



ARKANSAS

REAL ESTATE COMMISSION

N E W S L E T T E R

OCTOBER 2002

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From the Desk of ...

The Executive Director

What you *don't* do can cause problems...



In reviewing Complaints received from buyers and sellers a common issue stated is "that real estate salesperson or broker did not protect my interest." Many of these Complaints are because provisions found in real estate contracts used by licensees that require the buyer or seller to perform are not complied with. The buyer or seller will complain that their agent did not advise them that they were required to comply with that contract requirement within a specific period of time. They complain that because the real estate agent did not look after their interest they lost a sale or the property or the earnest money. In representing a client it is important that you make sure that the buyer or seller or both understand the terms, conditions and requirements of the real estate contract. Clients need to know that all agreements and understandings about that real estate transaction must be included in writing as a part of the real estate contract. Clients need to know that once all parties sign the real estate contract, it is legally enforceable. You, as their agent, need to properly advise buyers and sellers of specific requirements of the contract.

When representing a client Regulation 8.5 (a) requires that you protect and promote your client's interest. As an agent for the seller or buyer or both it's up to you to make your clients aware of obligations and requirements in the real estate contract and make sure that deadlines are met.

Some of the problems we see while investigating Complaints and at Hearings are because the real estate agent did not follow through and did not protect their client's interest. Some examples include the following:

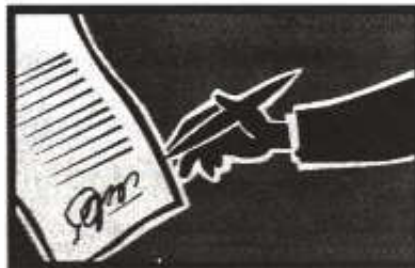
1. Did not apply for financing within specified time – If the contract requires the buyer to apply for financing within a specific time, *make sure it happens*. If you represent the buyer, *advise the buyer of this requirement*. If the buyer cannot apply within the required time, *ask for a written extension*. If you represent the seller, *get written proof* that the buyer has made application as required by the contract. Don't assume it will happen just because the real estate contract requires the buyer to apply.

CONTINUED ON PAGE 2

What you *don't* do can cause problems...

2. Earnest Money – If the contract indicates earnest money has been collected, *make sure it is collected*. If it is to be paid in installments, make sure the real estate contract states *how* it is to be collected, and make sure *you* collect each installment.

3. Real Estate Contract paragraphs that have choices or blanks are not completed – If the contract has choices or blanks to



complete, *fill them in* or indicate N/A. Don't leave a provision for someone to interpret or allege it was filled in after the fact. *Make it clear* what the buyer and seller are agreeing to.

4. Removal of Contingencies not in writing – If the contract is contingent upon a home selling or additional contract being presented, and requires written notice of removal within a certain time period, *make sure that happens*. If the contract requires written notice or written removal of a contingency, *nothing else will suffice*. Don't let your client lose a house or offer because written notice was not provided within the time required by the contract.

5. Inspection and Repairs are not performed timely – If the contract allows the buyer to inspect the property within a required time period, *make sure it happens* if you are representing the buyer. If notice of repairs to the seller have to be submitted in writing

within a specified number of days, protect the interest of your buyer and *make sure a written notice of repairs is submitted*.

Get written verification from seller or seller's agent that they received the list of required repairs and what the seller agrees to complete. If the buyer needs more time to inspect, *ask for a written extension*. If repairs are to be completed before closing, make sure buyer inspects and is satisfied and signs off in writing.

6. Lead Base Paint disclosure not provided – If the property is a targeted property, *make sure EPA requirements are complied with and proper disclosures made*. Get signatures verifying receipt.

7. Closing date passes with no written extension – If the contract requires closing to be

on a specific date, *make sure it happens on that date*. If date needs to be extended, *get it in writing* signed by parties to contract.

8. Real Estate Contract not signed by parties – Make sure you get the signatures of all parties to the contract. If any changes are made to the contract after the seller or buyer has signed, *make sure you have changes initialed and dated*. If someone else is signing the real estate contract for the seller or buyer, do not assume that party has the authority to sign unless there is *written authority*.

9. Copies of signed Contracts are not provided to clients – Make sure your client gets a *signed copy of the final contract* agreed to by the parties.



Remember, *what you don't do* could cause you problems. Protect the interest of your client by making sure all parties to the contract comply with conditions of the real estate contract.

"Just Say No"

Timothy W. Grooms

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I have been a licensed real estate broker for 25 years and a practicing attorney for 18 of those years representing clients involved in real estate transactions or the business of real estate brokerage. I proudly tell attorneys throughout Arkansas and the rest of our great nation that Arkansas licensees have high levels of education and professionalism unequalled in any profession in any state. Without question, in my opinion, the hardest part of being a real estate professional is the requirement of earning and maintaining the confidence of new clients and customers each and every day. Each new day evokes memories of Bill Murray in "Groundhog Day" (I'll save the "I've Got You Babe" analogies for later). Many real estate professionals believe they cannot obtain and maintain the confidence and respect of a client or customer if they are unable to answer all questions presented or have a solution to each crisis which occurs in a real estate transaction. However, when situations arise requiring analysis of contractual rights and responsibilities, Arkansas law prohibits licensees from providing legal advice (or passing along legal advice).

I have the privilege of contributing to the "frequently asked questions" website maintained by the Arkansas REALTORS® Association

("ARA") and to otherwise discuss with Arkansas licensees disputes which arise in real estate transactions. Buyers and sellers become irrational when involved in the purchase or sale of real estate — human emotions, with the possible exception of contentious divorce and child custody cases, when real estate is involved, are higher than any other situation.

It is important for Arkansas licensees to remember the most important provision of the various forms published by the ARA and made available to all Arkansas licensees. Paraphrasing, each and every one of the ARA forms have, for years, contained a bold faced type, highlighted warning to real estate buyers, sellers, landlords and tenants stating licensees may not give legal advice concerning the forms or other matters arising in the course of a real estate transaction. Yet, for example, when a seller believes a buyer has defaulted under a real estate contract, the licensee is frequently asked: (1) about disposition of the earnest money, (2) to confirm the existence of a buyer default, (3) to provide advice concerning whether the property should be placed back on the market without reference to the pending and allegedly defaulted contract, and (4) if another offer is received, to provide advice concerning whether such offer should

be unconditionally accepted without regard to the prior and allegedly defaulted contract. Can a licensee provide advice concerning any of the enumerated items from the example without providing legal advice?

I have often relayed a story involving a real estate contract entered into containing typical loan application and closing periods to be met by the buyer — yet 115 days passed following execution of the real estate contract and the buyer: (1) failed to deliver the earnest money check, (2) never made loan application, (3) never inspected or had the property inspected, and (4) could not be found on the closing date — or for 45 days after the closing date. The selling agent called the buyer, sent letters to the buyer and actually knocked on the buyer's apartment door — yet did not get a response. Thus, the seller — with advice from the listing agent — decided to put the property back on the market, received and accepted an offer. Two days prior to closing on the new real estate contract, the old buyer returned to town and called the selling agent firm to find out "...what do I need to do to get my house closed?" When told she had defaulted on the real estate contract and the property was about to be sold to someone else, the buyer contacted an attorney who:

continued on page 6

FORMAL Hearing DECISIONS

The following information is extracted from Findings of Fact, Conclusions of Law and Order which were issued for Hearings conducted by the Commission from April through July 2002. Formal Hearing Decisions that have been appealed are not listed.

Eddie Long, Principal Broker, and Norma Long, Salesperson, Cabot: In Formal Hearing #2044 by Consent Order the Commissioners ordered that "...Respondent Eddie Long's Broker's license is suspended for 24 months effective immediately and that prior to his activation of his Broker's license, he must successfully complete a 30-hour Broker Course to be approved in advance by the Commission's Executive Director. He will not be eligible for any scholarship funds. Respondent Norma Long's Salesperson's license is hereby revoked effective immediately."

The Commission found Mr. Long guilty of violating Commission Regulations 7.5(c), 9.2(a) and 10.4(b).

Mr. Long, as Principal Broker, did not strictly supervise the real estate activities of Norma Long. This failure to strictly supervise permitted Ms. Long to charge the Complainant for repairs to her property that were not made, to collect a \$450.00 security deposit from a tenant when the lease agreement required only a \$250.00 deposit, and to have a verbal agree-

ment with the Complainant for the deposit of the rental proceeds in a financial institution.

Mr. Long, as Principal Broker, closed HomePoint Realty, Inc. on or about December 1, 2001. Mr. Long did not notify the Real Estate Commission of the closing of the firm and did not return the real estate license and pocket card of those persons licensed with HomePoint Realty.

He did not file a written answer to this Complaint with the Real Estate Commission.

The Commission found Norma Long guilty of violating Arkansas Code Annotated §17-42-311(a)(3) & (7) and Commission Regulations 9.2(b) and 10.10(a).

Ms. Long committed acts involving fraud, dishonesty, untruthfulness, and untrustworthiness by notifying the Complainant that heat and air repairs were done to the Complainant's property in January and April 2001 when no such repairs had been performed, and deducting the amount of the purported repairs from the rental proceeds that the Respondents paid to the Complainant.

Ms. Long pled no contest to the charge of Theft of Property, a crime involving moral turpitude, fraud, dishonesty, untruthfulness, or untrustworthiness.

She had a verbal agreement with the Complainant to deposit the Complainant's rental proceeds into the Complainant's account with Arkansas Federal Credit Union. Ms. Long collected a security deposit from a tenant in the amount of \$450.00 when both rental agreements with the tenant stated that the security deposit was \$250.00.

Ms. Long did not file a written answer to the Complaint with the Real Estate Commission.

A Recovery Fund Hearing was held. The Commission found that the Complainant failed to prove actual compensatory damages. Therefore the Complainant's request for damages was denied.

Betty J. Cole, Principal Broker, Bentonville: In Formal Hearing #2045 the Commissioners ordered that "...Respondent Betty J. Cole 1) Be issued a Letter of Reprimand that will be placed in her file with the Arkansas Real Estate Commission; 2) Respondent Cole is directed to take the 30-hour Broker's Course, in addition to a Property Management Course to be approved by the Commission's Executive Director. Both are to be completed within 120 days of the date of this hearing (May 13, 2002); 3) Betty Cole Real Estate and Property Management, Inc. will undergo another office examination by the Commission staff within six months of the date of this hearing; 4) Respondent Cole is to comply fully with the Commission's request for documents, within ten (10) days of the date of this hearing; and 5) Respondent Cole is to pay a fine of \$3,000.00 payable within thirty (30) days of the date of the final Order."

The Commission found Ms. Cole guilty of violating Arkansas Code Annotated §17-42-108, §17-42-311(a)(13) and Commission Regulations 8.5(a) & (c), 10.8(d)(1) & (2), 10.8(g)(2) & (3), and 10.10(a).

The exact agreements regarding financial obligations and other agree-

Formal Hearing Decisions - continued



ments between Ms. Cole and the Complainant were not reduced to writing. Ms. Cole did not reduce to writing the parties' agreement that the Respondent would cause certain cleaning and maintenance services to be performed on the Complainant's property and bill the Complainant for said services. She did not reduce to writing her authority to act as a property manager for the Complainant.

Ms. Cole did not notify the Complainant of the amount of her fee for obtaining a tenant for the Complainant's property prior to performing that service and then deducted that fee from the rental proceeds without authority from the Complainant.

She failed to provide written agency disclosure to tenants.

While acting as agent in the management of the Complainant's property, she received profit, payment and/or compensation by deducting \$550.00 from rental income due the Complainant to pay for paint and labor services performed by Service Request, a business in which Ms. Cole owned an interest.

Ms. Cole did not reconcile her firm's trust account bank statements in writing at least monthly and did not balance said account to the total amount of trust funds deposited in the account which had not been disbursed.

She maintained broker's funds in the trust account, which were not

equivalent to six months service charges or a fixed minimum balance required by the bank in order to keep the account open.

The October 2001 bank statement did not balance to the total amount of trust funds deposited in the account which had not been disbursed.

Ms. Cole did not protect the interests of her client in a transaction. The tenant's security deposit of \$1,000.00 was not collected according to the written lease terms.

She did not provide the Commission Investigator the requested November 2001 trust account bank statement, reconciliation, and list of trust funds held for others.

A Recovery Fund Hearing was held. Pursuant to Arkansas Code Annotated §17-42-401 et seq., the Commission ordered Ms. Cole to pay the Complainant damages in the amount of \$650.00.

Leatho Don Linn, Principal Broker, and Keith A. Linn, Salesperson, Morrilton: In Formal Hearing #2040 by Consent Order the Commissioners ordered that "...Respondent Leatho Don Linn shall successfully complete a thirty (30) hour real estate Broker Course, approved in advance by the Commission's Executive Director, within six (6) months of the date of this order." The Commissioners ordered that "...Respondent Keith Linn shall successfully complete an eighteen (18) hour real estate Sales-

person Course, approved in advance by the Commission's Executive Director, within six (6) months of the date of this order. The above course required for each Respondent shall be in addition to the annual continuing education hours required to renew a license pursuant to Arkansas Code Annotated §17-42-501 et seq. and applicable Commission Regulations, and neither Respondent shall be eligible for any scholarship from the Commission for said course. It is further ordered that should either Respondent not successfully complete the respective professional education course as set forth above, said failure shall constitute a violation of Arkansas Code Annotated §17-42-311(a)(2) (Repl. 1995) for which the Commission, in its sole discretion and after notice and opportunity for a hearing, can take further action against Respondents' licenses pursuant to Arkansas Code Annotated §17-42-312(a)(4) (Repl. 1995)."

James Blackmon, Principal Broker, Winthrop: In Formal Hearing #2049 the Commissioners ordered that "...a \$2,000.00 civil penalty is assessed against Respondent Jim Blackmon, payable to the Commission by Mr. Blackmon within thirty (30) days after he receives service of this Order. A Letter of Reprimand is to be placed in Mr. Blackmon's license file."

continued on page 7

(1) sued the seller for specific performance; (2) sued the 2nd buyer to have their interest in the property declared inferior; and (3) sued the selling agent firm for "failing to protect the interest of the buyer by preventing the seller from entering into subsequent contracts." When the trial court heard of the first buyer's tragic and difficult out of state battle with leukemia, her failure to perform under the real estate contract was declared "excusable" and thus not a default (I assume the Court found the buyer's "excused" absence — and the cost and harm suffered by the seller — was similar to a 6th grader's tummy ache). The first buyer was allowed to purchase the property almost one full year after she was supposed to close — and the second buyer sued the selling and listing agent firms for failing to disclose existence of the prior contract — the outcome of the lawsuits against the licensees by both buyers are still pending. The moral of this story is simple — until a court declares a buyer or seller in default under a contract — whether a default exists and how the party not in alleged default should proceed is a minefield which licensees should not walk into — Arkansas law and the ARA forms state legal advice may not be provided — which should be heeded not only by parties to the form, but also by the licensees.

Recently, an Arkansas buyer attempted assignment of a primary contract to a "2nd back up" buyer. The listing agent firm (in writing) advised the seller contract assignment and the effect it might have on the first backup buyer were beyond the scope of their agency responsibilities and, in fact, legal advice should be immediately

sought. The Seller disregarded the listing agent's warning and proceeded to approve the assignment and move toward closing on the primary contract, as assigned to backup buyer #2. Backup buyer #1 filed suit and, though every lawyer in Arkansas with knowledge of contract and property law would disagree with the result, the trial judge erroneously ruled the assignment of the primary contract void and awarded the right to purchase the property to backup buyer #1. But for the listing agent's refusal to provide advice and the written warning the seller should seek legal advice, the seller could have sued the listing agent for providing wrong advice.

This article started with acknowledgment of the difficulty in obtaining and maintaining client confidence. A living room conversation with, for example, a furious seller concerning how to proceed with an allegedly defaulting buyer, is one of the most unpleasant situations faced by a licensee — telling the furious seller you cannot provide legal advice about the situation and that, instead, legal counsel should be obtained, is extremely difficult. Most licensees have faced this question: "Then what am I paying you for?" The honest answer from the licensee is that payment is expected due to marketing efforts — not for legal advice.

I think it very important for all Arkansas licensees to recall the 1981 decision of the Arkansas Supreme Court in *Pope County Bar Ass'n v. Suggs*.¹ The AREC website provides a link to a previous article outlining the specifics of this case; however, even if redundant, it is important to recall the decision authorized Arkansas licensees to practice law on a limited basis. The Court wrote:

In a "simple real estate transaction," being those which involve a direct, present conveyance of a fee simple absolute between parties... brokers may fill in the blanks of certain standardized, printed forms, under the following six restrictions:

(1) That the person for whom the broker is acting has declined to employ a lawyer to prepare the necessary instruments and has authorized the broker to do so; and

(2) That the forms are approved by a lawyer either before or after the blanks are filled in but prior to delivery to the person for whom the broker is acting; and

(3) That the forms shall not be used for other than simple real estate transactions which arise in the usual course of the broker's business; and

(4) That the forms shall be used only in connection with real estate transactions actually handled by such brokers as a broker; and

(5) That the broker shall make no charge for filling in the blanks; and

(6) That the broker shall not give advice or opinions as to the legal rights of the parties, as to the legal effects of instruments to accomplish specific purposes or as to the validity of title to real estate.

One member of the Court, after acknowledging Arkansas citizens relied upon Arkansas licensees to prepare documents for real estate transactions, summarized his feelings on the grant, to persons other than lawyers, of the limited and authorized right to practice law, as follows:

"Even so, realtors should be aware that their negligence in preparing such legal documents may well be examined

by applying a standard of care expected of attorneys. They [licensees] sought and gained the right "to practice law." With that convenience goes a heavy responsibility to the public."

As with contract preparation, should an Arkansas licensee provide legal advice, the outcome of that advice will be judged using the same standard applicable to attorneys. Arkansas licensees do an excellent job

of marketing and locating property for customers and clients. Licensees must do an equal job of avoiding the unauthorized practice of law.

Bill Murray "died" several times in Groundhog Day, only to wake up without a scratch or other ill effect at 6:00 a.m. the "next day." Arkansas licensees found to have engaged in the unauthorized practice of law will not be as lucky. Hopefully, this article will

assist Arkansas licensees avoid having a judge or jury return a verdict stating "I've Got You Babe."

¹Arkansas licensees may also wish to note reference to this decision in AREC Regulation 10.10(c), in addition to Ark. Code Ann. § 16-22-211 which, if not repealed by Amendment 28 to the Arkansas Constitution, provides the unauthorized practice of law is a misdemeanor punishable by fine up to \$5,000.

Formal Hearing Decisions

continued from page 5

The Commission found Mr. Blackmon guilty of violating Arkansas Code Annotated §17-42-311(a)(10) & (13) and Commission Regulation 8.5(a).



At an auction Mr. Blackmon announced that the buyer of any real estate would pay the Buyer's Premium in addition to the bid price, and that the real estate would be auctioned as individual tracts and then tied together to be auctioned as a block to be sold to the highest bidder between the individual bids and the tract bid. He had no written agreement with the Complainant to charge the buyer any amount in addition to

the bid price or to auction the real estate both in individual tracts and as a block.

Mr. Blackmon advertised the auction of the Complainant's real estate in a false, misleading and deceptive manner. His advertisements failed to disclose that a ten percent Buyer's Premium would be charged on the real estate sold at auction in addition to the bid amount, that the auction would be a reserve auction, or that the real estate would be auctioned in individual tracts and then as blocks to be auctioned for a higher price.

Mr. Blackmon's act of charging the Complainant a one percent fee on minimum prices, the amounts of which Complainant had not identified, constitutes improper dealings.

His failure to take any action to market the Complainant's property during his ninety-day exclusive listing after the date of the auction constitutes a failure to promote and protect his client's interests.

A Recovery Fund Hearing was held. Pursuant to Arkansas Code Annotated §17-42-401 et seq., the Commission ordered Mr. Blackmon to pay the Complainant damages in the amount of \$2,292.00.

ARKANSAS REAL ESTATE COMMISSION
612 SOUTH SUMMIT STREET
LITTLE ROCK, AR 72201-4740

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Education *scholarships* coming in January!

Effective January 1, 2003, AREC will offer scholarships in the amount up to \$50 to any active Arkansas Licensee who completes one or more of the five modules of the AREC Post-licensure course offered by a qualified provider. The five modules eligible for scholarship are (1) Practical Application of Agency and Disclosure, (2) Real Estate Contracts, (3) From Contract to Closing, (4) Agent and Broker Responsibility and (5) Real Estate Policies and Procedures. Each licensee is limited to one scholarship payment. Any one of the modules will fulfill the licensee's annual continuing education requirement. There are a limited number of scholarships and will be granted on a first-come, first-served basis; however, no scholarships can be awarded after June 15, 2003. *To obtain more information and sign up for a class, contact any of the following qualified providers.*

Arkansas Institute of Real Estate
Tina B. Daniel
915 East Race, P.O. Box 1681
Searcy, AR 72145
1-800-264-0606 / 501-268-0600

Broadway School of Real Estate
(Hot Springs)
Kent Keahey
1009 West Grand Avenue
Hot Springs, AR 71913
501-623-3029

Camp Real Estate School
L. Wayne Camp
700 South Main
Mountain Home, AR 72653
1-800-737-7000 / 870-424-7000

Faucette School of Real Estate
Paul R. Bynum
3589 N. College Avenue
Fayetteville, AR 72703
501-444-6480 / Fax 501-444-7546

Kelton Schools
Ron L. Kelton
1805 Executive Square, P.O.B. 638
Jonesboro, AR 72403
870-932-7202

National Real Estate School
Keith Montgomery
5323 John F. Kennedy Blvd.
N. Little Rock, AR 72116
1-800-467-1600 / 501-753-1633

Real Estate Education Center
John Sullivan
3418 West Sunset, Suite E
Springdale, AR 72762
501-750-2772

Real Estate Trainers
Carol Waters
615 N. Walton Blvd.
Bentonville, AR 72712
479-855-4200 / Fax 479-273-7726

**River Valley Real Estate
Licensing School**
Vernon Damron
800 East Main
Russellville, AR 72801
1-800-609-4745 / 501-968-1699

INSIDE THIS ISSUE

<i>Executive Director's Comments</i>	1
<i>Tim Grooms Article</i>	3-7
<i>Formal Hearing Decisions</i>	4-7
<i>Scholarships in January</i>	8