accepted – another appraiser provides retrospective appraisals that are \$175k and \$205k lower.
- She files a complaint to BREA.
- **Mistake #4** – the appraiser doesn't report the disciplinary complaint to his E&O.
- BREA cites the appraiser. Let's look at part of the citation.

Does California's Appraiser Law or BREA require that appraisers carry E&O insurance?

BREA Findings re Appraisal of Home



- a) Respondent failed to consistently identify the intended use of the appraisal report.
The report referred to the appraisal being used to estimate market value for purposes of marriage dissolution while the form defined the intended use as being for a mortgage finance transaction (S.R. 1-2(b) and S.R. 2-2(a)(ii));
- b) Respondent failed to develop a credible Sales Comparison Approach by:
- i. Failing to explain the use of a sale price for Comparable One which was different than the sale price noted in public records;
 - ii. Failing to report the location of Comparable Two as being in a development with home-owner's association dues;
 - iii. Failing to report the equestrian facilities for Comparable Four; and
 - iv. Failing to provide adequate support for the site and car storage adjustments. (S.R. 1-4(a) and S.R. 2-2(a)(viii));
- c) Based on the findings in a and b above, Respondent committed a series of errors that in the aggregate affects the credibility of the appraisal assignment results (S.R. 1-1(c));

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Appraiser's Divorce Assignment Goes Bad

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- BREA cites the appraiser.
- The punishment is 15 hours of specified basic education with an exam, a 4-hour corrective education course run by the Appraisal Foundation, and a fine of \$1,000.
- But it's not over.
- The wife sues the appraiser – to recover what she thinks she should have received in value in the divorce.

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Appraiser's Divorce Assignment Goes Bad

- So, the appraiser is:
 - Having to defend a case at his own expense that is more difficult, expensive to defense because he didn't use good intended user language or an engagement agreement.
- Ultimately he does win. Why? In essence, under California law, an unhappy party on one side of a case can't sue witnesses or other participants in the case, including expert witnesses. (Exceptions exist for suing your own lawyer, your own expert and for malicious prosecution.)
- **Lessons** – use an engagement agreement, don't misuse report forms, do a good job specifying who your client is, and report legal issues promptly if you're insured.

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What's the biggest pending appraiser liability case in the U.S.?

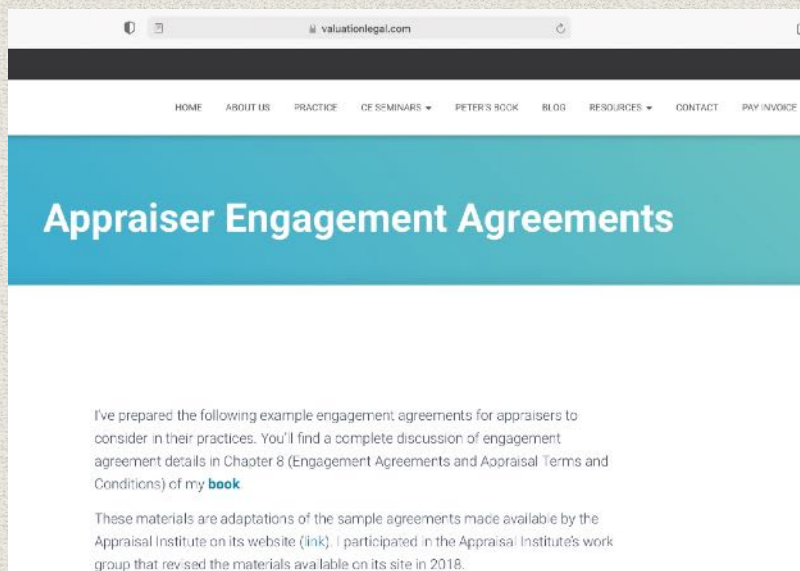
- The plaintiffs filed their complaint in Los Angeles Superior Court in December 2019.
- They allege that they have suffered out-of-pocket direct losses totaling approximately \$792 million.
- The appraisals at issue in the case, however, **don't concern real property.**
- The appraisals valued "mobile solar generators," trailer-mounted solar systems that can be used as temporary power stations for things like construction sites, disaster relief, and sports venues. Each mobile solar generator ("MSG") produced about 5,000 watts of solar power (and also had a diesel generator). The appraisal firm valued each MSG at \$150,000.
- The case is *Solar Eclipse Investment Fund III LLC et al. v. Cohnreznick LLP et al.*, Los Angeles Superior Court, Case No. 19STCV45775.
 - ***Good engagement agreements will be a key to the appraisal firm's (Alvarez & Marsal) defense at trial.***

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Where to Find Sample Engagement Letters

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Questions About BREA or Disciplinary Matters?

- Are professional negligence lawsuits filed against appraisers reported to the BREA for potential discipline?
- Are they reported to the Appraisal Institute as referrals for potential action by the Appraisal Institute?
- What about judgments in civil court legally finding the appraiser liable for professional negligence? Are they reported to BREA?
- What kind of discipline is shown on the National Appraiser Registry maintained by the AMC?
- Others?

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More important laws that are relevant to California appraisers.

Here's where we're going in the remainder of the course:

- **Part 5 - Fair housing and anti-discrimination laws – and an actual fair housing lawsuit.**
- **Part 6 - Key AMC laws and regs with examples of valuation independence violations by an AMC.**
- **Part 7 – California independent contractor law.**



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Part 5

Fair housing and anti-discrimination laws for California appraisers – and an actual fair housing lawsuit example.



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Key Federal Laws Relevant to Discrimination in Appraising

Two key federal laws that apply to alleged discrimination in appraising are:

- The **Fair Housing Act (FHA)** enacted as part of the Civil Rights Act of 1968. Applies to appraisers, firms, AMCs, lenders – all parties.
- The second key law is the **Equal Credit Opportunity Act (ECOA)**, which similarly makes it “unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction ... on the basis of race, color, religion, national origin, sex or marital status, or age...” (15 U.S.C. § 1691.)
- Notes:
 - The Fair Housing Act applies broadly to properties containing dwellings – not just single family.
 - ECOA is not limited to residential; it applies to commercial lending as well.



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The Legal Side of Alleged Discrimination in Appraising – Key Laws

A third key law is emerging with CFPB investigations:

- Under the Dodd-Frank Act, it is unlawful for any provider of consumer financial products or services or a service provider to engage in any **Unfair, Deceptive, or Abusive Acts or Practices (UDAAPs)**.
- CFPB February 2022 news release: “The CFPB is deeply troubled by the discriminatory statements the Federal Housing Finance Agency recently identified in some home appraisals, and the appraisal disparities for communities and borrowers of color recently found in both Freddie Mac and Fannie Mae studies.”



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Current Fair Housing Act Law

In 1988, the FHA was amended to include a specific prohibition against discrimination in appraising and now reads:

“It shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin.” (42 U.S.C. § 3605(a).)

The FHA defines the term “residential real estate-related transaction” as:

- (1) The making or purchasing of loans or providing other financial assistance —
 - (A) for purchasing, constructing, improving, repairing, or maintaining a dwelling; or
 - (B) secured by residential real estate.
- (2) The selling, brokering, or appraising of residential real property. (42 U.S.C. § 3605(a).)

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Notable Regulations under Fair Housing Act

- Implementing regulations under the Fair Housing Act, promulgated by HUD, broadly define the term “appraisal.”
- Under the regulations, appraisal means:

“an estimate or opinion of the value of a specified residential real property made in a business context in connection with the sale, rental, financing or refinancing of a dwelling or in connection with any activity that otherwise affects the availability of a residential real estate-related transaction, whether the appraisal is oral or written, or transmitted formally or informally. The appraisal includes all written comments and other documents submitted as support for the estimate or opinion of value.” 24 C.F.R. § 100.135(b).
- **The definition includes not just appraisals, but also BPOs and AVMs.**

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Notable Regulations under Fair Housing Act

- The regulations also make clear it's not just the appraising that may violate the law but it's also "using" a discriminatory appraisal.
- Under the regulations, prohibited practices include:
 - “[u]sing an appraisal of residential real property in connection with the sale, rental, or financing of any dwelling where the person knows or reasonably should know that the appraisal improperly takes into consideration race, color, religion, sex, handicap, familial status, or national origin.” 24 C.F.R. § 100.135(d)(1).
- **This means that a lender has potential liability for using a discriminatory appraisal.**

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Civil Rights Act of 1866

- Racial discrimination in the appraisal of housing may also violate the **Civil Rights Act of 1866**.*
- Section 1981 of this law, among other things, guarantees to all persons within the jurisdiction of the United States the same right as White citizens to make and enforce contracts.
- Section 1982 of this law provides all citizens with the same right as is enjoyed by White citizens to purchase, lease, sell, hold, and convey real and personal property.
- The Civil Rights Act of 1866 generally applies only to intentional racial and ethnic discrimination.

* 42 U.S.C. §§ 1981-1982; See, e.g., *Steptoe v. Savings of America*.

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Key California Laws Regarding Discrimination in Appraising

- In addition to such federal laws, California has two key anti-discrimination laws that are specific to appraisers.
- The prohibited bases of discrimination are broader than under federal law.
- For example, California prohibits discrimination in appraisals on the basis of gender expression and other additional categories.

California Fair Employment and Housing Act – Cal. Gov. Code § 12955:

It is unlawful . . . “For any person or other entity whose business includes performing appraisals, . . . of residential real property to discriminate against any person in making available those services, or in the performance of those services, because of race, color, religion, sex, **gender, gender identity, gender expression, sexual orientation**, familial status, **source of income**, disability, **genetic information, veteran or military status**, or national origin.”

California Appraiser Law – Cal. Bus. & Prof. Code § 11424:

“Licensees shall not base, either partially or completely, their analysis or opinion of market value on the basis of race, color, religion (creed), gender, gender expression, age, national origin (ancestry), disability, marital status, source of income, sexual orientation, familial status, employment status, or military status of either the present or prospective owners or occupants of the subject property, or of the present owners or occupants of the properties in the vicinity of the subject property, or on any other basis prohibited by the federal Fair Housing Act.”

Fair Housing Claims/Investigations

Four Primary Pathways for Fair Housing and Discrimination Complaints and Claims:

1. Complaint to HUD – Office of Fair Housing and Equal Opportunity.
2. Complaint to a state agency.
3. Legal action in court, asserting Fair Housing Act, ECOA and related legal claims.
4. And now – CFPB investigations.

United States of America
Consumer Financial Protection Bureau

Civil Investigative Demand

This demand is issued pursuant to Section 1032 of the Consumer Financial Protection Act of 2010 and 12 C.F.R. Part 1080 to determine whether there is or has been a violation of any laws enforced by the Consumer Financial Protection Bureau.

Notification of Purpose Pursuant to 12 C.F.R. § 1080.5

The purpose of this investigation is to determine whether appraisers, and the lenders that rely on their appraisals, or associated persons, in connection with origination of home mortgages, have: (1) improperly relied on race, ethnicity, or national origin in their appraisals in a manner that is unfair, deceptive, or abusive in violation of Sections 1031 and 1036 of the Consumer Financial Protection Act, 12 U.S.C. §§ 5531, 5536; or (2) engaged in unlawful discrimination in violation of the Equal Credit Opportunity Act, 15 U.S.C. § 1691, and Regulation B, 12 C.F.R. Part 1002. The purpose of this investigation is also to determine whether Bureau action to obtain legal or equitable relief would be in the public interest.

It's Not Just a Residential Appraiser Issue – Examples of Recent Allegations of Discrimination Affecting Commercial Appraisers

- HUD complaint filed by owners of multi-family property alleging undervaluation.
- Lawsuit complaint alleging violation of ECOA in connection with appraisal of multi-family property.
- Black farmer alleging undervaluation of his farm for an ag loan based on his race (home on the farm makes it a Fair Housing Act claim).
- State appraiser licensing board complaint (not in California) relating to appraisal of a school facility.
- Threatened regulatory complaints and lawsuit by owner of national chain restaurant property.
- Threatened HUD complaint and lawsuit regarding mixed-use property.

Let's Take a Look at What a Fair Housing Case in California Looks Like: Austin v. Miller

6 Julia Howard-Gibson (SBN 321789) 7 FAIR HOUSING ADVOCATES OF 8 NORTHERN CALIFORNIA 9 1314 Lincoln Ave., Suite A 10 San Rafael, CA 94901 11 Tel: (415) 483-7516 12 Fax: (415) 457-6382 13 julia@fairhousingnca.org	14 Attorneys for Plaintiffs
15 UNITED STATES DISTRICT COURT 16 NORTHERN DISTRICT OF CALIFORNIA	
17 TENISHA TATE-AUSTIN, PAUL 18 AUSTIN, and FAIR HOUSING 19 ADVOCATES OF NORTHERN 20 CALIFORNIA,	21 Case No. COMPLAINT FOR INJUNCTIVE, DECLARATORY, AND MONETARY RELIEF, JURY TRIAL DEMAND
v. JANETTE C. MILLER, MILLER APPRAISERS, AND	
PEROTTI REAL ESTATE, INC., AMC LENDING	

52. Race was a motivating factor in Miller's unreasonably low valuation of the Austins' house, in violation of the Fair Housing Act and related federal and state laws. There are at least five indicia of racial bias in the Miller Appraisal: (1) unreasonably and inexplicably low market value ascribed to the Pacheco Street House; (2) unsupportable adjustments to value made based solely on the Pacheco Street House's location in Marin City; (3) the selection of properties as "comparable" based on racial demographics; (4) comments regarding the "distinct marketability" of Marin City; and (5) the race or perceived race of the homeowners.

Let's Take a Look at What a Fair Housing Case in California Looks Like: Austin v. Miller

65. Race was a motivating factor in Miller's unreasonably low valuation of the Austins' house, in violation of the Fair Housing Act and related federal and state laws. Miller's valuation was influenced by the race of the Austins, or the racial demographics of Marin City, or both, when she undervalued the Pacheco Street House.

66. In the alternative, or in addition, the methods of valuation used by Miller had a disparate impact on African American homeowners or home purchasers based on their race.

67. AMC Links failed to review the Miller Report to ensure that the work was performed in accordance with USPAP standards and was not influenced by race. In the alternative, AMC Links carelessly and incompetently reviewed the Miller Report and failed to detect its breaches of USPAP and other professional norms.

Let's Take a Look at What a Fair Housing Case in California Looks Like: Austin v. Miller

SEVENTH CLAIM FOR RELIEF

[Negligent Misrepresentation]

Cal. Civil Code § 1710

[Plaintiffs Tenisha Tate-Austin and Paul Austin only vs. All Defendants]

102. Plaintiffs reallege and incorporate by reference each paragraph previously alleged in this complaint.

103. Defendants represented to plaintiffs that they were providing an unbiased appraisal of the Pacheco Street House based on all information available and in full compliance with USPAP. Defendants intended for plaintiffs to rely on those representations.

104. Defendants' representations were untrue. Although one or more defendants may have honestly believed that the representations were true, those defendants had no reasonable grounds for believing the representations were true when they made them.

Part 6

Key AMC laws and regulations with examples of appraiser independence violations by an AMC.



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Definition of an AMC

What is an AMC under California law?

Is your appraisal firm an AMC?

Section 11302 (chapter 2): "Appraisal management company" means any person or entity that satisfies all of the following conditions:

- (A) Provides appraisal management **services to creditors** or to secondary mortgage market participants, including affiliates.
- (B) Provides those services in connection with **valuing a consumer's principal dwelling** as security for a consumer credit transaction or incorporating those transactions into securitizations.
- (C) Within a given 12 calendar month period oversees an **appraiser panel of more than 15 state-certified or state-licensed appraisers in a state or 25 or more state-certified or state-licensed appraisers in two or more states**, as described in Section 11345.5.

- Replaces old definition tied to 11 more appraisers.
- Panel refers to independent contractors, not employees.
- Only relates to appraising consumer principal dwellings.
- Consistent with federal minimum AMC requirements.

Cal. Bus. & Prof. Code § 11302.

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Required AMC Registration

AMCs must register.

Section 11320.5 (chapter 3): "No person or entity shall act in the capacity of an appraisal management company or represent itself to the public as an appraisal management company, either in its advertising or through its business name, without a certificate of registration from the bureau."

Cal. Bus. & Prof. Code § 11320.5.

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Legal Duties of an AMC

Key legal duties of AMCs under state law.

Section 11345.3 (chapter 4): "All appraisal management companies shall do all of the following:

- (a) Ensure that all contracted appraisal panel members possess all required licenses and certificates from the bureau.
- (b) Establish and comply with processes and controls reasonably designed to ensure that the appraisal management company, in engaging an appraiser, selects an appraiser who is independent of the transaction and who has the requisite license, education, expertise, and experience necessary to competently complete the appraisal assignment for the particular market and property type.
- (c) Direct the appraiser to perform the assignment in accordance with the Uniform Standards of Professional Appraisal Practice.

...

Cal. Bus. & Prof. Code § 11345.3.

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Legal Duties of an AMC

Key legal duties of AMCs under state law.

continued:

(d) Establish and comply with processes and controls reasonably designed to ensure that the appraisal management company conducts its appraisal management services in accordance with the requirements of Section 129E(a) through (i) of the Truth in Lending Act, 15 U.S.C. 1639e(a) through (i), and regulations thereunder.

That's a reference to federal law – we saw that in Part 2 to the Appraiser Independence Requirements that are part of federal law in the Truth in Lending Act.

Cal. Bus. & Prof. Code § 11345.3.

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Legal Duties of an AMC

Key legal duties of AMCs under state law.

continued:

(e) Engage appraisal panel members with an engagement letter that shall include terms of payment.

(f) Appraisal management companies shall maintain all of the following records for each service request:

- (1) Date of receipt of the request.
- (2) Name of the person from whom the request was received.
- (3) Name of the client for whom the request was made, if different from the name of the person from whom the request was received.
- (4) The appraiser or appraisers assigned to perform the requested service.
- (5) Date of delivery of the appraisal product to the client.
- (6) Client contract.
- (7) Engagement letter.
- (8) The appraisal report.”

Cal. Bus. & Prof. Code § 11345.3.

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Appraiser Independence Requirements in California's AMC Law

Key legal duties of AMCs under state law.

These are the appraiser independence requirements.

Section 11345.4 (chapter 4): “No person or entity acting in the capacity of an appraisal management company shall improperly influence or attempt to improperly influence the development, reporting, result, or review of any appraisal through coercion, extortion, inducement, collusion, bribery, intimidation, compensation, or instruction. Prohibited acts include, but are not limited to, the following:

(a) Seeking to influence an appraiser to report a minimum or maximum value for the property being valued. Such influence may include, but is not limited to, the following:

(1) Requesting that an appraiser provide a preliminary estimate or opinion of value for one or more properties prior to entering into a contract with that appraiser for appraisal services related to that property or properties.

(2) Conditioning whether to hire an appraiser based on an expectation of the value conclusion likely to be returned by that appraiser.

(3) Conditioning the amount of an appraiser's compensation on the value conclusion returned by that appraiser.

(4) Providing an appraiser with an anticipated, estimated, encouraged, or desired valuation prior to their completion of an appraisal.”

Cal. Bus. & Prof. Code § 11345.4.

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Appraiser Independence Requirements in California's AMC Law

Key legal duties of AMCs under state law.

These are the appraiser independence requirements.

continued:

“(b) Withholding or threatening to withhold timely payment to an appraiser because the person does not return a value at or above a certain amount.

(c) Implying to an appraiser that current or future retention of that appraiser depends on the amount at which the appraiser estimates the value of real property.

(d) Excluding an appraiser who prepares an appraisal from consideration for future engagement because the appraiser reports a value that does not meet or exceed a predetermined threshold.

(e) Conditioning the compensation paid to an appraiser on consummation of the real estate transaction for which the appraisal is prepared.

(f) Requesting the payment of compensation from an appraiser for purposes of enabling that appraiser to achieve higher priority in the assignment of appraisal business.”

Cal. Bus. & Prof. Code § 11345.4.

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Appraiser Independence Requirements in California's AMC Law

Key legal duties of AMCs under state law.

These are the appraiser independence requirements.

continued:

(g) Nothing in this section prohibits a person or entity acting in the capacity of an appraisal management company from doing any of the following:

(1) Asking an appraiser to do any of the following:

(A) Consider additional, appropriate property information, including information about comparable properties.

(B) Provide further detail, substantiation, or explanation for the appraiser's value conclusion.

(C) Correct errors in an appraisal report.

(2) Obtaining multiple valuations, for purposes of selecting the most reliable valuation.

(3) Withholding compensation due to breach of contract or substandard performance of services.

(4) Providing a copy of the sales contract in connection with a purchase transaction.”

Cal. Bus. & Prof. Code § 11345.4.

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Let's Look at Real-World Alleged AIR Violations

Email from Loan Officer to AMC.

Let's see how the AMC's president responds.

From: [loan officer] <[redacted]>
Sent: Thursday, December 23, 2021 10:59 AM
To: [AMC president]
Cc: [redacted]
Subject: Order # 2112-00904

This is an appraisal from a month ago from my borrower. Your appraiser appraised this same property at 815,000 a month after this appraisal came in at 855,000. I am not sure how your appraiser came to the conclusion that this property is only worth 815,000. It's a beautiful multi family in the heart of Secaucus, New Jersey 10 minutes away from NYC.

Thank you,

[redacted] Loan Officer

[redacted]
MORTGAGE GROUP

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Let's Look at Real-World Alleged AIR Violations

The AMC's president's response.

----- Forwarded message -----

From: [AMC president]
 Date: Thu, Dec 23, 2021 at 2:18 PM
 Subject: RE: Order # 2112-00904
 To: [loan officer]

Hi [redacted],

You and I discussed this report, we didn't pull it from the appraiser as you emailed me to late to do so, this appraiser had already inspected. Unfortunately, I couldn't keep a pulse on this, but when it was delivered I had the guy I was going to send it to take a peak and he said the value was right on.

You said you would be willing to do another report if this one came in low, I suggest we do that. I can shop it around, because I know it's important to you and ensure someone can get me the \$900,000 you need.

I removed [redacted] as I wouldn't want them to see this response. You need to give me a heads up earlier next time if you want a guarantee.

Also, delete this email once you respond.

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An AMC May Not Alter Completed Reports and an Example Alleged Violation

Key legal duties of AMCs under state law.

Section 11345.6 (chapter 4):

“(a) No appraisal management company may alter, modify, or otherwise change a completed appraisal report submitted by an appraiser.”

On Apr 6, 2021, at 7:44 PM, [redacted]
 [AMC manager]

Major issue: [redacted] is DNU for Ice and they just got a report with his name on it since [redacted] asked us to change the lender name which led [redacted] to ask us about the process of lender change and how poorly we have it done on our end.

Moving forward - every name change for Ice has to be approved with me. Every lender change has to be reflected in a new order.

This is not goodddd...

On Tue, Apr 6, 2021 at 8:09 PM [redacted]
 <[redacted]> wrote:

Oh mannn, omg whatever we do, we can't win.
 How does [redacted] know it was changed and it isn't a new order?

Would an AMC really do that?

Emails from within an AMC about allegedly changing the lender name on reports.

Cal. Bus. & Prof. Code § 11345.6.

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Most Common Allegations in Complaints to BREA about AMCs?

Per BREA, the most common allegations in disciplinary matters against AMCs are:

- Non-payment of appraisal fees.
- Undue influence regarding the appraisal development or value conclusion.
- Failing to have reasonable measures in place to assure that appraisers comply with USPAP.

Part 7 California Independent Contractor Law for Appraisers

California Independent Contractor Law for Appraisers!



Where Are We Going?

- Clarify for appraisers California's independent contractor law as it applies to appraisers after AB5 and then AB2257.
- Why is that relevant? (a) many appraisers work for AMCs as independent contractors, and (b) appraisal firms often use independent contractor appraisers.
- We'll look at the factors under the law.
- We'll consider what should be in a contract between a firm and its contractor appraisers.

Let's Discuss the Nature of Independent Contractors

There are key advantages to businesses (such as small appraisal firms or AMCs) who classify appraisers as independent contractors ("ICs"):

- ICs not paid overtime for more than 8 hours in a day as required in California or 40 hours in a week (as required under both state and federal law).
- No withholding taxes or contributions for federal Social Security and Medicare.
- No unemployment or workers' compensation premiums for contractors (usually).
- ICs are only paid when there is work. "Layoffs" are easy.

Likewise for appraisers, there are also key advantages:

- ✓ Independence – running your own business.
- ✓ Lots of tax deductions not available to employees (including new exclusion of 20% of business income).

Appraisers as Independent Contractors

- There is no single standard for determining whether an appraiser is properly treated as an independent contractor – when working for an AMC or firm, or even a lender.
- Varies by state versus federal, and can vary by purpose (tax, overtime, union organizing, etc.).
- Nevertheless, there is a general theme that runs through most tests – it is the firm's control over the worker.
- IRS has summarized in its regulations that a worker generally will be considered an employee when:

“the person for whom services are performed [the appraisal firm] has the right to control and direct the individual who performs the services [the appraiser], not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished.”

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The Old Test Under the Borello Case in California

- For California employment law purposes, the applicable test under California historically has been a test described in a California Supreme Court case called Borello. It evaluates multiple factors of the relationship between the contractor and firm and gets at the economic realities of the relationship.
- We'll look into the Borello factors shortly.

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Then Came the California Supreme Court's *Dynamex* Decision

- In April 2018, the California Supreme Court adopted a strict version of what is called the “ABC test” for determining whether a worker is an employee or contractor for purposes of California “Wage Orders.” *Dynamex Operations West, Inc. v. Superior Court*.
- As outlined by the Court, the test is actually more straightforward than the multifactor *Borello* test – but it’s a lot harder to pass.

Independent Contractor Status

To meet the burden, an “employer” must establish all three of the following:

(A) that the worker is free from the control and direction of the hiring firm in connection with the performance of the work, both under the contract for the performance of the work and in fact; and

(B) that the worker performs work that is outside the usual course of the firm’s business; and

(C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.

AB 5 Adopts the ABC Test in California

- On January 1, 2020, AB 5 went into effect. That was the big anti-contractor bill (anti-Uber law).
- It adopted the hard ABC test for mot workers, occupations and professions. But it did have some exceptions – including one for “real estate licensees.”
- But the exceptions did not apply to appraisers or appraisal firms or AMCs (in relation to appraisers).

Then Came the “Clean Up” Bill – AB 2257

- It created a dozen new exceptions for different occupations and professions.
- It created an exception for appraisers from the ABC test in Dynamex under the “professional services” exception, if the **appraisal firm** can satisfy a number of requirements.
- Let’s look at those requirements – and match them to wording in a sample appraiser contractor agreement.

Requirements for Exemption – Matched to an Agreement

AB 2257 – Professional Services Exception Requirement	Matching Provision in a Sample Contract
<p>2778. (a) Section 2775 and the holding in <i>Dynamex</i> do not apply to a contract for “professional services” as defined below ... if the hiring entity demonstrates that all of the following factors are satisfied:</p>	<p>The firm needs a <u>contract</u> with the appraiser contractor! Let’s call it: “Appraisal Services Independent Contractor Agreement.”</p>
<p>(1) The individual maintains a business location, which may include the individual’s residence, that is separate from the hiring entity. <i>Nothing in this paragraph prohibits an individual from choosing to perform services at the location of the hiring entity.</i></p>	<p>a. Business and Work Location. Jane maintains and will continue to maintain her own business location, which may include a residence, that is separate from California Appraisal’s business location(s) and will perform the appraisal services contracted under this Agreement at Jane’s own business location or other work locations separate from any business location(s) of California Appraisal.</p>
<p>(2) If work is performed more than six months after the effective date of this section and the work is performed in a jurisdiction that requires the individual to have a business license or business tax registration, the individual has the required business license or business tax registration in order to provide the services under the contract, in addition to any required professional licenses or permits for the individual to practice in their</p>	<p>b. Responsibility for Required Business Licenses or Tax Registrations. If Jane is required by law, regulation or ordinance to have a business license ...in any ... jurisdiction to perform the appraisal services contracted under this Agreement, Jane agrees ... to maintain any such required business licenses ... for the duration of this Agreement.... Jane will provide evidence of such licenses ... to California Appraisal. If a business license ... is not required in an applicable jurisdiction, Jane will provide documentation substantiating that no such license ... is required (such as a printout or link to local business license requirements)</p>

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Requirements for Exemption – Matched to an Agreement

AB 2257 – Professional Services Exception Requirement	Matching Provision in a Sample Contract
<p>(3) The individual has the ability to set or negotiate their own rates for the services performed.</p>	<p>c. Negotiation of Appraisal Rates/Fees. Regardless of whether an Appraisal Request may offer an appraisal fee for a specific assignment, Jane is free to negotiate different fees for appraisal services in any Appraisal Request, to inform California Appraisal that an offered fee is not acceptable, and/or to decline any Appraisal Requests.</p>
<p>(4) Outside of project completion dates and reasonable business hours, the individual has the ability to set the individual’s own hours.</p>	<p>d. Days and Hours of Work. Jane is free to set the days and hours for performing appraisal services contracted under this Agreement, consistent with the nature of such appraisal services in terms of setting appropriate times for inspection of subject properties and similar activities and consistent with meeting agreed completion dates for Appraisal Requests.</p>
<p>(5) The individual is customarily engaged in the same type of work performed under contract with another hiring entity or holds themselves out to other potential customers as available to perform the same type of work.</p>	<p>e. Offering Services to Other Parties. Jane understands and agrees that Jane is free, and expected, to offer professional appraisal services to parties other than California Appraisal and will be available to the public in general to perform such services.</p>
<p>(6) The individual customarily and regularly exercises discretion and independent judgment in the performance of the services.</p>	<p>f. Jane Is Free from the Control and Direction of California Appraisal. California Appraisal does not and will not control or direct performance of the appraisal services rendered by Jane. Jane is solely responsible for determining the manner and means in which Jane performs the contracted appraisal services in compliance with USPAP, in accordance with applicable laws, regulations and guidelines, and in satisfaction of industry-standard service level standards implemented by California Appraisal.</p>

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California AB 5 – Some Keys for New Contractor Agreements

If your firm has contractors and your arrangement/contracts meets those requirements, then **Congrats!**

- That means that the old standard under *Borello*, rather than the ABC test under *Dynamex*, will apply to determining whether your appraiser contractor is properly treated as a contractor, rather than as an employee.
- So, now we have to see if your firm passes the real test.

The *Borello* Test

The Borello test looks first at whether the potential employer has control over the manner and means of accomplishing the work and evaluates a number of additional factors (none of which are themselves determinative, including such things as:

- Whether the worker performing services holds themselves out as being engaged in an occupation or business distinct from that of the employer;
- Whether the employer or the worker supplies the instrumentalities, tools, and the place for the worker doing the work;
- Whether the service provided requires a special skill;
- The worker's opportunity for profit or loss depending on their managerial skill;
- Whether the worker hires their own employees . . .

In real-world practice a lot details come up – business cards, hours, websites, how much work is done for the firm?

The *Borello* Test

- Neither the IRS nor historic Borello tests generally have presented problems for the AMC model of using “panelist” appraisers as contractors, but most appraisal firms do not pass the test (even under the old standard in Borello) when actually put to the test in court or by the EDD.
- AMCs have been audited by the IRS, Franchise Tax Board, and the California Employment Development Department (EDD) and succeeded in showing that appraiser panelists were properly treated as contractors.
- But both appraisal firms and AMCs have lost when treating true “staff” appraisers as independent contractors.

Risks of Misclassifying

- Contractor files for unemployment.
- EDD audit.
- Unhappy former contractor files suit for overtime, unpaid break time, etc. – based on assertion they were really an employee.
- A party claiming damages caused by a contractor appraiser claims the appraiser was your employee.
 - This could be an appraisal negligence claim, or
 - Personal injury claim.
- The risk increases with the size of your independent contractor staff.
- If looking to sell a firm, it can be a real stumbling block for buyers.
- I don't want to overstate the risk – for small firms of just a few appraisers. It is a small risk for small firms.

Employment Development Department
PO Box 989359
West Sacramento, CA 95798-9059

EDD Employment Development Department
State of California

NOTICE OF UNEMPLOYMENT INSURANCE CLAIM FILED

APPRISALS

Mail Date: [REDACTED]
New Claim: U
Additional Claim: X

ACTION REQUIRED

1. Gather the necessary facts for this claim.
2. Complete the reverse side of this form.
3. Mail this response within 10 calendar days of the above mail date to the address shown above.

Failure to respond within 10 calendar days may result in an increased employment tax rate and employer penalties.

You received this notice because the claimant shown below filed a claim for unemployment insurance benefits and listed you as his/her most recent employer. The claimant provided the following information:

Claimant's Name: [REDACTED] Social Security Number: [REDACTED]
Effective Date of Claim: [REDACTED] Last Date Worked: [REDACTED]
Reason for Separation: [REDACTED]

REPORTING FACTS

The law requires you to submit any facts in your possession which may affect a claimant's eligibility for benefits. These facts will be used in determining the claimant's eligibility for benefits. Provide information to the Employment Development Department (EDD) if the claimant:

Continued

Ending Our Appraiser Negligence Lawsuit Story

Will the appraiser win the lawsuit based on the statute of limitations? What is the limitations period?

No, the appraiser will not likely win based on a statute of limitations defense. The statute of limitations for a negligence claim against an appraiser in California is 2 years under Cal. Code of Civil Procedure section 339. However, the 2-year period does not begin running until the plaintiff “both (1) sustains damage and (2) discovers, or should discover, the negligence.” *Slavin v. Trout*, 18 Cal.App.4th 1536 (Cal. Ct. App. 1993). In our story, the appraisal was over 6 years old, but the borrower sued within 2 years of discovering the appraiser’s negligence.



How did the real case turn out?

The facts of the story are loosely based on *Tindell v. Murphy*, 22 Cal.App.5th 1239 (Cal. Ct. App. 2018). The appraiser won because the court ruled the appraiser did not owe a legal duty to the borrower. You can learn more about the case and how to decrease your liability risk in my 4-hour course entitled “Appraiser Liability 101: Essential Concepts.”