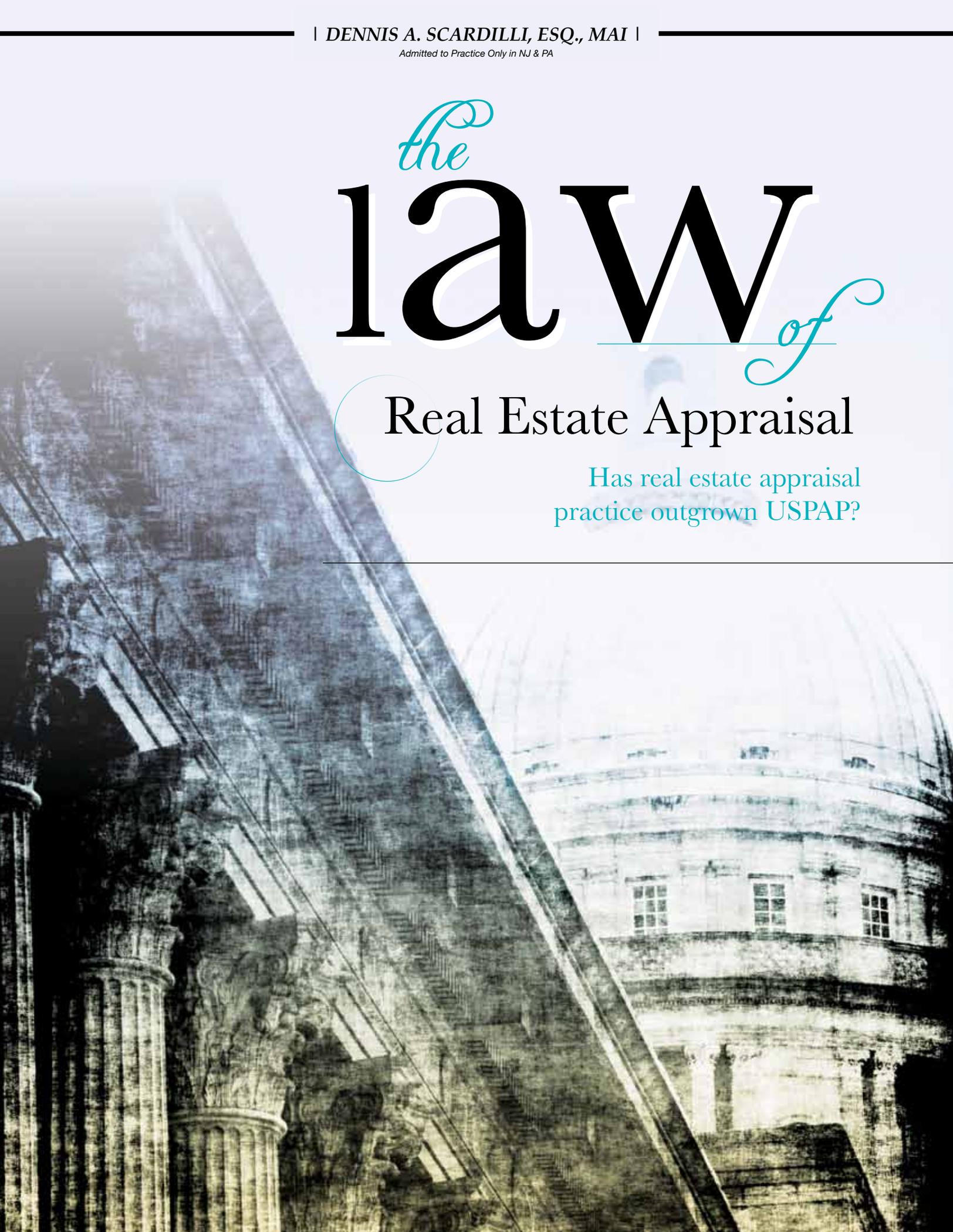


*the*  
**law** *of*

Real Estate Appraisal

Has real estate appraisal  
practice outgrown USPAP?



# In the spirit of

*Live Valuation's*

m o d u s

operandi of bringing you cutting-edge industry issues in thought-provoking articles,

I pose the question:

“Has real estate  
**APPRAISAL  
PRACTICE  
OUTGROWN USPAP?**”

No, I'm not suggesting that we do away with USPAP. And no, I'm not dissing The Appraisal Foundation, the Appraisal Subcommittee or state regulators, all of whom I hold in the highest regard.

Rather, I am merely asking what is now a rhetorical question. Real estate appraisal practice is far from being the “cottage industry” that it was often called when I performed my first appraisal in 1980. The changes that may occur over the next several years could make the past few years look relatively tame by comparison. It's time for real estate appraisal law to go beyond USPAP.

## THE DAWNING OF THE AGE OF REAL ESTATE APPRAISAL LAW

The Mortgage Reform and Anti-Predatory Lending Act of 2010 (MRAPLA) makes it clear that the law of real estate appraisal must go far beyond USPAP.<sup>1</sup> For the past 20 years, real estate appraisal has been a regulated industry, but the importance of real estate appraisal law has not been recognized. Under MRAPLA the industry is even more regulated. The law of real estate appraisal must, therefore, be recognized as an important component of

the education of real estate appraisers and an important part of real estate appraisal practice.

I started to think about this issue in 2009 after taking the USPAP instructors course sponsored by The Appraisal Foundation (TAF). As an attorney, my discussions with other students got me thinking about real estate appraisal law and the future of appraisal practice.

At the Appraisal Institute (AI) January 2010 Federal Update conference, it was clear that in many ways, appraisers are increasingly dependent on government, both for work and to create the regulations under which that work is performed. The AI's Washington Summit took place last summer, days before MRAPLA was signed as part of what is popularly known as the Financial Reform Act. Even after the summit's luncheon speech by MRAPLA's prime sponsor, Rep. Paul Kanjorski (D-PA), there was a lot of uncertainty regarding what MRAPLA meant for the industry.

The joint meeting of the Association of Appraisal Regulatory Officials (AARO), TAF and the Appraisal Subcommittee (ASC) brought the issue into focus. That conference included an appraiser discipline mock trial, which was videotaped and can now be viewed on TAF's website.<sup>2</sup> Federal agents made presentations on mortgage and appraisal fraud. We were told how MRAPLA became law and about the changes that it was bringing to appraisal practice. Immediately after that joint meeting, the National Association of Realtors (NAR) held an appraisal summit in Washington filled with industry leaders. The presentations included how MRAPLA and other governmental actions affected the industry.

Virtually everyone with whom I spoke at these conferences agreed that real estate appraisal law had become part of the

appraiser's world. The only question was, “But, what does that mean?”

Today, there is no question that real estate appraisal practice is a regulated industry. Under MRAPLA, it will become even more so. Everyone involved with real estate appraisal knows that the industry is being increasingly regulated. But few understand the relationship between that dynamic and the law. Perhaps that is because both fledgling appraisers and more experienced appraisers are taught only one part of the picture. That's right, just USPAP.

Yes, some states require at least a two-hour block of state-level instruction in addition to the seven-hour USPAP update. And yes, organizations such as the Appraisal Institute have a number of courses involving appraisal and law, but those courses typically deal with valuation litigation. No one addresses the regulatory aspects of appraisal practice, risk management or other process-driven issues in real estate appraisal law.

As a result, I believe that it is time to encourage appraisers, regulators, educators and users of appraisal services to start thinking about real estate appraisal law that goes beyond litigation valuation.

## WHAT IS REAL ESTATE APPRAISAL LAW GOING TO DO FOR ME?

What does real estate appraisal law do for a real estate appraiser? For that matter, what does it do for a lender, an attorney, or other users of real estate appraisal services?

For one thing, real estate appraisal law goes beyond functionally obsolete appraisal education and regulatory paradigms, which are currently focused exclusively on USPAP. That's part of what I mean when I ask if we have outgrown USPAP. >>

<sup>1</sup> 11 P.L. 203

<sup>2</sup> <http://www.globalpres.com/mediasite/Catalog/pages/catalog.aspx?catalogId=97b75dbc-da29-4ac2-b603-caa7705cf271>

The answer is yes – certainly as a means of training new appraisers. The same is true in regard to regulating those currently in the field; ditto for cutting-edge regulatory legal issues for lenders. Most users of appraisal services, including a majority of lawyers and judges, don't know what I'm talking about when I utter the acronym USPAP. When I say, "appraisal regulatory standards," I can see that they understand.

### Let's face it: Appraisal practice has changed. The present real estate appraiser regulatory and educational paradigms need to change with it.

Real estate appraisal practice must deal with certain facts of life. Its future is as an increasingly regulated industry. Appraisal practice is in the midst of change that has more "unknown unknowns" than even known unknowns. The issue is how to structure that change so that it does not ruin the industry.

Those facts lead me to believe that real estate appraisal law is a steady influence in an uncertain world. Law is based on precedent. The Latin term *stare diesis* means "to stand by things decided."<sup>3</sup> This bedrock principle of law can be described as "intended to ensure that people are guided in their personal and business dealings by prior court decisions through established and fixed principles..."<sup>4</sup>

Courts typically follow precedent, except when that precedent needs to be broken, such as in *Brown v. Board of Education*<sup>5</sup>, the 1954 landmark civil rights decision by the U.S. Supreme Court. At other times, court decisions include a dissenting opinion that creates societal change, such as Justice Clarence Thomas' brilliant dissent in *New London v. Kelo*<sup>6</sup>, the Supreme Court's 2005 landmark eminent domain case. Through his dissent, Justice Thomas established the basis for numerous political, legislative and



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judicial rejections of the Supreme Court's unpopular majority opinion. In both instances, the "established and fixed principles" of the law established the parameters of dramatic cultural change, even when the court's decision went against precedent.

Appraisers should embrace real estate appraisal law as a means of delineating similar "established and fixed principles" that go beyond the common law and cottage-industry history of appraisal practice. Real estate appraisal practice has seen a topsy-turvy world of change over the past several years. The Government Accountability Office (GAO) statutorily mandated study on the valuation industry, along with the myriad rules and regulations that will be evolving out of MRAPLA, portend even more changes in the relatively near future. Real estate appraisal law can provide the structure necessary to keep tumultuous change from destroying the industry.

### ISSUE AREAS

Now that I've told you why real estate appraisal law is important, let's drill

down into some substance. The three most important issue areas in real estate appraisal law are regulation, education and the future of appraisal practice.



### REGULATION

Perhaps the greatest regulatory issue in real estate appraisal law today is how MRAPLA will affect the industry. That act brings about the greatest changes in appraisal regulation since the passage of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA). MRAPLA's Subtitle F, Appraisal Activities, establishes a significantly revised regulatory regime for real estate appraisal practice at the state/territorial and federal levels. In addition, both MRAPLA and the other acts in what is popularly known as the Financial Reform Act affect a wide range of real estate-related services. Thus, real estate appraisal activities for a wide range of real estate practitioners will be affected by statute or regulation, thereby creating a knowledge economy demand for real estate appraisal law.

One area of that demand should be among providers, and regulators, of appraisal practice services. **Unfortunately, the regulatory knowledge of most appraisers and regulators is limited to USPAP. Even more unfortunately, the lack of a body of information on state disciplinary actions and interpretations has caused USPAP's application to essentially be anecdotal.**

USPAP actually evolved from what would be akin to common law. In the mid-1980s, appraisal organizations created USPAP by meshing their individual ethics rules. Those rules were essentially common law, just like the legal standard before the relatively modern practice of codifying the law and making written decisions of courts available to the general public.

<sup>3</sup> *Black's Law Dictionary* (8th Ed.).  
<sup>4</sup> *Corby v. McCarthy*, 154 Md. App. 446, 840 A.2d 188 (2003).  
<sup>5</sup> *Brown v. Board of Education*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954).  
<sup>6</sup> *Kelo v. City of New London*, 545 U.S. 1158 (U.S. 2005).

USPAP was designed to be like the Uniform Commercial Code, but for real estate appraisal practice. It sets up a broad general national standard that is then applied to specific facts and circumstances by a state-level statutory and regulatory process. This was true under FIRREA and will be increasingly true under MRAPLA.

USPAP is merely a guide to be used by regulators to make decisions, under its standards, similar to the manner in which the UCC is employed. State legislatures use the UCC as a general guide. Then, they draft specific state-level laws based on certain provisions of that general guide. Courts and administrative bodies look to these specific laws, and the case law based on them, in adjudicating matters involving the UCC within a jurisdiction. This is virtually impossible to do with USPAP due to the lack of a publically available body of law on the interpretation of that general guide by state appraiser regulatory entities.

Litigation will inevitably develop in regard to disputes under MRAPLA's provisions for appraiser independence, mandatory complaints against appraisers and appraisal management company regulations, and unknown issues that will arise out of the mandated GAO studies.

Appraisers are not the only ones who need to know about real estate appraisal law. For example, accountants will soon be using appraisal concepts and, along with appraisers, will be applying world-level accounting standards of Fair Value. Lawyers and courts will need to know how appraisals are supposed to be performed and how appraisals are regulated beyond USPAP. This need goes well beyond representation of appraisers in disciplinary matters before state boards. Just ask lenders about the appraisal-related conundrums they face with regulators and investors, let alone borrower lawsuits. Numerous other real estate industry

participants will also need to know this information, including real estate licensees performing BPOs.



## EDUCATION

The Appraisal Qualifications Board (AQB) has proposed a significant change in criteria for both the qualification of new real estate appraisers and requirements for the upgrading of existing appraisers, with a projected implementation date of January 1, 2015.

**Today's young blood in real estate appraisal practice is going to want courses that provide credit for both academic requirements and appraiser qualification.** Current appraisers who seek to upgrade their license or certification status will similarly demand courses that provide both appraiser and academic credit.

Nonprofit real estate education providers will have to determine the elements of real estate appraisal laws that should be included in appraisal education. Profit providers of continuing education will have to determine what can be profitably marketed to practicing appraisers. It will come down to what elements of real estate appraisal law should be included, for whom, when, and how those elements will be presented.

This may surprise you, but I believe that a real estate appraisal law academic course could be built around the current 15-hour USPAP course. Other topics should be added, such as risk management and state and federal regulation. Ethics and critical thinking would become an important part of such a curriculum. Hot Topics should also be included. These elements could then be mixed and matched to a variety of academic and continuing education offerings.



## THE FUTURE OF APPRAISAL PRACTICE

Hot Topics brings up the future of appraisal practice. At all levels, there needs to be integration between a real estate appraisal law curriculum and other cutting-edge courses in real estate appraisal practice. Such course topics could include sustainable real estate development, administration of the outsourcing of appraisal work to developing economies, and digitally driven future valuation methodologies exemplified by NAR's development of a national database of sales and listings as well as Freddie and Fannie's mandated XML formatted 1004s.

The future is here. Now we have to deal with it. But how? One way to address the future is to understand the past. Real estate appraisal law can help provide the necessary structure to both understanding the past and addressing the future.

How can appraisers rely on the law when "the courts aren't even enforcing USPAP"? How many times have you heard that from appraisers? **I recently searched the LexisNexis database for cases containing both the words "appraisal" and "BPO," and found that courts routinely confused the two.** What kind of future does a regulated industry have if the courts do not understand the difference between a regulated valuation and an unregulated one?

Don't think that I'm criticizing the courts. Judges only address issues that litigants and their attorneys bring before them. That's their job. Judges are not the USPAP police. Look to activities that are generally considered professions. Courts understand what they do because a body of law has been developed for each profession. That body of law combines with, and builds upon, the body of technical information >>

for each recognized profession. The result is a public perception of competence and professionalism.

If appraisers expect to be treated as professionals, there needs to be a body of real estate appraisal law developed that is recognized by the courts, embodied in precedent, and accepted by related professions. A body of real estate appraisal law would help create a perception of professionalism by delineating “established and fixed principles” of law in this field. Such principles would then help control the type of change that could destroy the industry.



*I recently searched the LexisNexis database for cases containing both the words “appraisal” and “BPO,” and found that courts routinely confused the two.*

## WRAP-UP AND NEXT STEP

Real estate appraisal practice will never go back to being a cottage industry. For real estate appraisal practice to achieve the recognition necessary to maintain the public trust, it must go beyond relying upon its common law tradition, recognize its nature as a regulated industry and coherently present itself to both practitioners and to users of appraisal services. Real

estate appraisal law provides the structure for that process, especially in light of the changes that the industry has experienced and will undergo in the next few years. Where can we go with the issues discussed above? Well, for one thing I’m going to the Seattle conference of the American

**Real Estate Society (ARES) April 13-16, 2011.** At that esteemed conclave, I will be moderating a panel of equally esteemed real estate appraisal industry experts who will be discussing the thesis of this article. The panel presentation will primarily consist of a lively and productive interactive discussion among panel members and the audience. The starting point for that panel discussion will be my academic manuscript on the issues discussed in this article, to be posted by March 1, 2011, on the ARES website.

I hope that you will participate in that discussion. See you in Seattle.

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