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Does USPAP Prohibit an Appraiser from Disclosing Confidential Appraisal Information to Defense Counsel? Handle the "Issue" in Your Engagement Agreement

By Peter C

[This post is adopted from a larger post about confidentiality.]

With respect to an appraiser's confidentiality responsibilities, USPAP's Ethics Rule provides:

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

Some appraisers and USPAP instructors -- but not this lawyer -- believe that USPAP's confidentiality rule bars an appraiser from providing confidential appraisal information to the appraiser's own legal defense counsel without specific client authorization. That position would leave the appraiser in the absurd position of having to ask for a client's authorization to provide information to defense counsel while being threatened or sued by that very same client. Even more absurdly, it would prohibit the appraiser from ever providing such information to defense counsel or even using the information for his or her own defense at all when the client no longer exists to ask for permission and the appraiser is being threatened or actual sued by a third party. If followed, this reading of USPAP prevents the appraiser from obtaining informed legal advice and representation when faced with a liability action or disciplinary action and just about makes the appraiser defenseless.

These absurd propositions come about because the language addressing confidentiality in USPAP is vague and lacking needed detail. The ASB simply hasn't done its work in this area. If there's going to be a confidentiality rule in USPAP, it needs to address how that rule affects appraisers outside of simply performing appraisals and reporting them. More detailed professional responsibility and ethics rules and laws applying to other professions like medicine and law generally recognize explicitly the professional's right to disclose confidential information for the professional's own defense. Moreover, these rules and laws recognize the professional's right to disclose in contexts where the information at stake (such as a patient's diagnosis or a criminal defendant's communication with an attorney) is usually more sensitive than information contained in an appraisal report. Even the Gramm-Leach-Bliley Act contains specific exceptions to its confidentiality protections for consumer records which permit disclosure by financial institutions "to protect against or prevent actual or potential . . . claims, or other liability" and which also permit disclosure to "the institution's attorneys, accountants, and auditors."

Yet, on this issue, the key words in USPAP state only that an appraiser may disclose confidential information to "third parties as may be authorized by due process of law." So, the question is then: in the absence of client authorization, does the right of an appraiser to disclose confidential appraisal information to defense counsel fall under the ASB's chosen words "as may be authorized by due process of law?"

USPAP doesn't define what "authorized by due process of law" means for purposes of USPAP, and the ASB does not provide any helpful guidance -- other than suggesting, for example, in a 2008 Q&A that "it may be necessary to seek legal counsel to determine what constitutes 'due process'." Now, my personal opinion is that the generalized notion of "due process of law" as used in USPAP includes within it a right to consult with defense counsel when threatened with legal action, whether civil, criminal or administrative, and that this right includes an ability to provide information deemed confidential by USPAP. Further, the "disclosure" being made by the appraiser to defense counsel is one that is itself confidential and protected by the attorney-client privilege and a communication occurring between the appraiser and his or her own agent (the attorney). That's my personal opinion only -- and one that is partly the result of a desire to avoid the absurd results that would otherwise occur. I will add, however, that out of thousands of claims and disciplinary matters, I have never seen any appraiser regulator in any state seek to discipline or even question an appraiser about providing any information to his or her own defense counsel.

To avoid tangling with this confidentiality issue in USPAP altogether, I would suggest that appraisers confirm their client's consent to these necessary types of disclosures in their engagement agreements - it is not good enough to put language such as this only in an addendum to a report. Appraisers should consider including a provision such as:

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