

**MEETING AGENDA****TALCB Enforcement Committee**

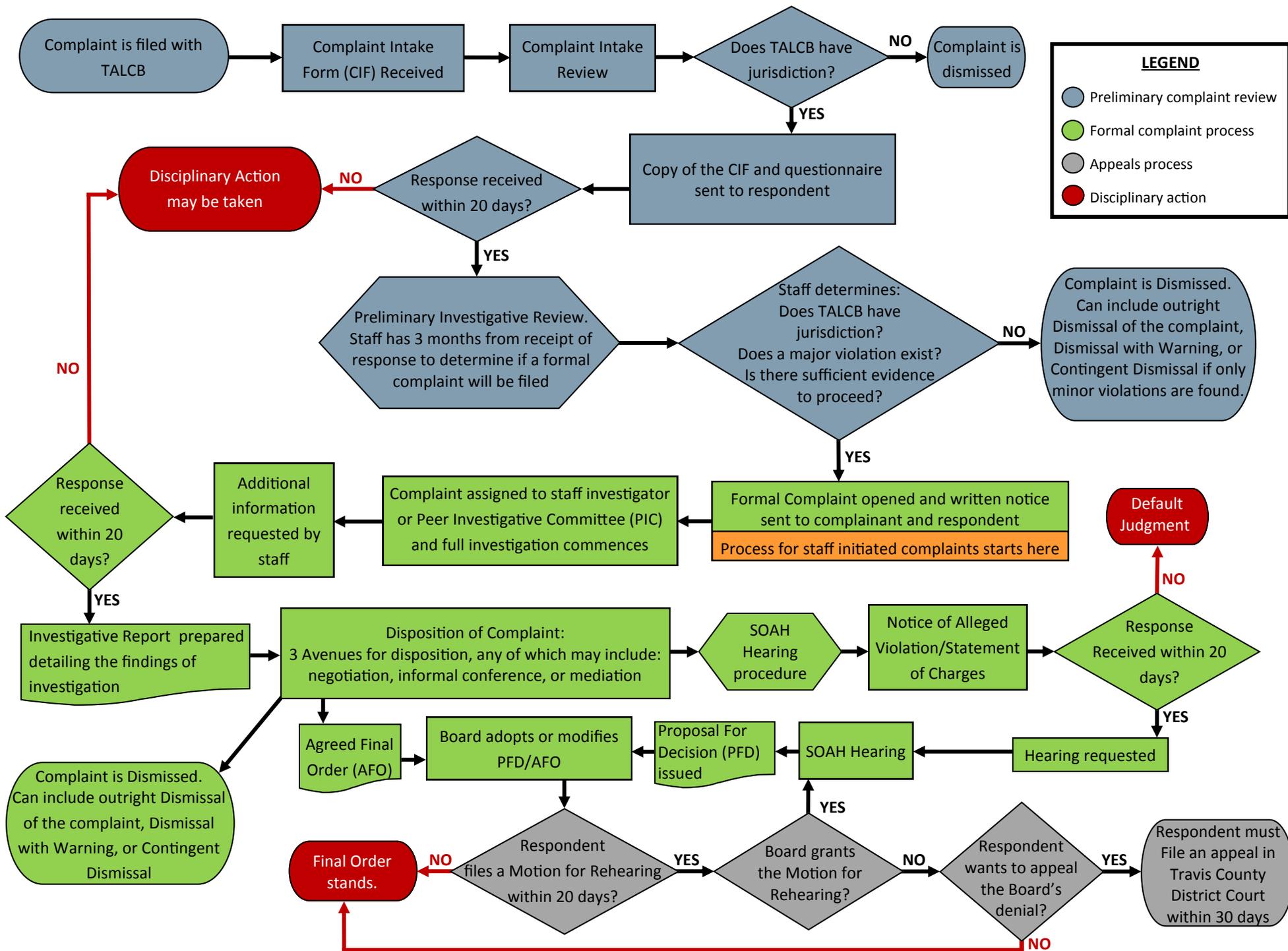
4th Floor, Stephen F. Austin State Office Building  
1700 North Congress, Austin, Texas 78701  
Via Teleconference

Wednesday January 22, 2014, 10:00 am

1. Call to order
2. Announcement regarding telephonic committee meetings
3. Discussion and possible action regarding preparation of a flow chart of the complaint process for the website
4. Discussion and possible action regarding a rule for appraiser violation of confidentiality
5. Discussion and possible action regarding SES division documentation policies, including information for the public, manual, procedures, website and forms
6. Discussion and possible action regarding appraiser duty to disclose past listings
7. Discussion to identify issues for future meetings regarding complaint processing including complaints on older files, multiple complaints, staff initiated complaints, informal conferences, contested cases, litigation negotiation process and committee policies
8. Discussion regarding other items for future meetings and times
9. Adjourn

# TALCB COMPLAINT PROCESS

AGENDA ITEM 3



**DEFINITIONS**

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38 **APPRAISER’S PEERS:** other appraisers who have expertise and competency in a similar type of assignment.

39 **ASSIGNMENT:** 1) An agreement between an appraiser and a client to provide a valuation service; 2) the  
40 valuation service that is provided as a consequence of such an agreement.

41 **ASSIGNMENT RESULTS:** an appraiser’s opinions and conclusions developed specific to an assignment.

42 Comment: Assignment results include an appraiser’s:

- 43       ▪ opinions or conclusions developed in an appraisal assignment, such as value;
- 44       ▪ opinions of adequacy, relevancy, or reasonableness developed in an appraisal review assignment;
- 45       or
- 46       ▪ opinions, conclusions, or recommendations developed in an appraisal consulting assignment.

47 **ASSUMPTION:** that which is taken to be true.

48 **BIAS:** a preference or inclination that precludes an appraiser’s impartiality, independence, or objectivity in an  
49 assignment.

50 **BUSINESS ENTERPRISE:** an entity pursuing an economic activity.

51 **BUSINESS EQUITY:** the interests, benefits, and rights inherent in the ownership of a business enterprise or a  
52 part thereof in any form (including, but not necessarily limited to, capital stock, partnership interests,  
53 cooperatives, sole proprietorships, options, and warrants).

54 **CLIENT:** the party or parties who engage, by employment or contract, an appraiser in a specific assignment.

55 Comment: The client may be an individual, group, or entity, and may engage and communicate with  
56 the appraiser directly or through an agent.

57 **CONFIDENTIAL INFORMATION:** information that is either:

- 58       ▪ identified by the client as confidential when providing it to an appraiser and that is not available
- 59       from any other source; or
- 60       ▪ classified as confidential or private by applicable law or regulation\*.

61 \*NOTICE: For example, pursuant to the passage of the Gramm-Leach-Bliley Act in November 1999, some  
62 public agencies have adopted privacy regulations that affect appraisers. As a result, the Federal Trade  
63 Commission issued a rule focused on the protection of “non-public personal information” provided by  
64 consumers to those involved in financial activities “found to be closely related to banking or usual in connection  
65 with the transaction of banking.” These activities have been deemed to include “appraising real or personal  
66 property.” (Quotations are from the Federal Trade Commission, Privacy of Consumer Financial Information;  
67 Final Rule, 16 CFR Part 313.)

**ETHICS RULE**

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234 **If known prior to accepting an assignment, and/or if discovered at any time during the assignment,**  
 235 **an appraiser must disclose to the client, and in the subsequent report certification:**

- 236 • **any current or prospective interest in the subject property or parties involved; and**
- 237 • **any services regarding the subject property performed by the appraiser within the three**  
 238 **year period immediately preceding acceptance of the assignment, as an appraiser or in any**  
 239 **other capacity.**

240 Comment: Disclosing the fact that the appraiser has previously appraised the property is permitted  
 241 except in the case when an appraiser has agreed with the client to keep the mere occurrence of a  
 242 prior assignment confidential. If an appraiser has agreed with a client not to disclose that he or she  
 243 has appraised a property, the appraiser must decline all subsequent assignments that fall within the  
 244 three year period.

245 **Management:**

246 **An appraiser must disclose that he or she paid a fee or commission, or gave a thing of value in**  
 247 **connection with the procurement of an assignment.**

248 Comment: The disclosure must appear in the certification and in any transmittal letter in which  
 249 conclusions are stated; however, disclosure of the amount paid is not required. In groups or  
 250 organizations engaged in appraisal practice, intra-company payments to employees for business  
 251 development do not require disclosure.

252 **An appraiser must not accept an assignment, or have a compensation arrangement for an**  
 253 **assignment, that is contingent on any of the following:**

- 254 1. **the reporting of a predetermined result (e.g., opinion of value);**
- 255 2. **a direction in assignment results that favors the cause of the client;**
- 256 3. **the amount of a value opinion;**
- 257 4. **the attainment of a stipulated result (e.g., that the loan closes, or taxes are reduced); or**
- 258 5. **the occurrence of a subsequent event directly related to the appraiser’s opinions and specific**  
 259 **to the assignment’s purpose.**

260 **An appraiser must not advertise for or solicit assignments in a manner that is false, misleading, or**  
 261 **exaggerated.**

262 **An appraiser must affix, or authorize the use of, his or her signature to certify recognition and**  
 263 **acceptance of his or her USPAP responsibilities in an appraisal, appraisal review, or appraisal**  
 264 **consulting assignment (see Standards Rules 2-3, 3-6, 5-3, 6-9, 8-3, and 10-3). An appraiser may**  
 265 **authorize the use of his or her signature only on an assignment-by-assignment basis.**

266 **An appraiser must not affix the signature of another appraiser without his or her consent.**

267 Comment: An appraiser must exercise due care to prevent unauthorized use of his or her signature.  
 268 An appraiser exercising such care is not responsible for unauthorized use of his or her signature.

269 **Confidentiality:**

270 **An appraiser must protect the confidential nature of the appraiser-client relationship.**

271 **An appraiser must act in good faith with regard to the legitimate interests of the client in the use of**  
 272 **confidential information and in the communication of assignment results.**

273 **An appraiser must be aware of, and comply with, all confidentiality and privacy laws and regulations**  
274 **applicable in an assignment.<sup>2</sup>**

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

- 277 • **the client;**
- 278 • **persons specifically authorized by the client;**
- 279 • **state appraiser regulatory agencies;**
- 280 • **third parties as may be authorized by due process of law; or**
- 281 • **a duly authorized professional peer review committee except when such disclosure to a**  
282 **committee would violate applicable law or regulation.**

283 **A member of a duly authorized professional peer review committee must not disclose confidential**  
284 **information presented to the committee.**

285 Comment: When all confidential elements of confidential information and assignment results are  
286 removed through redaction or the process of aggregation, client authorization is not required for  
287 the disclosure of the remaining information, as modified.

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<sup>2</sup> Pursuant to the passage of the Gramm-Leach-Bliley Act in 1999, numerous agencies have adopted privacy regulations. Such regulations are focused on the protection of information provided by consumers to those involved in financial activities “found to be closely related to banking or usual in connection with the transaction of banking.” These activities have been deemed to include “appraising real or personal property.” (Quotations are from the Federal Trade Commission, Privacy of Consumer Financial Information; Final Rule, 16 CFR Part 313.)

## FROM TED WHITMER'S JUNE 13, 2013 EMAIL

**Website:** The TALCB website is used to post orders, usually Agreed Orders, between the Texas Appraiser Licensing & Certification Board and an appraiser. The website is open to the public for viewing and often decisions are made by appraiser's clients concerning placement of appraisers on approved lists based upon past board action.

The website serves an important function to assist the public by providing information needed concerning the quality of appraisers that might be used by management companies or financial institutions. However, the appraiser has no control over what is posted on the website and often the details of the Agreed Order that are posted are not agreed upon by the appraiser. Most Agreed Orders include a statement that the appraiser does not agree nor disagree with the findings of facts of the TALCB being enforcement committee. If details of the Agreed Order are posted, this statement also needs to be posted.

There needs to be a balance between the protection of the public and protection of the appraiser. **Public trust does not exclude the appraisers; public trust includes the appraisers.** Many Agreed Orders are entered into in lieu of a \$30,000-\$50,000 court case. Most Agreed Orders are educational in purpose and most appraisers who have a discipline with the TALCB take the education seriously. The inclusion on the website, especially for an indeterminate number of years, has been unduly punitive on appraisers who received discipline.

The ASC does not have a requirement that the state post appraiser disciplines on any website. Therefore, there is no mandate or requirement that the Texas Appraiser Licensing & Certification Board provide a website much less level of details that it posted on the website.

The following are proposed rules governing the website.

1. Limit the number of years a discipline is posted and available for review on the website.
  - A. For findings of intentional conduct, have the findings posted for 10 to 15 years.
  - B. For findings involving gross negligence, have the findings posted from 7 to 10 years.
  - C. All other violations of USPAP, have the findings posted for 5 years.
2. Delete all postings of Agreed Orders or orders that are older than 10 years on the current database.
3. Limit the findings of fact to just the USPAP number or rule numbers. State on the website that the appraiser did not necessarily agree to the findings of the TALCB's

Enforcement Division but chose to accept for the purpose of expediting the process. List the discipline required of the appraiser including education, mentorship hours, logs, and administrative fees.

[Note: Anyone can, through open records, request more details of any Agreed Order. In fact, they may receive an entire copy of any Agreed Order or order from the Texas Appraiser Licensing and Certification Board.]

**Confidentiality:** There is a recurring issue around the nation that places an appraiser in an ethics dilemma.

Many lenders and downstream recipients of loans in the secondary mortgage market receive appraisals that were done by appraisers for clients that are not the downstream lender or recipient of the appraisal report. Often, an appraiser is asked to comment on his or her appraisal report that was prepared for a client that is not the one asking for clarification. In fact, often the lender or recipient of the appraisal report is not even a listed intended user at the time of the contract.

The ASB requires confidentiality to be to clients (not to any other intended users), even clients that are no longer in business. Therefore, if an appraiser addresses the concerns of the downstream recipient of the appraisal report they would be in violation of the Confidentiality Provision of the ethics rule. However, if they refuse to answer the concerns of the downstream recipient of the appraisal report that entity often retaliates by turning the appraiser in to a state board.

Some states have already addressed this issue. It is suggested that the Texas Licensing & Certification Board create a rule that will give certainty to this issue.

The following is a suggested rule concerning this problem.

(1) it is a violation of confidentiality for an appraiser to discuss an appraisal report that was prepared for another client without getting permission from that client to discuss said report. The appraiser has no duty to seek permission from the original client. Any person or entity that has in their possession and appraisal report that was not prepared for them as the named client has the duty to first get permission from the named client to discuss the appraisal report with the appraiser. However, to the extent that they have the appraisal document, that information is deemed to have been made public and is not subject to confidentiality. The appraiser may discuss any information that has been made public because it is not subject to confidentiality by definition.

**FROM TED WHITMER'S JUNE 13, 2013 EMAIL**

**Duty to disclose past listings:** Standard Rule 1-5 requires an appraiser to analyze any current agreement of sale, listing, or option if available in the normal course of business. The ASB has issued advice on this subject through a frequently asked question concerning the duty of an appraiser to analyze and in his report or reports show the analysis of a path listing report. The ASB takes the position that an appraiser under Standard Rule 1-5 does not have a duty to analyze any expired listings. However the ASB in a frequently asked question stated that if an expired listing was considered significant information that would affect the results that an appraiser would have a duty under Standard Rule 1-1(b) to analyze the expired listing.

604 **Standards Rule 1-5**

605 **When the value opinion to be developed is market value, an appraiser must, if such information is**  
 606 **available to the appraiser in the normal course of business:<sup>14</sup>**

607 **(a) analyze all agreements of sale, options, and listings of the subject property current as of the**  
 608 **effective date of the appraisal; and**

609 **(b) analyze all sales of the subject property that occurred within the three (3) years prior to the**  
 610 **effective date of the appraisal.<sup>15</sup>**

611 **Comment:** See the **Comments** to Standards Rules 2-2(a)(viii), 2-2(b)(viii), and 2-2(c)(viii) for  
 612 corresponding reporting requirements relating to the availability and relevance of information.

**226. OBLIGATION TO ANALYZE PRIOR LISTINGS OF SUBJECT PROPERTY**

**Question:** **I know that Standards Rule 1-5(a) requires an appraiser to analyze all current listings of the subject property. Does it also require analysis of *prior* listings of the subject property?**

**Response:** No. However, in the development of an appraisal, an appraiser is required under Standards Rule 1-1(b), to *not commit a substantial error of omission or commission that significantly affects an appraisal*. If information about a prior listing is known by the appraiser, and that information is relevant to solving the appraisal problem, it must be considered.

Appraisers are cautioned to be aware that an analysis of the subject's prior listing history may be required by assignment conditions that apply to some assignments.

This has created considerable confusion with appraisers and enforcement. It is suggested that the Board adopt a rule related to analyzing past listings.

The following is a suggested rule

(1) An appraiser must analyze and report both the listing price and the analysis of any expired listing price of the subject for a period of 2 years prior to the effective date of the appraisal when the listing price that is expired has a substantial affect on the results of the appraisal.

**FROM TED WHITMER'S JUNE 13, 2013 EMAIL**

**Intermediary litigation negotiation process:** The current system of enforcement of regulations and USPAP results in unnecessary litigation costs to both appraisers and the Texas Licensing and Certification Board. At times an appraiser agrees that there is a violation of USPAP and would agree to education offered by staff, but refuses to sign an Agreed Order because of the alleged violations of USPAP or rules. Sometimes, litigation ensues because of the mere interpretation of parts of rules or USPAP. In fact, at least two litigated cases last year would probably not have gone to court if the board could have been approached prior to the case being tried at the State Office of Administrative Hearings (SOAH).

The current system does not allow an attorney or an appraiser to get an audience with the board until an informal conference has been held in Austin with the Enforcement Division and then a subsequent case tried at the State Office of Administrative Hearings. The average case costs and appraiser between \$30,000 and \$40,000 to try. I would assume that the cost to the Texas Licensing & Certification Board is also substantial.

The TALCB did not always use SOAH for contested cases. In the early 2000s, and prior, a portion of the board heard contested cases involving appraisal issues.

When the board was convened, the board members who heard the cases would recuse themselves from a final vote.

To alleviate litigation costs, I suggest that a subcommittee of the Board be allowed to negotiate settlements between appraisers and Enforcement Division.

In the alternative, I suggest a rule that allows negotiation of Agreed Orders if the discipline or education is agreed upon, but the language of Rule or USPAP violations is not agreed upon.

**Contested cases:** In cases set for the State Office of Administrative Hearings, the Enforcement Division frequently pleads with the request for revocation when suspension or revocation was not part of the original discussions.

The logic behind pleading for revocation is that it would foster settlement of the case from the standpoint that an appraiser would not be willing to risk his or her certification or license to contest either discipline or the language of an Agreed Order. The effect of this is that almost every Agreed Order that is signed by an appraiser contains language that the appraiser strongly disagrees with.

Although one could argue that our system of administrative law has layers of protection for the license or certification holder, this is really negated by the

opportunity of an appraiser to merely go before a judge for purposes of clarifying the write up of an Agreed Order. In most cases, the risk of potential loss of an entire career is not worth attempting to litigate in court a disagreement in findings of fact or the discipline that may be offered. The Enforcement Division uses this as leverage and often fails to seriously negotiate the language of an Agreed Order.

I would like to see a proposed rule, or at least guidance to the Enforcement Division, to not engage in these tactics. When an appraiser agrees to the discipline, but disagrees with the language of the Agreed Order, it would be expedient for both the board and the appraiser to be able to talk and negotiate language without having to file a contested case. In fact, I believe it would greatly impact on the cost of litigation and add to the public trust.

I would like to see a rule that prohibits the pleading of revocation if negotiations fail and surrender was not a part of the offer to the appraiser by the Enforcement Division. As previously discussed, this problem may be negated with an intervention process by the board before a case is set for SOAH.

**Older complaints:** complaints often times are initiated on appraisals that are passed the five-year requirement of the workfile rule. The ASB is clear that the five-year requirement of keeping workfiles has nothing to do with any statute of limitations for board enforcement.

It is suggested that a rule be developed for cases where an appraiser is defending the complaint concerning appraisal that was written over 5 years from the date of notification of the complaint.

Suggested rules are as follows

(1) an appraiser who receives a complaint concerning an appraisal report that was conducted past the five-year requirement of the workfile rule must not destroy his workfile if it is in existence, even though passed the five-year requirement, when receiving a complaint.

(2) if the appraiser who receives a complaint concerning an appraisal report was conducted past the 5 requirements the workfile rule does not have the workfile related to the appraisal report, then the appraiser will be asked to respond to the appraisal attempting to duplicate data, information and documentation that would have been used to create the appraisal report.

(3) regardless of having or not having a workfile with a notification of complaint passed the five-year period, the appraiser will not be disciplined for any workfile violation from UASBAP.

**Multiple Complaints:** A number of occurrences when a contested case is followed by another complaint. Generally, the Enforcement Division will combine the complaints into one SOHA case. However, there have been multiple times when a contested case is proceeding while there is another pending complaint.

This can occur when either the agency has not proceeded to full investigation of the subsequent complaint, or when a complaint comes in during the filing of a contested case.

The practical problem is both the appraiser and the agency it is subject to are trying two different cases and are spending money to try two different cases.

Additionally, it is possible to use subsequent complaints as leverage to force a surrender because of the doubling the cost of litigation to try to separate cases. This is not to say that this occurs, however, it is a practical reality.

Absent a rule, an administrative law judge would probably not require an agency to complete investigation just to combine cases. Therefore, a rule would be necessary concerning this problem.

I suggest one of the following two rules to cover this.

(1) Before filing a contested case or win a contested case has been filed, all complaints that have been received will be combined into a single case. It will be acceptable to file a case while subsequent complaints are processed. However, all complaints will be combined into one trial before the trial proceeds.

(2) All complaints received prior to the following of a contested case to the State Office of Administrative Hearings will be combined into a single trial and cause number.

**Staff Initiated Complaints:** The TALCB Statute gives staff the authority to initiate complaints. There are two major problems with staff initiated complaints. (1) They can be used to target appraisers who do not have clients initiating complaints. (2) They are often done when a trainee is applying for experience credit. Often, there is a complaint against the training (experienced) appraiser and the trainee or licensed appraiser.

Staff initiated complaints are dominated by the following.

- Unsigned intake complaint forms
- Referrals from the Texas Department of Insurance (TDI)
- Experience reviews
- Reviews from log requirements from Agreed Orders

Because of this practice, training is one of the highest risk activities in the business of appraising. Many appraisers will refuse to train because of the increased chance of complaints that are staff initiated. (My son is training and I am advising him and his sponsor to go through another state for his General Certification, and only then apply for his certification in Texas through reciprocity.) Because of the 100% audit rule by the ASC to all boards, experience reviews guarantee that the Enforcement Division views an appraiser's work and there is a chance a complaint can be filed. Furthermore, there are complaints initiated from Agreed Orders with log requirements. This gives the Enforcement Division the opportunity to enter into an Agreed Order with an appraiser, and then later go for his or her license or certification once there is an Agreed Order on the books. In other words, it increases the punishment because of the disciplinary matrix. The bonus system that now exists for investigators who reach their quota makes those logs ripe for the use in farming bonuses.

I suggest that there be a safety valve between the TALCB and staff concerning staff initiated complaints. I suggest a rule that would require one of the board members check off on the complaint and all staff initiated complaints be reviewed (also) by a member of PIC.