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MEMO RE: APPRAISER QUALIFICATION RESEARCH

PROJECT DESCRIPTION

We need a memo regarding the ability of an appraiser with a temporary practice permit under NRS 645(c) to testify as an expert with regard to his or her appraisal of real estate when the appraisal was performed prior to the issuance of the temporary practice permit. The appraiser temporary practice permit application required by the State of Nevada Department of Business and Industry Real Estate Division required that the appraiser certify that the appraisal was not begun prior to the issuance of the temporary permit. The appraiser did in fact commence and complete the draft of the appraisal prior to the issuance. Only want an analysis of existing Nevada statutes and regulations and case law.

Applicable jurisdiction: Nevada

Flat Fee Price for Project: \$1250

Hours Billed to Attorney's Client: 10.3 Hours

Attorney Profit: (billed @ \$185/hr) \$656

Area of Law: Litigation, Real Estate

Application Period: 8 Hours

Project Completed: 7 Days

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MEMORANDUM

To:

From:

Date: October 9, 2017

Re: Appraiser Qualification

I. Assignment Description

We need a memo regarding the ability of an appraiser with a temporary practice permit under NRS 645(c) to testify as an expert with regard to his or her appraisal of real estate when the appraisal was performed prior to the issuance of the temporary practice permit. The appraiser temporary practice permit application required by the State of Nevada Department of Business and Industry Real Estate Division requires that the appraiser certify that the appraisal was not begun prior to the issuance of the temporary permit. The appraiser did in fact commence and complete the draft of the appraisal prior to the issuance. Only want an analysis of existing Nevada statutes and regulations and case law.

II. Issue

1. Whether an unlicensed appraiser – who subsequently became licensed via temporary practice permit under NRS 645(c) – can testify as an expert with regard to his or her appraisal of real estate?

III. Analysis

1. NRED Statutes

a. NRS 645C.470 Unprofessional Conduct (i.e. Conducting Appraisals Without a Permit) of Certified or Licensed Appraiser

NRS 645C.470 provides the following: A certified or licensed appraiser or registered inter is guilty of unprofessional conduct if he or she:

- Willfully uses a trade name, service mark or insignia indicating membership in an organization for appraisals of which he or she is not a member;
- Violates any order of the Commission, agreement with the Division, provision of this chapter or provisions of any regulation adopted pursuant to this chapter;
- Fails to disclose to any person with whom he or she is dealing any material fact or other information he or she knows, or he or she exercises of reasonable care and diligence should know, concerning or relating to any real estate he or she appraises, including any interest he or she has in the real estate;
- Knowingly communicates a false or fraudulent appraisal to any interested person or otherwise engages in any deceitful, fraudulent or dishonest conduct;
- Pretends to provide or enters into a contract to prepare or provide an appraisal if he or her compensation is based partially or entirely on, or is otherwise affected by, the amount of the appraisal value.

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appraised value of the real estate;

6. Before admitting a license, or registration card, engaged in any conduct of which the Division is not aware that would be a ground for the denial of a certificate, license or registration card;

7. Makes a false statement of material fact on his or her application.

Here, the appraiser commenced and completed the draft of the appraisal prior to obtaining a NRED temporary appraiser permit. As such, pursuant to 645C.470 the appraiser is guilty of unprofessional conduct.

i. NRS 645C.470 Does Not Provide for a Private Cause of Action

Although Nevada does not have case law analyzing NRS 645C.470, the United States District Court for the District of Nevada held in *Smith v. F & J LLC*, 118 F.3d 1111, 1113 (9th Cir. 2000), that NRS 645C.470 does not create a private cause of action for a plaintiff who alleges that the defendant violated NRS 645C.470 by preparing an appraisal that misrepresented the value of the property.

defendant's argument that the plaintiff did not allege the existence of a private right of action under this statute.

The Federal Court agreed with Defendant that NRS 645C.470 does not provide for a private cause of action where an appraiser is accused of violating NRS 645C.470. As such, the federal court dismissed plaintiff's claim for failure to state a claim upon which relief may be granted and subsequently granted plaintiff's motion to amend.

b. NRS 645C.215 Administrative Fine For Conducting Real Estate Appraisals Without Certificate, License, Registration, Registration Card or Authorization

NRS 645C.215 provides the following:

- In addition to any other remedy or penalty, the Commission may impose an administrative fine against any person who knowingly:
 - Engages or offers to engage in any activity for which a certificate, license, registration or registration card, or any type of authorization is required, pursuant to this chapter, or any regulation adopted pursuant thereto, if the person does not hold the required certificate, license, registration or registration card or has not been given the required authorization; or
 - Assists or offers to assist another person to commit a violation described in paragraph (a).

2. If the Commission imposes an administrative fine against a person pursuant to this section, the amount of the administrative fine may not exceed the amount of any gain or economic benefit that the person derived from the violation or \$5,000, whichever amount is greater.

3. In determining the appropriate amount of the administrative fine, the Commission shall consider:

- The severity of the violation and the degree of any harm that the violation caused to other persons;

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persons;

(b) The nature and amount of any gain or economic benefit that the person derived from the violation;

(c) The person's history or record of other violations; and

(d) Any other facts or circumstances that the Commission deems to be relevant.

Before the Commission imposes the administrative fine, the Commission must provide the person with notice and an opportunity to be heard.

The person is entitled to a judicial review of the decision of the Commission in the manner provided by chapter 218B of NRS.

4. The provisions of this chapter do not apply to a person who engages or offers to engage in activities within the purview of this chapter if:

- A specific statute exempts the person from complying with the provisions of this chapter with regard to those activities; and
- The person is acting in accordance with the exemption while engaging or offering to engage in those activities.

Here, because the appraiser knowingly engaged in the draft of the appraisal without a NRED temporary appraiser permit the Commission may impose an administrative fine against the appraiser under NRS 645C.215. Further, under 645C.215(2), if an administrative fine is, in fact, imposed, the fine may not exceed the amount of any gain or economic benefit that the appraiser derived from the violation or \$5,000, whichever amount is greater.

c. NRS 645C.260 Penalty for Engaging in Appraisals Without a Certificate, License or Permit.

NRS 645C.260 provides the following:

- Any person who, in this State, engages in the business of, acts in the capacity of, advertises or assumes to act as:
 - An appraiser without first obtaining the appropriate certificate, license or permit pursuant to this chapter; or
 - An inter without first obtaining a registration card pursuant to this chapter,is guilty of a misdemeanor.

2. The Division may file a complaint in any court of competent jurisdiction for a violation of this section, and assist in presenting the law or facts at any hearing upon the complaint.

3. At the request of the Administrator, the Attorney General shall prosecute such a violation. Unless the violation is prosecuted by the Attorney General, the district attorney shall prosecute a violation which occurs in the district attorney's county.

Here, because the appraiser knowingly engaged in the draft of the appraisal without a NRED temporary appraiser permit, under NRS 645C.260 he is guilty of misdemeanor. Further, NRED may file a complaint with the courts. Moreover, at the request of the Administrator, the Attorney General must prosecute such a violation. If the Attorney General declines to prosecute such violation, the District Attorney must prosecute such violation.

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d. NRS 645C.330 Education and Experience Requirements for NRED Appraiser Certificate or License

NRS 645C.330 provides the following:

The Commission shall adopt regulations that prescribe the standards for education and experience required for the issuance of a certificate or license. Until the Commission adopts those regulations, the standards are as follows:

- An applicant for a license as a residential appraiser must furnish proof satisfactory to the Commission that the applicant has successfully completed:
 - At least 90 hours of academic instruction in subjects related to appraisals taught in courses approved by the Commission; and
 - At least 2 years of experience working full-time as an appraiser or inter.

2. An applicant for a certificate as a residential appraiser must furnish proof satisfactory to the Commission that the applicant has successfully completed:

- At least 120 hours of academic instruction in subjects related to appraisal taught in courses approved by the Commission; and
- At least 2 years of experience working full-time as an appraiser or inter, including not less than 500 hours of experience relating to complex property.

3. An applicant for a certificate as a general appraiser must furnish proof satisfactory to the Commission that the applicant has successfully completed:

- At least 180 hours of academic instruction in subjects related to appraisals taught in courses approved by the Commission; and
- At least 3 years of experience working full-time as an appraiser or inter.

Here, based on the limited facts it appears the appraiser may have performed an appraisal without a license and thus subsequently obtained a NRED Temporary Appraiser Permit. Under NRS 645C.330, to obtain such permit the appraiser would have been required to prove that he had the requisite education and experience requirements. If the appraiser had the requisite education and experience to obtain the permit, his education and experience bolsters his argument as to why his testimony should be admissible under NRS 50.275(1)'s "qualification" prong. Therefore, the Court may consider his testimony admissible under NRS 50.275. Analysis of Admissibility Expert Testimony is discussed below.

2. Under Nevada Law, Conducting Appraisals Without a License Is Illegal

a. Arguments As to Why Such Illegal Evidence Should Not Be Considered.

Nevada case law does not have any cases regarding whether an unlicensed appraiser's testimony should be admissible in court. However, *Jacob v. America, Inc. v. Middle Canyon Properties, LLC*, No. 2:10-cv-00396-KJB-PAL, 2012 WL 1201, 1203 (D. Nev. 2012), is a case in the United States District Court for the District of Nevada involving whether an unlicensed appraiser's testimony should be admissible. The following arguments are similar to those made in Plaintiff Bank of America, N.A.'s Trial Brief (2012 WL 601101).

Under Nevada law, an appraisal is broadly defined as "an analysis, opinion or conclusion,

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whether written or oral, relating to the nature, quality, value or use of a specified interest in, or asset of, identified real estate for or with the expectation of receiving compensation." NRS 645C.030. Thus, the appraiser's analysis of the Property are deemed appraisals.

However, conducting an appraisal or valuation without the appropriate certification is illegal in Nevada and is a misdemeanor. NRS 645C.215 provides: "Any person who ... engages in the business of ... an appraiser without first obtaining the appropriate certificate, license or permit pursuant to this chapter ... is guilty of a misdemeanor." Further, the Nevada Commission of Appraisers imposes administrative fines for conducting appraisals without a license. *Id.* Pursuant to the facts presented, the appraiser did not provide the adequate permit pursuant to NRS 645C at the time of the appraisal. As such, this illegal evidence should not be admitted.

3. Expert Testimony

a. Admissibility of Expert Testimony Under NRS 50.275

This Court reviews a district court's decision to allow testimony for abuse of discretion. *Hallmark v. Eldridge*, 124 Nev. 492, 498, 189 P.3d 646 (2008) (citing *Brown v. Cowmes*, 105 Nev. 665, 671, 782 P.2d 1299, 1303 (1989)). To testify as an expert witness under NRS 50.275, the witness must satisfy the following three requirements: (1) he or she must be qualified in an area of "scientific, technical or other specialized knowledge" (the qualification requirement); (2) his or her specialized knowledge must "assist the trier of fact in understanding the evidence or in determining a fact in issue" (the assistance requirement); and (3) his or her testimony must be limited "to matters within the scope of [his or her specialized] knowledge" (the limited scope requirement). *Hallmark v. Eldridge*, 124 Nev. 498.

b. Qualification Requirement Under NRS 50.275

As discussed above, before a person may qualify as an expert under NRS 50.275, the district court must first determine whether he or she is qualified in an area of scientific, technical, or other specialized knowledge. *Hallmark v. Eldridge*, 124 Nev. 492, 499, 189 P.3d 646 (2008). In determining whether a person is properly qualified, a district court should consider the following factors: (1) formal schooling and academic degrees; (2) licensure; (3) employment experience; and (4) practical experience and specialized training. *Id.* These factors are not exhaustive, may be accorded varying weights, and may not be equally applicable in every case. *Id.*

Regarding the "licensing" prong the qualification requirement under NRS 50.275, the Nevada Supreme Court has addressed the admissibility of unlicensed expert testimony. The following cases discuss whether the testimony of an unlicensed expert is admissible:

1. Admissibility of an Unlicensed Expert

Wright v. Las Vegas Hacienda, Inc., 102 Nev. 261, 720 P.2d 696 (1986)

In *Wright*, Appellant injured her ankle when she tripped and fell on respondent's stairway. The stair had a metal strip across the top that was raised about one eighth of an inch. None of the other

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stairs had a metal strip. *Wright v. Las Vegas Hacienda, Inc.*, 102 Nev. 261, 720 P.2d 696 (1986)

During the trial, appellant attempted to call Dr. Rasmussen, Chairman of the Dept. of Psychology at UNLV, as an expert in the field of human factors engineering to testify to the dangerous condition of the metal strip as it relates to the psychological effects of the variations in the heights and curvatures of the stairway. *Id.* The district court excluded his testimony.

At trial, the District Court's reason for excluding the testimony was that Dr. Rasmussen was unqualified to testify in the field of human factors engineering because he did not (1) possess the requisite academic credentials and (2) that he was not licensed as a psychologist or an engineer. *Id.* The District Court concluded that Dr. Rasmussen was therefore disqualified to testify because he would thereby engage in the unlicensed practice of psychology or engineering. *Id.* The Nevada Supreme Court disagreed. *Id.*

The admission of expert testimony is a matter generally left to the discretion of the district court. See *Provenza v. Camacho*, 95 Nev. 4, 7, 588 P.2d 1020, 1021 (1979). However, the Nevada Supreme Court will not hesitate to intervene if that discretion is manifestly abused. *Id.*

The Nevada Supreme Court found that Dr. Rasmussen had taught a course in human factors engineering at UNLV and, thus, was academically qualified to testify as an expert in the field of human factors. Moreover, the Nevada Supreme Court stated "a witness need not be licensed to practice in a given field in order to be qualified to testify as an expert." *Id.* at 263. Further, they stated that NRS 50.275 does not require an expert to be licensed as Dr. Rasmussen's knowledge, training, and education would have enabled him to testify as an expert in the field of human factors engineering. *Id.*

Here, the admission of the appraiser's expert testimony is a matter generally left to the discretion of the district court. Further, under *Wright* the appraiser need not be a licensed appraiser to testify in an appraisal as long as he possesses the requisite knowledge, training, and education and education that enables him to testify in the field of appraisals.

Freeman v. Davidson, 105 Nev. 15, 768 P.2d 885 (1989)

In *Freeman*, Mr. Freeman died following a surgery. *Freeman v. Davidson*, 105 Nev. 15, 768 P.2d 885 (1989). The estate and heirs filed a civil suit against Dr. Davidson alleging malpractice. *Id.* Appellate planned to present testimony of three experts at trial. *Id.* The trial court excluded testimony of Dr. Bowling (doctor) and Dr. White (economist). *Id.* at 15.

The trial court excluded Dr. Bowling's testimony because she was not licensed to practice medicine until after the date of the alleged malpractice. *Id.* However, the Nevada Supreme Court cited *Wright v. Las Vegas Hacienda* and stated "a witness need not be licensed to testify as an expert as long as he or she possesses special knowledge, training, and education, or in this case, knowledge of the standard of care." *Id.* The Nevada Supreme Court went on to state "the expert's

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license need not be acquired contemporaneously or before the alleged negligence." *Id.* (citing *Brown v. Cowmes*, 105 Nev. 665, 671, 782 P.2d 1299, 1303 (1989)).

Id. The Nevada Supreme Court reversed and remanded the matter for retrial emphasizing that the competency of an expert witness is a matter within the trial court's discretion. *Freeman v. Davidson*, 105 Nev. 15, 768 P.2d 885 (1989). For the reasons stated, the court of license is not a consideration, and the testimony of an economist is accepted means of proving loss of probable support. *Id.*

Here, under *Freeman* the appraiser need not be a licensed appraiser to testify in an appraisal as long as he possesses the requisite knowledge, training, and education that enables him to testify in the field of appraisals. Further, the appraiser did not have to possess a license or temporary permit at the time of the appraisal to be considered qualified to testify as an expert.

Stuccato v. Valley Hospital, 123 Nev. 526, 179 P.3d 503 (2007)

In *Stuccato*, the Nevada Supreme Court held that the emergency room physician was not disqualified from testifying as an expert about appropriate standard of care for administering intramuscular injections merely because the patient's administration injection to patient was an error. *Stuccato v. Valley Hospital*, 123 Nev. 526, 528, 179 P.3d 503 (2007). Although many aspects of the case are regarding whether the patient was the appropriate standard care, the Nevada Supreme Court stated that "there is no requirement that the expert medical witness be from the same specialty as the defendant; the issue is simply one of the witness's actual knowledge." *Id.* at 531. Further the Nevada Supreme Court went on to state "an expert witness need not be licensed to practice in a given field to be considered qualified to testify as an expert." *Id.*

Here, under *Stuccato* it appears that the court will give considerable weight to the appraiser's actual knowledge surrounding real estate appraisals. Further, the appraiser did not have to possess a license or temporary permit at the time of the appraisal to be considered qualified to testify as an expert.

6. The Assistance Requirement Under NRS 50.275

If a person is qualified to testify as an expert under NRS 50.275, the district court must then determine whether his or her testimony will assist the trier of fact in understanding the evidence or determining a fact in issue. *Hallmark v. Eldridge*, 124 Nev. 492, 500, 189 P.3d 646 (2008). An expert's testimony will assist the trier of fact only when it is relevant and the product of reliable methodology. *Id.* In determining whether an expert's opinion is based upon reliable methodology, a district court should consider whether the opinion is (1) within a recognized field of expertise; (2) testable and has been tested; (3) published and subjected to peer review; (4) generally accepted in the scientific community (not always determinative); and (5) based more on particularized facts rather than assumption, conjecture, or generalization. *Hallmark v. Eldridge*, 124 Nev. 492-501.

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If the expert formed his or her opinion based upon the results of a technique, experiment, or calculation was controlled by known standards; (2) the testing conditions were similar to the conditions at the time of the incident; (3) the technique, experiment, or calculation had a known error rate; and (4) it was developed by the verified expert for purposes of the present dispute. *Hallmark v. Eldridge*, 124 Nev. 492, 502-503, 189 P.3d 646 (2008). We again note that these factors are not exhaustive, may be accorded varying weights, and may not apply equally in every case. *Hallmark v. Eldridge*, 124 Nev. 492 at 502.

Here, although the appraiser was unlicensed at the time of the appraisal, the court may consider his testimony if it will assist in the trier of fact in understanding the evidence or determining a fact in issue. Further, if appraiser's testimony is based on specialized knowledge and techniques he learned from his appraisal education and experience, the court may also consider his testimony. On the other hand, if the appraiser has no appraisal education, training, or experience, the court may not consider his testimony as it would not assist the trier of fact.

IV. Conclusion

Under NRS 645C, the appraiser's conduct of appraising real estate prior to obtaining a temporary license is a misdemeanor and fine up to \$5,000. However, notwithstanding the aforementioned, under Nevada law the appraiser's testimony is likely admissible as long as he possesses the education, training, or experience that enables him to testify in the field of appraisals.

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During the trial, appellant attempted to call Dr. Rasmussen, Chairman of the Dept. of Psychology at UNLV, as an expert in the field of human factors engineering to testify to the dangerous condition of the metal strip as it relates to the psychological effects of the variations in the heights and curvatures of the stairway. *Id.* The district court excluded his testimony.

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