



CELEBRATING  
55 YEARS

# nerenj

## **How the legal environment can endanger your appraisal practice - by Roger Durkin**

December 11, 2020 - Spotlights

Roger Durkin  
Durkin Law PC

This article is directed at all appraisers including real estate appraisers, business appraisers, art, antique, machinery, equipment, sports memorabilia, jewelry, coin, or collectibles. An appraiser is a person who provides a defined economic exchange value opinion of the rights inherent in the ownership of some tangible or intangible property. It has to do with divorce appraisals and IRS related appraisals.

Appraisers are dominated by dogma that has engrained itself in the practice of appraisal. Who or what made it law that there are three and only three approaches to value? Adjusting comparable sales is an exercise in subjective guessing. Most of you know it. When is the last time any real estate appraiser did a matched-pair study? Who made the Fannie Mae type form appraisal applicable to valuations in divorce, decedent estates, gift tax, charitable donation, petitions to partition, bankruptcy, environmental damages, or shareholder disputes?

There are many issues that can cause an appraiser professional negligence liability. I will limit the subject to just two areas, marital estate appraisals and IRS related appraisals.

Just because you have a credential to appraise residential properties does not automatically make you competent to appraise for gift tax, charitable donation, decedent estates or marital estates. USPAP Competency Rule requires the appraiser to be familiarity with an intended use, specific laws, and regulations. You should not ignore laws and regulations about lead paint, lead pipes, asbestos, oil storage tanks, or other toxic material. Typically, the appraiser states he/she is not qualified to identify environmental issues. You cannot use willful blindness. A 50-gallon drum with skull and cross bones on it is obvious. If you ignore it, you could be liable. Common knowledge tells you that environmental issues affect value. If you are valuing 30 acres plus, there is the Archaeological Survey Act, the Wetlands Act, the Rivers Act, the Endangered Species Act, and so on.

## Divorce Appraisals

It is an appraisal report used to assist in the division of the marital estate assets. The largest marital estate assets are the marital home and/or family business. The typical real estate appraiser automatically pulls up a “non” Fannie Mae General Purpose Appraisal Report Form called “Gee-Par.” Some appraisers continue to use the 1004 form. Who cares? Most attorneys’ concern about an appraisal is the final value and how it affects their case. Lawyers are not as concerned how the report is presented, so long as it is defensible. If the only tool in your appraisal tool box is a form appraisal, you need to learn how to write a narrative appraisal report.

Issues in divorce appraisals include the appraiser incorrectly identifying the Intended Use, Intended User(s) and value type and source definition. The appraiser usually identifies the Intended User as the client who hired the appraiser. Seldom does the appraiser get the Intended Use correct. The words used to describe intended use are usually, “for internal use”, “client personal use”, etc.<sup>1</sup> The Intended Use in a divorce is to assist in a division of marital assets. The appraiser tends to identify the intended users as the client. Intended users are foreseeable and include the divorce attorneys, the divorcing parties, and potentially the Mass. Family Court. Usually the appraiser identifies the type of value as Market Value citing USPAP or uses the Fannie Mae 1004 preprinted market value definition citing Fannie Mae #B4-1.1-01.2 USPAP itself does not contain a citable definition of market value. The standard in Massachusetts divorce is fair value, first established with *Bernier*. The court emphasized, where valuation of assets occurs in the context of divorce, the judge must take particular care to treat the parties not as arm’s-length hypothetical buyers and sellers in a theoretical open market, but as fiduciaries entitled to equitable distribution of their marital assets. *Bernier I*, 449 Mass. at 775-776, citing G. L. c. 208, § 34. The appraiser should know something about Mass Gen Laws Chapter 208, § 34, containing fourteen factors that a judge must consider in dividing a marital estate.

The form appraisal, especially Fannie Mae, has a different Certification than required by USPAP. The appraiser warrants in #25. “Any intentional or negligent misrepresentation(s) contained in this appraisal report may result in civil liability and/or criminal penalties including, but not limited to, fine or imprisonment or both under the provisions of Title 18, United States Code, Section 1001, et seq., or similar state laws.”

In the division of marital assets, there are often opposing expert appraisers. The wife (or husband) is buying the house. You do your client a favor and come in with a low appraisal. The other appraiser is much higher. Split the difference is typical. One of the parties will be damaged. So, is it typical to sue the intentionally biased appraisers for professional negligence and you might be turned-in to the state license board? Do I need to cite the dozens of such appraisal negligence cases?<sup>3</sup> You are not the lawyer in litigation appraisal! You should not be a team advocate. Do not negligently or intentionally taint the value opinion. It happens too often.

## Decedent Estates, Gift Tax, and Non-Cash Charitable Donation Appraisals

The value definition for a decedent estate is fair market value cited at IRS Reg. §20.2031. The state

uses that definition. The Intended Use is to support the filing of 706 estate tax returns. Similarly, if you are providing an appraisal for gift tax or non-cash charitable donation, the IRS definition of value is slightly different. The Intended Users of a decedent estate appraisal include the client, personal representative, estate attorneys, accountants and potentially the revenue service. You better know that the IRS may critique your appraisal.

I have had students argue that the IRS should not be identified as an Intended User. You need to know about Circular 230, IRS Notice 2006-96 4 and the Pension Reform Act of 2006. Circular 230 is cited as 31 CFR (10). The Regulation has applied to appraisers and CPAs since 2006.5 The IRS has increased enforcement through fines, penalties, disbarment to curb abusive tax avoidance. If you provide appraisals for decedent estates, gift tax or charitable donation, you are giving IRS related tax advice. You may have liability. Many appraisers are simply uninformed about Circular 230.

Litigation related appraisal work is significantly different from mortgage related appraisal work. Litigation involves the courts, lawyers, legal concepts, case law, statutes, state, and federal regulations. Fannie Mae guidelines are not law. Fannie Mae can blacklist the appraiser. Litigation related appraisal mistakes can put you out of business. Divorce, shareholder disputes, petitions to partition, gift tax, probate disputes, trusts, non-cash charitable donations and decedent estates require you to know about applicable laws and regulations.

Roger Durkin is an attorney with Durkin Law PC, Boston.

New England Real Estate Journal - 17 Accord Park Drive #207, Norwell MA 02061 - (781) 878-4540