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Action on ADRE Rule Package delayed

The Governor's Regulatory Review Council (GRRC) hearing for the Department's 2000 Rules Package scheduled for February 1 has been moved to May 2.

Changes proposed by the Department after the package was filed with GRRC are considered to be material changes, and necessitate republication of the package thus delaying the hearing.

The change affects Rule R4-28-701, "Compensation Sharing; Disclosure." The Department will also change R4-28-103 to clarify that a request for an extension under time frames must be approved by the Department.

The changes will be published in the Arizona Administrative Register, in the Arizona Real Estate Bulletin and on the Department's Web site at www.re.state.az.us.

The May 2 GRRC hearing will be held beginning at 9 a.m. at the Industrial Commission Auditorium, 800 West Washington Street, in Phoenix. The meeting is open to the public.

Vernon Penner named to head Administrative Actions Division

Cindy Wilkinson to take over school liason position replacing Helen Alt

Vernon Penner

Cindy Wilkinson

Vernon Penner is the new the Director of ADRE's Administrative Actions Division. He replaces Cindy Wilkinson who has moved to the Education and Licensing Division to oversee relations with Arizona's more than 100 approved real estate schools.

Mr. Penner, who was born in the U.S., received his law degree from the Faculty of Law at the National Autonomous University of Mexico in Mexico City. As a practicing attorney in Mexico he has vast experience in that country's real estate matters.

He held an Arizona real estate license from 1986 until 1993. Recently, he has worked with the Financial Remedies Unit of the Arizona Attorney General's Office assisting with investigations into unlawful fiancial gain.

Ms. Wilkinson joined the Department in 1979 and has served as an Investigator, Compliance Officer, and was the Director of the Customer Service Division. She was named Director of the the Administrative Actions Division in 1996.

Access to the Web satisfies requirement to have *Arizona Real Estate Law Book* available to licensees

A new Substantive Policy Statement, No. 23, has been written to clarify that access to the Arizona Real Estate Lawbook on the Internet satisfies the requirements of A.R.S. § 32-2123(E) .

The statute states, in part: "Each person licensed pursuant to this article, whether the license is active or inactive, shall have available for the licensee's use a current copy of the department's statutes, rules and annotations pertaining to real estate laws.

"The Commissioner considers unrestricted access to the World Wide Web, and thus to the on-line edition of the Arizona Real Estate Law Book on the Department's Web site at www.re.state.az.us to satisfy the requirements of this statute.

"Unrestricted access" is defined as access to the Department Web site at any time without the permission or assistance of others."

Commissioner asks Supreme Court to overturn Lombardo v. Albu

by Thomas Stoops
Reprinted from the February 2000 issue of the Arizona Journal of Real Estate & Business, *with permission.*

On December 3, 1999, Arizona Department of Real Estate Commissioner Jerry A. Holt, acting through Attorney General Janet Napolitano and Assistant Attorneys General Robert A. Zumoff and Michael T. Denious, filed an Amicus Curiae (friend of the court) Brief urging the Arizona Supreme Court to accept review and overturn the Arizona Court of Appeals' decision in *Lombardo v. Albu*.

The Lombardo decision has generated a great deal of controversy since it was published in July 1999. The Arizona Association of Realtors has publicly supported the decision and sought leave to file its own Amicus Curiae Brief at the Court of Appeals Level, urging the court to uphold the Lombardo decision. Commissioner Holt, through the Attorney General's Office, vigorously opposes the decision.

In the Lombardo case, the plaintiffs claimed that the buyers' real estate agent breached the Commissioner's Rule imposing a duty of fairness by failing to inform the plaintiffs of his clients' financial difficulties which prevented the buyer from obtaining financing. The Court of Appeals, Division one, held that the Commissioner's Rules do not create a duty to disclose material information that is enforceable in a private lawsuit.

The regulation at issue imposes a duty upon all real estate agents to "deal fairly" with all parties to a real estate transaction, and Commissioner's Rule R4-28-1101(B) specifically requires a real estate agent participating in a real estate transaction to disclose to all parties information in his possession that materially and adversely affects the transaction, including information that the buyer may be insolvent. The Commissioner has argued that the Arizona Supreme Court should grant review and reverse the appellate court's decision.

The Commissioner's Brief raises three primary arguments in opposition to Lombardo:

1. That the Court of Appeals erred in its decision when it stated that the Legislature did not intend for a breach of the Commissioner's Rules to give rise to a private cause of action;
2. That the Court of Appeals' decision directly conflicts with a line of previous Arizona cases which have applied the Commissioner's Rule in private lawsuits; and
3. That the Court of Appeals' decision incorrectly states that an agent may violate his fiduciary duties to his own client if he complies with the disclosure requirements under the Commissioner's Rules.

In arguing that the Lombardo case is inconsistent with the real estate statutes, the Commissioner's Brief cites several examples to demonstrate that the State Legislature intended that a violation of the Commissioner's Rule be subject to a remedy in a civil action in Superior Court. The first example noted is that the Real Estate Commissioner has specific statutory authority to apply to the Superior Court to enjoin conduct by the real estate agent that violates the Commissioner's Rules. The Commissioner cites A.R.S. §§ 32-2154 and 32-2183(I).

The Brief also points out that the Commissioner may order a violator to make restitution or take other affirmative actions to remedy such a violation.

Continued on page 8

Number of complaints against licensees increased 20% in 1999

The Department's Investigations Division processed nearly 21 percent more complaints against real estate licensees in 1999 than in 1998. Of the 1,933 complaints received, 421 were referred to investigators. Of these, 118 resulted in sanctions against licensees ranging from an administrative warning letter to revocation or denial of a license.

The remaining 1,512 complaints were resolved by our Customer Services Division (CSD) without the need for disciplinary action.

	1999	1998
Complaints		
Complaints Processed	1,972	1,599
Assigned to Investigator	429	368
Assigned to CSD	1,512	1,227
Cases Closed by Investigations	440	388
Investigation Categories		
License Issues 234 Cases		
Possible false applications	118	105
License certification investigations	69	24
Failure to Disclose	15	5
Unlicensed Activity	12	34
Felony Convictions	8	9
Misdemeanor Convictions	7	14
Failure to disclose judgment	1	7
License irregularities	4	2
Subdivision Issues : 55 Cases		
Illegal Subdivision	44	43
Illegal Land Split	2	1
Time-share Violations	2	2
Illegal Cemetery	1	0
Unlawful Lot Split	5	11
Unlawful Offering	1	3
General Statute Violations 151 Cases		
Abandonment of Office	0	2
Membership Camping Violation	0	2
Forgery	5	4
Material Change	1	1
Trust Account Violation	6	4
Unethical Practices	4	4
Incompetent/Unworthy	7	5
Breach of Fiduciary Duty	24	11
Dishonest Dealings	7	10
Failure to Account/Remit	6	2
Failure to Disclose Material Facts	13	8
Failure to Supervise Employees	2	2
False Promises	1	3
Felony Allegations	2	2
Improper Advertising	7*	2*
Misdemeanor Conviction	7	14
Paid Commission to Unlicensed Person	1	3
Property Management Irregularities	15	18
Representing Other Than Broker	0	2
Substantial Misrepresentation	31	32
Violation of Rules	12	10
Administrative Actions 118 Cases		
Administrative Warnings	7	41
Cease and Desist Orders	2	1
Civil Penalties Assessed	2	0
Consent Agreement	66	24
License Denied	26	13
License Revoked	14	17
Summary Suspension	1	1

*Most advertising issues are handled as education issues by CSD. These cases represent issues where respondents did not comply with CSD requirements or were repeat violators.

Jerry Holt

News From The Commissioner

It's Legislation time again

Senate Bill 1430, our Real Estate Omnibus Bill, has been introduced in the Senate by Sen. Tom Freestone. The text of the bill was published in the last issue of the Bulletin. The introduced version is virtually the same except for some minor language changes.

At the same time, the Real Estate Educators Association (REEA) has had two bills introduced that will directly affect real estate licensees.

House Bill 2116, introduced by Rep. John Verkamp, would amend A.R.S. § 32-2124 to increase the required hours for the Arizona-specific portion of the 90-hour prelicensure course from 27 to 45 hours.

The bill would also permit the Commissioner to waive all or a portion of the prelicensure requirement for an applicant who holds a current real estate license in another state except for the 45-hour Arizona-specific course.

Statistically, out-of-state applicants who have a portion of the 90 hours waived perform more poorly on the state real estate examination than those who complete the entire 90-hour curriculum. The pass rate for salespersons who take the 90-hour course is 88.5 percent compared to 68.9 percent for those for whom the national portion of the course is waived. The pass rate for brokers who took the 90-hour course is 89.3 percent compared to 82.7 percent for those who took only the 27-hour Arizona-specific course. These pass rates represent the average over a 13-month period from September 1998 through September 1999.

House Bill 2116, also introduced by Rep. Verkamp, would replace the Department's mandatory Broker Audit Clinic with a Broker Management Clinic to be given by approved real estate schools.

The clinic would address the same subjects as the present Broker Audit Clinic, but would add the subjects of advertising and promotions, and material disclosures.

A person issued an original real estate broker's license would be required to attend the Broker Management Clinic within 90 days after issuance of the license and once during every two-year licensing period after initial attendance. Presently, brokers are required to attend a Broker Audit Clinic once during every four year period after initial attendance.

The Department would approve instructors who could teach Broker Management Clinics and determine the content of the course. Those attending a clinic would receive three hours of continuing education credit.

REEA's rationale for this legislation is threefold:

- Department auditors presently teach The Broker Audit Clinic, taking them away from their primary responsibility of conducting broker audits;
- Broker auditors are not professional educators and are not ideally suited for teaching;
- There are so many ongoing changes in real estate law and practice that a Broker Audit Clinic is not an effective teaching tool if required only once every four years.

We have carefully considered both bills and add our support to their passage.

New Director, Administrative Actions Division

I am pleased to welcome Vernon Penner to the Department as our new Director of the Administrative Actions Division (see story on page 1). I've known Vern for several years and have a great deal of respect for his knowledge of real estate law. I am also pleased that Cindy Wilkinson, who has been Director of that Division for more than three years, has agreed to take over the responsibilities for liaison with Arizona's more than 100 real estate schools. It's quite a job, and I'm sure Cindy will work well with the people who educate Arizona's real estate brokers and salespersons.

Cindy, who will report to Education and Licensing Division Director John Bechtold, will also recommend policy changes and act as an advisor within the Education and Licensing Division.

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THE STATE OF ARIZONA
DEPARTMENT OF REAL ESTATE
2910 N. 44th Street, Suite 100
Phoenix, Arizona 85018
(602) 468-1414
Fax (602) 468-0562

400 W. Congress, Suite 523
Tucson, Arizona 85701
(520) 628-6940
Fax (520) 628-6941

Jane Dee Hull
Governor

Jerry Holt
Commissioner

Charles M. Downs
Editor
cdowns@re.state.az.us

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1999 - 2000 Schedule of Broker Audit Clinics

A.R.S. § 32-2136 requires all newly licensed real estate brokers to attend a Broker Audit Clinic presented by the Department within 90 days of issuance of their original broker's license. *Effective July 21, 1997, all designated real estate brokers must also attend a Broker Audit Clinic within 90 days after becoming a designated broker unless the broker has attended an audit clinic during the broker's current licensing period.* All designated brokers shall attend a broker audit clinic once during every four-year period after their initial attendance.

Seating is limited and reservations are required. To make a reservation for a Phoenix clinic, call the Department's Customer Services Division at (602) 468-1414, extension 100. In Tucson, call (520) 628-6940. Those who fail to make reservations will be turned away if seating is not available. Brokers who attend will receive three hours of continuing education credit in the category of Commissioner's Standards.

The following is the schedule of Clinics to be offered in Phoenix and Tucson during the remainder of 2000. Additional clinics may be scheduled from time to time at other locations in Phoenix and in rural areas. **Call the Department at (602) 468-1414 X100 for information about this Clinic: March 29 in Sedona.**

PHOENIX	**TUCSON**
Industrial Commission Auditorium	State Office Building
800 W. Washington	400 W. Congress
	Room 222
1 p.m. to 4 p.m.	**1 p.m. to 4 p.m.**
February 17	February 16
March 16	March 15
April 20	April 19
May 18	May 17
June 15	June 14
July 20	July 19
August 17	August 16
September 21	September 20
October 19	October 18
November 16	November 15
December 14	December 13

The mission of the Arizona Department of Real Estate is to safeguard and promote the public interest through timely and capable assistance, fair and balanced regulation, and sound and effective education.

ADMINISTRATIVE ACTIONS

REVOCATIONS

99A-092
Frederick J. Harper
Scottsdale
DATE OF ORDER: October 22, 1999
FINDINGS OF FACT: In his January 7, 1999 application for a real estate salesperson's license, Respondent failed to disclose that he had been convicted of three felonies in Florida in 1988 and 1944 including aggravated battery, battery on a law-enforcement officer and issuing forged checks. In 1994, Respondent violated the terms of a Florida probation order relating to his forged check convictions. The Department also determined there were seven outstanding Florida warrants for Respondent's arrest.

An administrative hearing was held in this matter in October 1999. Respondent failed to appear.
VIOLATIONS: Respondent violated A.R.S. §§ 32-2153(B)(1) (procuring a license by fraud, misrepresentation or deceit, or filing an application which is false or misleading); 32-2153(B)(2) (conviction of a felony); 32-2153(B)(3) (substantial misrepresentation); 32-2153(B)(7) (failure to demonstrate honesty, truthfulness and good character); 32-2153(B)(9) (violation of criminal order, decree or sentence); and 32-2153(B)(10) (violation of laws involving forgery and violence against another person).
DISPOSITION: Respondent's real estate salesperson's license is revoked.

LICENSE APPLICATIONS GRANTED

99A-044
Thomas A. Gish
Phoenix
DATE OF ORDER: October 18, 1999
FINDINGS OF FACT: Respondent was issued an Arizona real estate salesperson's license in September 1996. Before that time he practiced law in the state of Washington for 28 years. He was a member of the Washington and Oregon State Bars and had no disciplinary actions recorded against him.

In April 1995, when he was in his mid-50s, Respondent had gotten himself into a tremendous amount of financial debt. He knowingly under-reported his income in his 1994 federal income tax return. In April 1996 authorities became aware of Respondent's false tax return and his life changed drastically. He quit practicing law and moved to Arizona where he worked as a real estate salesperson for nine months, successfully handling three transactions.

In May 1996, Respondent entered a plea agreement with the U.S. Attorney for Washington in which he agreed to plead guilty to attempted evasion of income taxes and was sentenced to three years' probation, to be completed in August 2000.

In December 1997, he surrendered his inactive Oregon license to practice law, informing the Oregon Supreme Court that he had a federal criminal conviction. The resignation was accepted in January 1998.

In September 1997, the Washington Supreme Court suspended Respondent's license to practice law pending the outcome of disciplinary proceedings based on the federal conviction. Respondent was disbarred on May 14, 1998.

In March 1999, Respondent applied for renewal of his Arizona real estate salesperson's license, disclosing the federal conviction and his disbarments. Based on that information, and the fact that Licensee was still on probation, the Department notified him it was denying renewal of his license. Licensee timely requested a hearing.

In May, 1999, Respondent was given an early release from probation. He had successfully completed 60 days of home confinement and a period of mental health counseling. He had met all probation conditions except resolving his IRS financial obligations. He was given early probation termination to help him earn an income to start repaying the IRS. It was revealed at the hearing that although Respondent has paid some of the balance, he still owes approximately $140,000 in taxes, penalties and interest.

At the hearing, Respondent's psychiatrist testified that Respondent was suffering from bipolar disorder at the time he committed the crime, and that now he is on medication and has been stabilized.

The Administrative Law Judge found that Respondent ran a successful legal practice for almost 30 years before the offense occurred. Respondent fully cooperated with authorities and surrendered his law licenses. He worked to achieve early termination of his probation and did not try to hide the adverse actions from the Department. "Given Licensee's long track record without incident and that his false income tax return is an isolated incident for which Licensee has taken responsibility and is trying to make amends, this tribunal concludes that the mitigating evidence weighs in Licensee's favor," the Judge wrote.
DISPOSITION: Respondent's renewal application is approved.

99A-104
Anthony J. Contreras
Tucson
DATE OF ORDER: November 15, 1999
FINDINGS OF FACT: In his July 8, 1999 application for a real estate salesperson's license, Respondent disclosed that in 1991 he had been arrested and sentenced to six months' work furlough and seven years' probation for transporting marijuana from Phoenix to Boston on a commercial airline flight, a Class 2 felony. The conviction occurred in 1992.

At the Administrative Hearing, Respondent argued that his actions in 1991 were a big mistake, and that he had been punished and had paid for his crime.

In his Conclusions of Law, the Administrative Law Judge wrote, "Respondent's conduct in the 1991 incident was a serious offense, but it is now tempered by time, occurring eight years ago and being fully served or repaid to society since 1997," and recommended that the license be issued.
DISPOSITION: Respondent's license application is approved.

CONSENT ORDERS

99A-083
Michael M. Antonelli
Glendale
DATE OF ORDER: December 2, 1999
FINDINGS OF FACT: In September 1998, Respondent submitted an application for a real estate salesperson's license in which he disclosed 1994 and 1995 DUI convictions. He also disclosed a pending December 7, 1997 DUI charge.

The Department issued the license. In March 1999, Respondent advised the Department he had been found guilty of the 1997 DUI charge. In April 1999, Respondent was convicted of Aggravated DUI, a class 4 felony.
VIOLATIONS: Respondent has been convicted of a felony in violation of A.R.S. § 32-2153(B)(2).
DISPOSITION: Respondent's real estate salesperson's license is revoked.

99A-140
Gary L. Haymore, dba as Prudential/Haymore Realty, and in the matter of the real estate salesperson's license of Peter Markey
Sierra Vista
DATE OF ORDER: November 23, 1999
FINDINGS OF FACT: Markey was issued a real estate salesperson's license in January 1993. At all times material to this matter, Markey was employed as a salesperson by Prudential Haymore Realty.

Haymore was issued a real estate broker's license in March 1982. He is, and was at all times material to this matter, a self-employed broker doing business as Prudential Haymore Realty.

On May 13, 1997, Haymore contracted with a property owner to manage a 20-unit apartment complex in Sierra Vista, the "Mariane Apartments." Haymore delegated to Markey responsibility for the management of, and the property management account for, the apartments. The account, set up at Norwest Bank under the name Prudential Haymore Realty, was not properly established and designated as a trust account.

A few months after Prudential Haymore Realty began managing the apartments, Haymore questioned Markey concerning a check Markey had issued from the account to Cellular One. According to Haymore, Markey advised him that the property owner had approved the expense.

A management agreement authorizing Prudential Haymore Realty to manage the apartments, which reflected Haymore's ini-

Continued on page 6

Continued from page 5
tials/signature, indicating that Haymore had reviewed the contract, expired December 31, 1997. A subsequent management agreement, showing an inception date of January 28, 1998 and an expiration date of December 31, 1998, was signed by the property owner and Markey, but was not initialed and dated by Haymore.

In February or March 1998, after experiencing numerous problems with management of the apartments, Haymore terminated management of the apartments and instructed Markey to close the Mariane Apartments account. When Norwest Bank was acquired by The Arizona Bank, Haymore became aware that the account had not been closed, closed the account and waited to see who would come to him about it.

Markey admitted to Haymore that he had continued to manage the apartments on his own from his home, and had intercepted bank statements pertaining to the account and correspondence regarding the apartments.

Neither Haymore nor Markey could produce copies of rental or lease agreements, a receipts and disbursements journal, a client ledger, or bank statements and records pertaining to the apartments and the account, either while Prudential Haymore Realty was managing the apartments, or after Haymore had instructed Markey to terminate management.

Neither Haymore nor Markey could produce records which would demonstrate that the account was reconciled and the client ledger balanced on a monthly basis.

Haymore believes the account was short approximately $40,000. Markey has borrowed money and has repaid Haymore $43,000 to replace money taken from the account.

According to Markey, he felt sorry for tenants when they could not pay their rent, so he did not always collect it. He took money from the account for his personal use but did not keep track of it and does not know how much was taken.

VIOLATIONS: Haymore allowed Markey to keep all the records pertaining to the apartments and did not ensure that proper records were being kept, in violation of A.R.S. § 32-2151(B)(2). Haymore did not ensure that the account was properly established, designated and titled as a trust account, in violation of A.R.S. § 32-2174(A). Pursuant to A.R.S. § 32-2175, Haymore, as designated broker, was responsible to keep residential rental agreements and related residential rental agreement documents for one year from the expiration of the rental agreement or until given to the owner upon termination of any property management agreement.

During the time Haymore believed Prudential Haymore Realty was managing the apartments, Haymore did not establish and implement safeguards to ensure that Markey was maintaining the required property management records for the requisite time periods; that he was properly documenting receipts to and expenditures from the account; that expenditures made were proper and authorized pursuant to the terms of the management agreement; that he was administering the property management account in accordance with generally accepted accounting standards; that Markey was reconciling the bank statements and client ledger monthly; and that the records were turned over to the property owner at the time he believed the property management contract was terminated. This conduct constitutes negligence in performing acts for which a license is required, within the meaning of A.R.S. § 32-2153(A)(22).

Markey failed to keep a record of funds deposited with him relating to a real estate transaction, within the meaning of A.R.S. § 32-2153(A)(15). He commingled money belonging to his client with his own, and has converted that money or property to himself, within the meaning of A.R.S. § 32-2153(A)(16). He violated A.R.S. § 32-2153(A)(18) by his failure to keep a complete record of each transaction which comes within the provisions of Arizona Revised Statutes, Title 32, Chapter 20. Markey pursued a course of misrepresentation and made substantial misrepresentations to his broker, in violation of A.R.S. §§ 32-2153(A)(1) and (B)(3). Markey has been guilty of conduct which constitutes fraud or dishonest dealings, within the meaning of A.R.S. § 32-2153(B)(5). His actions show he is not a person of honesty, truthfulness and good character, within the meaning of A.R.S. § 32-2153(B)(7).

Haymore's and Markey's actions constitute violations of the provisions of Arizona Revised Statutes, Title 32, Chapter 20, and the Commissioner's Rules, within the meaning of A.R.S. § 32-2153(A)(3).

DISPOSITION: Markey's real estate sales person's license is revoked. He is to pay a civil penalty in the amount of $2,000 and is assessed for investigative costs in the amount of $545.50.

Haymore to pay a civil penalty in the amount of $1,000. Haymore shall complete six hours of continuing education, approved by the Department, in addition to hours required for license renewal.

99A-141
Nelson B. Guyer
San Diego, Calif.
DATE OF ORDER: December 16. 1999
FINDINGS OF FACT: Petitioner submitted an application for a real estate salesperson's license in September 1999 in which he disclosed a 1981 felony conviction.

In May 1981, Petitioner pleaded guilty in U.S. District Court in Texas to making false statements and for use in determining the rights of Home Health Services of Dallas, Inc. (HHSD), and false statements on an application of HHSD, a corporation owned and controlled by Petitioner, for Medicare payment pursuant to Title 42 U.S.C. 1395n(a) and (d), in violation of federal law.

In July 1981, the Court entered a judgment convicting Petitioner pursuant to the plea agreement, and sentenced Petitioner to three years in prison. Petitioner was released from prison in July 1984.

In 1987 the State of California issued Petitioner a real estate salesperson's license No disciplinary action has been taken against that license and it is presently in good standing.

VIOLATIONS: Petitioner has been convicted of a felony within the meaning of A.R.S. § 32-2153(B)(2).

DISPOSITION: Petitioner's application for a real estate salesperson's license is approved. Petitioner shall post a surety bond in the amount of $20,000 in favor of the State of Arizona for a period of one year.

99A-153
Daniel J. Ledwidge
Phoenix
DATE OF ORDER: December 16, 1999
FINDINGS OF FACT; Respondent was issued an original real estate salesperson's license in December 1996.

In August 1999, Respondent disclosed to the Department hat he had been convicted of Aggressive Driving and B.A.C. Over 0.1 percent.

On April 8, 1999, he was convicted of Aggressive Driving and B.A.C. Over 0.1 percent, both class 1 misdemeanors.

Although Respondent apprised the Department several times of the pending charges, he did not disclose the convictions in writing within 10 days.

VIOLATIONS: Respondent failed to disclose his convictions to the Department in 10 days as required by A.A.C. R4-28-301(F), formerly (C), in violation of A.R.S. § 32-2153(A)(3). He has violated a state law relating to violence against another person, within the meaning of A.R.S. § 32-2153(B)(10).

DISPOSITION: Respondent's real estate salesperson's license is suspended for 10 days, effective 10 days after entry of this Order. Respondent to pay a civil penalty in the amount of $500.

99A-155
Albert O. Varela
Douglas
DATE OF ORDER: December 17, 1999
FINDINGS OF FACT: Respondent was issued an original real estate salesperson's license in 1994 and a real estate broker's license in 1998.

On August 6, 1999, Respondent disclosed to the Department that he had been convicted of false reporting. In April 1998, he reported to the Douglas Police Department that his 1990 Chevrolet pickup truck had been stolen, and filed a claim with his insurance company. Subsequently, and before the insurance company paid the claim, he admitted to police that the pickup truck had been seized and impounded by Mexican authorities at a border crossing when a box of ammunition was found in a toolbox in the truck.

On October 9, 1998, Respondent pleaded guilty in Douglas Justice Court to False Information, a class 1 misdemeanor. He was assessed $520 in fines and fees.

VIOLATIONS: Respondent failed to disclose his conviction to the Department within 10

days as required by A.A.C. R4-28-301(F), formerly (C), in violation of A.R.S. § 32-2153(A)(3). He has been found guilty of conduct which constitutes fraud or dishonest dealings, within the meaning of A.R.S. § 32-2153(B)(5).
DISPOSITION: Respondent's real estate broker's license is suspended for 14 days effective December 19, 1999. Respondent to pay a civil penalty in the amount of $300. Respondent to take six hours of approved continuing education, in addition to hours required for license renewal.

99A-090
Rexford R. Beatty
Scottsdale
DATE OF ORDER: December 20, 1999
FINDINGS OF FACT: In his June 1998 application for a real estate salesperson's license, Respondent failed to disclose that he had been convicted in Toledo, Ohio, on the charge of Window Peeper. He was placed on probation for one year.

In May 1963, Respondent was arrested and convicted in Largo, Fla., for Petty Larceny. He was sentenced to five days in jail.

In September 1964, he was arrested and convicted in Wyoming, Mich., for issuing a check with insufficient funds. He was fined $14.00.

In October 1986 he was arrested by the Phoenix Police Department and convicted for criminal trespass. He was sentenced to counseling.
VIOLATIONS: Respondent procured a license by fraud, misrepresentation or deceit by filing a license application that is false or misleading in violation of A.R.S. § 32-2153(B)(1).
DISPOSITION: Respondent's real estate license is suspended for two weeks beginning December 20, 1999. Respondent to pay a civil penalty in the amount of $500.

99A-156
Anna Sprague
Payson
DATE OF ORDER: December 22, 1999
FINDINGS OF FACT: Respondent was issued an original real estate salesperson's license in 1994. On August 2, 1999, she disclosed to the Department that she had been convicted of shoplifting in Payson Justice/Magistrate Court and fined $190.
VIOLATIONS: Respondent was convicted of a felony or any crime of forgery, theft, extortion, conspiracy to defraud, a crime of moral turpitude or any other like offense within the meaning of A.R.S. § 32-2153(B)(2).
DISPOSITION: Respondent's real estate salesperson's license suspended for 14 days to begin 10 days after entry of this Order.

99A-119
Veronica Daniella Hewitt
Tucson
DATE OF ORDER: January 6, 2000
FINDINGS OF FACT: Respondent was issued an original real estate salesperson's license in October 1997. At all times material to this matter, Respondent was employed by Veterans Properties, Inc., a licensed real estate broker. At all times material to this matter, William Kent was designated broker for Veterans Properties.

In June 1999, Walter and Melissa Kerby filed a complaint with the Department alleging that Hewitt, who had acted as their agent in the purchase of a home, had misappropriated funds and forged documents.

Joann and Charles DeFrates were looking for a home to purchase for their daughter, Melissa Kerby, and her family. Hewitt gave her lock box keys and code to Melissa Kerby so the Kerbys could look at prospective homes.

On March 8, 1999, Hewitt, acting as both real estate salesperson and loan officer at West America Mortgage, wrote a purchase contract for the DeFrates to purchase, for the Kerbys, a home in Tucson from the Ruizes. Pursuant to the terms of the offer Hewitt prepared for the DeFrates, Hewitt received an earnest money deposit of $1,000 from the Kerbys which she deposited in an escrow account at Stewart Title.

The seller made a counter offer which the buyer accepted on March 10, 1999.

Because the Kerbys needed to move in immediately, pre-possession was negotiated with the seller and and it was arranged for the Kerbys to rent and occupy the home before close of escrow. On March 28, 1999, the Kerbys took possession of the home. According to the DeFrates, they verbally agreed to pay $21 per day before escrow closed. Hewitt did not prepare a pre-possession agreement or rental agreement to reflect the arrangement.

On April 29, 1999, Hewitt signed an addendum on behalf of the DeFrates to increase the daily rent to $29. According to the DeFrates, Hewitt signed several documents, including the April 29th contract addendum, without their authorization. Hewitt claims she was verbally authorized to sign certain documents.

According to Melissa Kerby, in addition to the $1,000 earnest money deposit, she gave Hewitt two checks dated March 8, 1999. One was in the amount of $53 for a credit check and the second in the amount of $275 for an appraisal fee. Both were made payable to West America Mortgage.

Between March 8 and March 22, 1999, Hewitt changed the payees on the checks and deposited them to benefit the Davises, buyers in a separate transaction. Hewitt states she did this because the Davises were behind in their payments and admits she altered the checks and applied them to the Davis escrow.

Hewitt did not keep a complete record of the Ruiz/DeFrates transaction, nor did she provide her broker with all documents in the transaction.

While living in the home, some checks written by the Kerbys for rent were returned for insufficient funds and the Kerbys stopped payment on other rent checks because of their dissatisfaction with the transaction. The Kerbys have been reimbursed $328 for the credit check and appraisal fee checks.

In mid-May 1999, the buyers canceled escrow and the $1,000 earnest money deposit was applied toward unpaid rent.

On June 3, 1999, Kent and the DeFrates agreed that Kent would compensate the DeFrates $150 for repairs made on the pool and $8 per day for each day the Kerbys were in the home. On the same day, the Kerbys were served with a five-day notice to vacate the property.
VIOLATIONS: Hewitt pursued a course of misrepresentation while acting as a licensee in a transaction in violation of A.R.S. § 32-2153(A)(1). She failed to act in her clients' best interests and did not deal fairly with all parties to the transaction as required by A.A.C. R4-28-1101(A).

She did not, within a reasonable time, account for or remit monies, or surrender to the rightful owner, documents or other valuable property coming into her possession which belonged to others within the meaning of A.R.S. § 32-2153(A)(9). She converted funds entrusted to her for the Ruiz/DeFrates transaction to a separate, unrelated transaction without the knowledge and consent of the parties in violation of A.R.S. § 32-2153(A)(16).

She failed to maintain a complete record in the Ruiz/DeFrates transaction within the meaning of A.R.S. § 32-2153(A)(18). She signed the name of another person on documents or forms without the express written consent of the person in violation of A.R.S. § 32-2153(A)(25). Her conduct and actions constitute violations of provisions of Arizona Revised Statutes, Title 32, Chapter 20 within the meaning of A.R.S. § 32-2153(A)(3).
DISPOSITION: Respondent's real estate salesperson's license is suspended for two years effective upon entry of this Order. Respondent to pay a civil penalty in the amount of $2,000.

99A-163
Michael Casper
Palm Desert, Calif.
DATE OF ORDER: January 12, 2000
FINDINGS OF FACT: In his February 1999 application for an original real estate salesperson's license, Respondent failed to disclose the he had been convicted in Oregon for DUI. He also failed to disclose that a warrant had been issued in February 1999 in Pima County for his arrest on the charge of issuing a bad check. The warrant was quashed in May 1999 on his completion of a bad-check program.
VIOLATIONS: His failure to disclose the conviction constitutes procuring or attempting to procure a license by filing a license application that was false or misleading within the meaning of 32-2153(B)(1). He was convicted of a felony or of the crime of forgery, theft, extortion, conspiracy to defraud, a crime of moral turpitude or other like offense within the meaning of A.R.S. § 32-2153(B)(3). His conduct shows he is not a person of honesty, truthfulness or good character within the meaning of A.R.S. § 32-2153(B)(7).
DISPOSITION: Respondent's real estate salesperson's license is suspended for 90 days to begin upon entry of this Order. Respondent to pay a civil penalty in the amount of $1,000.

Lombardo

Continued from page 2

The Brief notes that these are examples of the broad authority the Legislature has given the Commissioner to seek judicial or administrative relief for violation of the Department's Rules and regulations.

Another example of statutory provisions that strongly support the existence of a private cause of action for the violation of the Commissioner's Rules is the Legislature's directive to the Commissioner to establish a Real Estate Recovery Fund, thus creating a mechanism for individuals to seek private remedies for violations of the Rules. In the Brief, it is pointed out that an individual harmed by a real estate agent's violation of the Rules may obtain compensation from the Fund, yet the individual's right to receive this compensation is itself conditioned upon first commencing an action in a state court against the violator and obtaining a judgment for such violation. A.R.S. § 32-2188(D)(3). Thus, the Commissioner's Brief argues that the Legislature expressly intended that the real estate agent's duties under the Rules be enforceable in private causes of action.

The second argument set forth in the Commissioner's Brief deals with the fact that the Lombardo case runs contrary to a long line of appellate court cases which have held that the Commissioner's Rules have "the force and effect of law." The Brief cites the cases of *Red Carpet-Berry & Associates v. APEX Associates, Baker v. Leight, Aranki v. RKP Investments, Inc., Brown v. Department of Real Estate* and *Herzberg v. David* which have applied the Commissioner's Rules in the context of tort and contract actions, as well as administrative disciplinary proceedings.

Even though the Lombardo decision has created quite a bit of turmoil, there may be less to Lombardo than meets the eye. For one thing, the regulation imposing a duty of fairness has, since the events in the Lombardo case, been adopted by Arizona Legislature in A.R.S. § 32-2153(B)(10). Now, by statute, a licensee may lose his license if he is guilty of "failure to deal fairly with any party to a transaction that materially and adversely affected the transaction." Therefore, the Lombardo case, which dealt solely with standards set by the Commissioner's Rules, may well have been rendered obsolete by this legislative enactment.

Another point not addressed by the Commissioner's Amicus Curiae Brief is that the apparent "safe harbor" created by the Lombardo case may generate a false sense of security. Even if the Lombardo decision withstands the scrutiny of the Arizona Supreme Court, it does not mean that a real estate licensee may withhold material information from a party to the transaction without incurring civil liability. For instance, under the Arizona Consumer Fraud Act, which specifically includes real estate transactions within its provisions, a broker failing to reveal material facts would face civil liability to any party damaged by such a failure. The tort theories of negligent misrepresentation and common law fraud apply to omissions of material facts as well as overt misstatements.

Therefore, even if the Lombardo decision were upheld, it would not result in reduced civil liability for a licensee's material omissions, rather at most, it would change the form such a civil suit would take. Indeed, The Lombard court specifically acknowledged that there is liability for agents who fail to disclose information which is "critical" to the transaction. The Lombardo court uses the example of the real estate agent who has knowledge of termite infestation as information which is "critical." Arguably, the effect of Lombardo could be a net increase in liability of real estate agents because the case seems to say that an agent can be sued by his principal for making the very disclosures mandated by the Commissioner's Rules.

What is clear from the controversy that has arisen as a result of the Lombardo decision, there is no doubt that it has created considerable confusion on the issue of what standard a real estate agent must adhere to in carrying out his day to day duties. Hopefully, the Commissioner's Amicus Curiae Brief will be persuasive in convincing the Arizona Supreme Court to grant such review.

Thomas Stoops is a State Bar Certified Real Estate Specialist and a partner in the firm of Stoops & Kloberdanz, PLC

ARIZONA
REAL ESTATE BULLETIN
Arizona Department of Real Estate
2910 N. 44th Street, Phoenix AZ 85018