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Alaska dual agents may face avalanche of law suits

by Blanche Evans
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Do you know exactly when you should disclose dual agency to your buyer, and if so, do you?

That's the question facing some Alaskan brokers who are being sued by buyers claiming that they weren't informed early enough in the transaction of their agents' dual agency status.

The same attorney Robert Wagstaff, who represented Joe Columbus, Jr. and his agent Robert Holbrook and McAlpine Investments, Inc., in their successful ($200,000 settlement before punitive damages could be awarded) lawsuit against agent Bonnie Mehner and her brokerage Prudential Jack White, has filed a new lawsuit on behalf of buyer clients.

This time the plaintiffs are Eldon and Elizabeth Tanner, who claim that it was not disclosed to them until well into their purchase of a $46,900 Mat-Su property that the same brokerage firm, Prudential Vista, was acting as dual agent to both sides of the transaction.

Uh, oh—shades of *Debs v. Coldwell Banker*.

In 2000, a California buyer named Jerome Debs claimed that he overpaid for a property because his brokerage firm was also representing a competing buyer whose agent caused Debs' accepted contract to be set aside by the seller in a competing bid. Since Coldwell Banker was representing both buyers, Debs felt that Coldwell Banker didn't do enough to protect his interests as a client, particularly since his offer had already been accepted by the seller. Because he could prove how he was damaged materially, the case went to court.

Explains attorney Robert Wagstaff, "There are different degrees of dual agency, when an agent represents both sides and when two agents from the same brokerage represent both sides of the transaction. It's worse when one agent does it, but if the same brokerage is collecting commissions, it's still dual agency."

Debs v. Coldwell Banker was settled out of court, for an undisclosed sum. Even though the brokerage had to pay, the case represented a skirmish won for the real estate industry. Without a verdict, the case did nothing to abrogate the law of agency. That means it didn't set any new precedent and agents could resume doing business as usual.

However, with the Colombus case in Alaska, there was a verdict and the case was settled for a large amount before punitive damages were awarded.

And Wagstaff is planning to hit the same defendants again, as well as others who practice undisclosed dual agency.

"They (Prudential Jack White) do a high volume residential business," says Wagstaff. "For Alaska, they are the biggest player up there and now they are on court record saying they ignored the statute because it was too difficult to follow, that everybody does it, and this is how we do business."

Like the Debs case, the Tanner case has the vast potential to impact designated and dual agency laws across the nation. And a lot depends on the intentions of these attorneys and their clients. Will Wagstaff go the distance or will he settle?

"We are asking for disgorgement of commissions," says Wagstaff, "and punitive damages."

For years, the National Association of Realtors and their state associations have lobbied to enact new representation statutes that allow the continuing practice of dual agency. But dual agency is problematic. When disclosure is offered it reveals an inherent conflict of interest that typical agency law simply doesn't properly address.

Wagstaff says he is aware the problem is nationwide, and fully realizes the potential his lawsuit has to impact the practices of dual agents everywhere. He says he knows first-hand how con-

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Governor exempts Department from 10% budget cut

The Department's Tucson Office will not be closed, thanks to Governor Jane Dee Hull. In September, the Department announced that a 10 percent budget cut mandated by the Governor would force the closure of the office on November 30.

On October 23, the Governor said the Department would be exempted from the budget cut because the Department "would have to lower fees if its expenditures drop below certain level." She added that a budget reduction would not net any savings for the state.

The Governor was referring to the fact that the Department is what is known as a "95-110" agency. Each year, the Department receives an appropriation from the Legislature with which to operate the Department. The Department "pays back" the appropriation with fees collected for licenses and other transactions.

If fees collected drop below 95 percent of the appropriation, the Department must increase fees. If the fees exceed 110 percent of the appropriation, fees must be lowered. Cutting the Department's budget has the same effect as lowering its appropiration. As things stood, the 10 percent budget cut would mean that next year the Department would have to reduce fees—roughly by the same amount of the budget cut—to comply with the law.

Presenting and negotiating multiple offers

A National Association of Realtors® White Paper

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"When representing a buyer, seller, landlord, tenant, or other client as an agent, Realtors® pledge themselves to protect and promote the interests of their clients. This obligation to the client's interests is primary, but it does not relieve Realtors of their obligation to treat all parties honestly." (from Article 1 of the 2002 Realtors Code of Ethics)

"Realtors shall submit offers and counter-offers objectively and as quickly as possible." (Standard of Practice 1-6)

Perhaps no situation routinely faced by Realtors can be more frustrating, fraught with potential for misunderstanding and missed opportunity, and elusive of a formulaic solution than presenting and negotiating multiple purchase or lease offers and/or counter-offers on the same property. Consider the competing dynamics. Listing brokers are charged with helping sellers get the highest price and the most favorable terms for their property. Buyers' brokers help their clients purchase property at the lowest price and on favorable terms. Balanced against the Code's mandate of honesty is the imperative to refrain from making disclosures that may not, in the final analysis, be in a client's interests. (Revised 11/01)

Will disclosing the existence of one offer make a second potential purchaser more likely to sign a full price purchase offer to pursue a different opportunity? Will telling several potential purchasers that each will be given a final opportunity to make their best offer result in spirited competition for the seller's property in a table devoid of offers?

What is fair? What is honest? What is to be done? Who decides? And why is there not a simple way to deal with these situations?

As Realtors know, there are almost never simple answers to complex situations. And multiple offer presentations and negotiations are nothing if not complex. But, although there is not a single, standard approach to dealing with multiple offers, there are fundamental principles to guide Realtors. While these guidelines focus on negotiation of purchase offers, the following general principles are equally applicable to negotiation of lease agreements. (Revised 11/01)

Be aware of your duties to your client—seller or buyer—both as established in the Code of Ethics and in state law and regulations. (Revised 05/01)

The Code requires you to protect and promote your client's interests. State law or regulations will likely also spell out duties you owe to your client.

The Code requires that you be honest with all parties. State law or regulations will likely spell out duties you owe to other parties and to other real estate professionals. Those duties may vary from the general guidance offered here. REALTORS need to be familiar with applicable laws and regulations.

• Be aware of your duties to other parties, both as established in the Code of Ethics and in state law and regulation.

• Remember that the decisions about how offers will be presented, how offers will be negotiated, whether counter-offers will be made and ultimately which offer, if any, will be accepted, are made by the seller, not by the listing broker. (Revised 05/01)

• Remember that decisions about how counter-offers will be presented, how counter-offers will be negotiated, and whether a counter-offer will be accepted, are made by the buyer, not by the buyer's broker. (Adopted 05/01)

• When taking listings, explain to sellers that receiving multiple, competing offers is a possibility. Explain the various ways they may be dealt with (e.g., acceptance of the "best" offer; informing all potential purchasers that other offers are on the table and inviting them to make their best offer; countering one offer while putting the others to the side; countering one offer while rejecting the other offers, etc.).

• Explain the pluses and minuses of each approach (patience may result in an even better offer; inviting each offeror to make their "best" offer may produce a better offer[s] than what is currently on the table or may discourage offerors and result in their pursuing other properties).

• Explain that your advice is just that and that your past experience cannot guarantee what a particular buyer may do.

• Remember and remind the seller that the decisions are theirs to make not yours, and that you are bound by their lawful and ethical instructions.

• When entering into buyer representation agreements, explain to buyers that you or your firm may represent more than one buyer-client, that more than one of your clients or your firm's clients may be interested in purchasing the same property, and how offers and counter-offers will be negotiated if that happens. (Adopted 05/01)

• Explain the pluses and minuses of various negotiating strategies (that a "low" initial offer may result in the buyer purchasing the desired property at less than the listed price, or in another, higher offer from another buyer being accepted; that a full price offer may result in the buyer purchasing the desired property while paying more than the seller might have taken for the property, etc.). (Adopted 05/01)

• Remember—and remind the buyer—that the decisions are theirs to make not yours, and that you are bound by their lawful and ethical instructions. (Adopted 05/01)

If the possibility of multiple offers and the various ways they might be dealt with were not discussed with the seller when their property was listed and it becomes apparent that multiple offers may be (or have been) made, immediately explain the options and alternatives available to the sellersand get direction from them.

When representing sellers or buyers, be mindful of Standard of Practice 1-6's charge to "…submit offers and counter-offers objectively and as quickly as possible." (Revised 05/01)

While the Code of Ethics does not expressly mandate "fairness" (given its inherent subjectivity), remember that the Preamble has long noted that "…Realtor has come to connote competency, fairness, and high integrity."

If a seller directs you to advise offerors about the existence of other purchase offers, fairness dictates that all offerors or their representatives be so informed.

Article 3 calls on Realtors to "…cooperate with other brokers except when cooperation is not in the client's best interest." Implicit in cooperation is forthright sharing of information relat-

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Jerry Holt

News From The Commissioner

Budget Cuts Averted

I was extremely pleased to learn on October 23 that the Governor had exempted the Department from a 10 percent budget cut announced in September. The decision means that our Tucson office will remain open, and that we will not have to lay off four of our five auditors who examine the books and records of brokers, especially those in the property management business.

We will, however, complete the reorganization announced earlier. The goal is to streamline Department operations, eliminate redundancy, and to serve licensees and the public in a more efficient manner. Here are the changes:

• Denise Sulista is the new Director of Licensing and Education.

• Cindy Ferrin and Kurt LaBotz have moved to the Investigations Division where Cindy is the new director. Her duties include initial evaluation of complaints filed with the Department, and, with her seven-person staff, investigating alleged violations of real estate rules and statutes. Kurt will handle the public assistance requests, advertising complaints, and phone calls.

• Cindy Wilkinson has moved to the Administrative Actions Division. Carla Randolph becomes the Administrative Actions Division legal secretary in addition to her duties as compliance officer.

• In the Education Division, the volunteer monitor program is abolished. Monitoring of real estate schools and classes will occur only upon complaint. The entry of class schedules into a database is discontinued.

• Developers are now required to submit completed Public Report applications on magnetic media or by email.

Other changes:

• The Licensing Division will discontinue mailing courtesy notices to licensees advising them of an expired or inactive license.

• Licenses will be issued at the front counter to those who visit the Department to apply for renewal or an original license. This will shorten processing time and greatly reduce mailing costs. As before, license certificates will be mailed to the designated broker when a licensee submits an application for renewal or original licensure by mail.

• The Department will continue to mail license renewal notices.

• The Investigations Division will obtain certified copies of deeds, escrow files, court records, etc., only when required for an administrative hearing.

Evaluating the state real estate examination

I have formed a 12-person committee to conduct our annual review of the questions new license candidates must answer in the state examination.

Members are real estate broker C. Dale Hillard, broker and school owner Fred Brodsky, broker and community college real estate instructor Sue Jahns, broker and school owner Bill Gray, broker and school owner Andy Israel, associate broker Martha VanDer Werf, attorney and school owner Tim Burns, commercial broker Pat Sheahan, real estate broker and school owner Lin Ferrara, and title insurance executive Howard Weiner. The Department will be represented by Cindy Wilkinson, Denise Sulista and yours truly.

The examination, administered by Experior Assessments, comprises 60 Arizona-specific questions, 80 national questions, and five unscored questions in each category. The unscored questions are being evaluated for possible addition to the bank of more than 900 questions from which the unique set of questions presented to each candidate is compiled. The answers to unscored questions are examined to spot those that produce an inordinate number of wrong answers. Those questions are either scrapped or modified before addition to the question bank.

Paul Lindsey resigns from Advisory Board

Paul Lindsey has resigned his position on the Arizona Real Estate Advisory Board. He was appointed by Gov. Rose Mofford in 1991.

Paul has been an outstanding Board member. No one has ever accused Paul of being shy, but his advice has always been sound and well researched. The Department is a better place for Paul having passed its way. Clearly he will be missed!

At the same time we welcome Jack Marek, designated broker for A. P. Brown Company in Tucson, who has been appointed by Gov. Hull to fill Paul's unexpired term.

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The way things were

Bill Nixon—The Arizona Republic

From the February 15, 1963 issue of Time *magazine:*

Vaguely Realizing Westward

Triple-rivited into the American Dream is a shining picture called the Little Gray Home in the West. And nowhere is it shinier than in real estate brochures aimed at retirement-age oldsters. Sadly, in all too many cases, the grass and sparkling water, recreational facilities and well-paved roads of Retirement Land are only so much printer's ink.

Biggest theater of operations for land grabbing hucksters is Arizona, where some 630 so-called subdivisions have spring up during the past 18 months and 60,000 lots have been sold, mostly sight unseen. Determined to get federal intervention to stop what may blow up into a national scandal, Arizona's Real Estate Commissioner J. Fred Talley recently testified before a U.S. Senate special committee, and concentrated his fire on an Arizona desert development called Lake Mead Rancheros.

Advertising in newspapers around the country, Lake Mead Rancheros promises 1 1/4-acre lots for as little as $595 with easy terms ($10 down, $10 a month). Its brochures show bikini-clad cuties splashing in the lake's blue waters and proclaim "livable now! . . . not raw, undeveloped, inaccessible land." But, said Talley, Lake Mead is some 50 miles away. And at the property, "there are absolutely no utilities available. Six miles from the nearest lot and 10 to 12 miles from the principal part of the subdivision is a tank-operated machine where one can deposit a quarter and water runs out of an old inner tube. At the same distance away are a telephone and power line running down the highway." Scratches bulldozed in the desert are given glamorous names such as Riverside Drive. And in the center of this wasteland of sage and sand stands a giant billboard saying: THIS IS IT!

Lake Mead Rancheros claims that it is now willing to change its advertising. But it will probably take federal intervention to accomplish lasting reforms (only five state laws require "full disclosure" to purchasers about the state of the property) because of the difficulty in determining jurisdiction when promoters are careful to sell their land outside the state in which it sits.

**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,**

ADMINISTRATIVE ACTIONS

REVOCATIONS

02A-063
David W. Locke
Tucson
DATE OF ORDER: August 13, 2002
FINDINGS OF FACT: After the Department notified Respondent that it intended to deny his application for a real estate salesperson's license because of a felony conviction for theft and his admission that he stole money to support his drug addiction, and Respondent appealed the Department's decision, Respondent entered into a Consent Order with the Department which, in part, provided for the issuance of a provisional license.

Conditions of the provisional license included the requirement that Respondent abstain completely from the use of alcohol and illegal drugs, submit to periodic body fluid test at federally certified laboratories and consent to the Commissioner to summarily suspend the provisional license in the event of Respondent's violation of any of the terms of the Consent Order.

Respondent tested positive for cocaine metabolite and the Commissioner summarily suspended Respondent's provisional license. Respondent appealed.
DISPOSITION: Respondent real estate salesperson's license is revoked. The Commissioner finds that it is in the best interest of the public and for the protection of the public welfare to enter this Order effective immediately as a final administrative decision. No further motion for review or rehearing will be considered by the Department.

APPLICATIONS DENIED

02A-013
Shane M. Bokn
Glendale
DATE OF ORDER: August 16, 2002
FINDINGS OF FACT: The Department advised the Petitioner of it's indent to deny his application for a real estate salesperson's license due to a 1995 felony conviction for menacing and a 1998 conviction for driving while ability impaired. Petitioner appealed.
VIOLATIONS: Respondent is in violation of A.R.S. § 32-2153(B)(2) and (B) (10) because he has been convicted of a felony and a crime of violence against another person. Petitioner criminal convictions indicate that Petitioner is not a person of good character pursuant to A.R.S. § 32-2153(B)(7).
DISPOSITION: Petitioner's license application is denied.

02A-030
Theodore E. Hansen
Mesa
DATE OF ORDER: October 4, 2002
FINDINGS OF FACT: In his application for a real estate salesperson's license, Petitioner disclosed that his license to practice law in Arizona has been suspended. In an administrative hearing brought by the State Bar of Arizona, it was determined that Petitioner knowingly practiced law while suspended.
VIOLATIONS: Applicant practiced law while suspended violating the terms of an administrative order. For this reason he may be denied a real estate salesperson's license. THe evidence shows substantial misrepresentations and dishonesty. Petitioner used client money that he had not yet earned or that was earmarked for filing fees.

Petitioner has not shown he is a person of honesty, truthfulness or good character.
DISPOSITION: Petitioner's application for a real estate salesperson's license is denied.

CONSENT ORDERS

02A-005
Pamela S. Geroux
Mesa
DATE OF ORDER: August 9. 2002
FINDINGS OF FACT: While Respondent was employed as a real estate salesperson by the Walcox Realty Group with Thomas E. Walker, the designated broker, Respondent was the listing agent for the sale of investment property but failed to sell this property as a Internal Revenue Code tax deferred exchange. Respondent maintains that the designated broker failed to advise her that the sale was to be a tax deferred exchange.
VIOLATIONS: Respondent disregarded or violated provisions of Arizona Revised Statutes, Title 32, Chapter 20, within the meaning of A.R.S. § 32-2153(A)(3). Respondent failed to protect and promote the interests of her clients and fulfill her fiduciary duties to her clients, in violation of A.A.C. R4-28-1101(A).
DISPOSITION: Respondent to pay a civil penalty in the amount of $1,000 and to attend six hours of continuing education in addition to hours required for license renewal.

01A-035
Jerome S. Shull
Tucson
DATE OF ORDER: August 15, 2002
FINDINGS OF FACT: Respondent is the designated broker for Jerome S. Shull & Associates, Inc. A Department auditor scheduled a routine audit of Shull & Associates.

The auditor began the audit based on documentation provided through Respondent's bookkeeper whose duties included receipt and deposit of monies in trust accounts for several properties managed by Respondent.

The audit discovered that property management agreements on file were all expired, and a random audit of six of the 17 bank trust accounts showed discrepancies exceeding $14,600.

Respondent's CPA determined that the bookkeeper engaged in an elaborate and sophisticated scheme to defraud Respondent and embezzle monies from the trust accounts, and that it was difficult to detect. Respondent's audit revealed that missing funds exceeded $100,000, and that $75,000 of that was client funds.

Respondent used his own funds to replenish client funds before any request from the Department. He filed criminal charges against Freeman.
VIOLATIONS: Respondent failed to exercise reasonable supervision over the activities of Freeman, in violation of A.R.S. § 32-2153(A)(21).
DISPOSITION: Respondent to pay a civil penalty in the amount of $1,500. Respondent to attend three hours of continuing education in addition to hours required for license renewal.

02A-052
Thomas E. Detzer
Flagstaff
DATE OF ORDER: August 20, 2002
FINDINGS OF FACT: When Petitioner took the real estate salesperson's license examination at the Experior testing site in Flagstaff, he left the room during the test and was found in his car. Petitioner did not exit and complete his computer test program prior to leaving the testing room.

The Experior regional manager invalidated the score report because of Petitioner's breach of test security.

Petitioner retook the examination, received a passing score and submitted an application for a real estate license. The Department notified Petitioner of its intention to deny his application for a real estate salesperson's license due to the security breach on the prior examination. Petitioner filed a notice of appeal.
DISPOSITION: Petitioner shall be issued a two-year provisional real estate salesperson's license subject to several terms and conditions including a three-month license suspension.

02A-005 and 02A-037
Shelley D. Zammataro
Apache Junction
DATE OF ORDER: August 22, 2002
FINDINGS OF FACT: Respondent was issued an original real estate license in March of 2000 and was hired by Thomas Walker, the designated broker for Thom Walker & Associates.

Respondent was designated by Walker as property manager for several rental properties. In two instances, Respondent entered into rental agreements with tenants whose written disclosures in rental agreements indicated a poor credit history, and in one case, a criminal background including current probation status for two felony convictions. In both cases, the tenants had to be evicted for failure to pay rent.
VIOLATIONS: Respondent disregarded or violated provisions of Arizona Revised Statutes, Title 32, Chapter 20, within the meaning of A.R.S. § 32-2153(A)(3). Respondent failed to protect and promote the interests of her clients and fulfill her fiduciary duties to these clients, in violation of A.A.C. R4-28-1101(A). Respondent was negligent in representing clients in violation of A.R.S. § 32-2153(A)(22).
DISPOSITION: Respondent's license is revoked.

02A-079
Marie F. Ranallo
Glendale
DATE OF ORDER: August 22, 2002
FINDINGS OF FACT: In her application for a real

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estate salesperson's license, Petitioner disclosed that she was previously a licensed real estate broker in Illinois and a managing broker. An audit determined that there was a shortage of approximately $78,290.50 in the escrow account, and Petitioner failed to provide certain escrow records and a reconciliation of the escrow account. During the investigation, Petitioner and other owners sold their interests in their brokerage company with proceeds from the sale were used to rectify the escrow account shortage.

Petitioner entered into a Consent Order with the Office of Banks and Real Estate in Illinois, resulting in revocation of her real estate broker's license and corporate broker's license.
VIOLATIONS: Petitioner's behavior that led up to the Illinois revocations did not demonstrate she is a person of honesty, truthfulness and good character, in violation of A.R.S. § 32-2153(B)(7). Petitioner violated state laws, regulations or rules that relate to real estate, in violation of A.R.S. § 32-2153(B)(10).
DISPOSITION: Petitioner shall be granted a two-year provisional real estate license subject to several terms and conditions.

02A-041
Devin W. Morris
Mesa
DATE OF ORDER: August 27, 2002
FINDINGS OF FACT: Respondent was issed an original real estate salesperson's license in August 1998. While covering floor duty for his employer, C21 Desert Palm, Respondent was approached by a potential new client about purchasing a new home and selling her current home. Respondent showed the new client a house in Gilbert and the client advised Respondent that she wanted to make a purchase offer for the house.

While still employed by Desert Palm, Respondent advised the client that he was terminating his employment with Desert Palm. Respondent told the new client he would soon become employed as a real estate salesperson by C21 San Tan and that he could prepare a purchase offer on behalf of San Tan, and that he could then assist her in the completion of the acquisition of the house.

While still employed by Desert Palm, Respondent prepared the purchase offer with the client's agent designated in the purchase contract as the designated broker of San Tan.
VIOLATIONS: Respondent represented or attempted to represent a broker while employed by another broker in violation of A.R.S. § 32-2153(A)(8).
DISPOSITION: Respondent to pay a civil penalty in the amount of $1,000. Respondent to attend six hours of continuing education classes in addition to hours required for license renewal.

02A-085
Jodie L. Ramsey
Peoria
DATE OF ORDER: August 29, 2002
FINDINGS OF FACT: Petitioner was issued an original real estate salesperson's license in 1994. The license expired in 1998. In 2002, Petitioner submitted a second application for a real estate salesperson's license.

In her 2002 application, Petitioner disclosed a 1998 conviction for possession of dangerous drugs, a class 4 felony. In 1998, she was convicted of issuing a bad check, a class 1 misdemeanor.

Since 1998 Petitioner has been employed by RE/MAX Integrity Realtors.
VIOLATIONS: Petitioner has been convicted of a felony in violation of A.R.S. § 32-2153(B)(2). Petitioner's conduct that led to her convictions did not demonstrate she is a person o honesty, truthfulness and good character, in violation of A.R.S. § 32-2153(B)(3).
DISPOSITION: Petitioner shall be issued a two-year provisional real estate salesperson's license subject to several terms and conditions.

02A-070
Bennie Farrar
Sun City
DATE OF ORDER: September 9, 2002
FINDINGS OF FACT: Respondent was issued a cemetery broker's license in 1998. Petitioner has been employed by Sunwest Cemetery & Crematory, Inc. (Sunwest) as the cemetery's designated broker and sold numerous cemetery lots.

Sunwest submitted an application for a Certificate of Authority to Operate a Cemetery to the Department in October 1992, but the application was denied for various deficiencies in the application.

Sunwest has continually operated as a cemetery without the required license and without notice to and approval by the Department.

Respondent represented to the Department that she relied on the representation by Stanley Stobierski that Sunwest has a license to operate, and did not personally verify that Sunwest had secured the license.
VIOLATIONS: Respondent failed to exercise reasonable supervision and control over the activities of Sunwest for which her license is required, in violation of A.R.S. § 32-2153(A)(21). Respondent disregarded or violated provisions of Arizona Revised Statutes, Title 32, Chapter 20, within the meaning of A.R.S. § 32-2153(A)(3). Respondent was negligent in failing to determine that Sunwest did not have a license required by A.R.S. § 32-2194.03(C), in violation of A.R.S. § 32-2153(A)(22).

Respondent failed to protect and promote the interests of her clients and fulfill her fiduciary duties in violation of A.A.C. R4-28-1101(A).
DISPOSITION: Respondent's cemetery broker's license is suspended for 90 days to begin upon entry of this Order and shall cease and desist from offering for sale or selling any Sunwest cemetery plots until Sunwest secures the license from the Department and her cemetery broker's license is reinstated.

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02A-070
Sunwest Cemetery & Crematory, Inc., Stanley S. Stobierski and Marilyn G. Stobierski
El Mirage
DATE OF ORDER: September 20, 2002
FINDINGS OF FACT: In 1992, the Stobierskis, on behalf of Sunwest, their wholly-owned corporation, submitted to the Department an application for a Certificate of Authority to operate Sunwest Cemetery. The Department notified Respondent's of deficiencies in their application that prevented the issuance of the certificate.

Respondents failed to correct any of the application deficiencies. At no time has the Department issued the license to Sunwest.

The Department learned that Sunwest has continuously operated the cemetery since 1992 and sold cemetery plots in the cemetery without the required license and without approval of the Department.
VIOLATIONS: Respondents have sold cemetery plots within the cemetery without first notifying the Department of their intent to sell and providing all required supporting information and documentation, and obtain the Department's approval by license to do so, in violation of A.R.S. § 32-2194.01.

Respondents have operated the cemetery since 1992 and have sold cemetery plots in the cemetery without the required license, in violation of A.R.S. §§ 32-2194.02 and 32-2194.03(C).

The cemetery was not examined by the Department before it began offering cemetery plots for sale, in violation of A.R.S. § 32-2194.02.
DISPOSITION: Respondents shall cease and desist from offering for sale and/or selling cemetery plots in the cemetery without first securing the license.

Sunwest shall submit to the Department a complete application for a Certificate of Authority to operate the cemetery within 15 days of the date of this Order.

Sunwest shall continue to service all existing pre-need contracts. Sunwest shall continue to properly maintain the cemetery.

Respondents shall pay a civil penalty in the amount of $5,000.

Sunwest shall provide a copy of this Order and written notice within 30 days after entry of this Order to all existing pre-need purchasers of cemetery plots not yet used informing them that the sale of plots prior to Sunwest's receipt of a license from the Department is voidable by them, and that they can secure a refund of all fees paid to Sunwest including all fees paid for the cemetery plot and all other related goods and services.

01A-108
Daniel V. Fahy
Bisbee
DATE OF ORDER: October 22, 2002
FINDINGS OF FACT: In Petitioner's 2002 application for a real estate salesperson's license, he disclosed convictions for public indecency in 1984, 1987, 1990 and 1991.
VIOLATIONS: Petitioner was convicted of crimes of moral turpitude in violation of A.R.S. § 32-2153(B)(2). He failed to demonstrate that he is a person of honesty, truthfuness and good character in violation of A.R.S. § 32-2153(B)(7).
DISPOSITION: Petitioner to be issued a two-year provisional license subject to certain conditions and restrictions.

02A-142

Woodside Homes Sales Corporation
Tempe
DATE OF ORDER: October 25, 22002
FINDINGS OF FACT: Woodside sold and closed escrow on 11 lots in the Cambria Parcel 4 subdivision without first obtaining an amended public report authorizing sale of the lots.
VIOLATIONS: Woodside failed to apply for and secure an amended public report covering the unregistered lots prior to their sale in violation of A.R.S. §§ 32-2181(A), 32-2183(F) and 32-2184(A), and A.A.C. R4-28-B1203.
DISPOSITION: Woodside to pay a civil penalty in the amount of $10,000 and shall provide all purchasers of the unregistered lots with a copy of the amendment to the subdivision public report.

Woodside shall also provide all purchasers of unregistered lots with a copy of thie Consent Order and notify them of their right to rescind their purchases.

Dual agency

Continued from page 1

sumers can get "sucked in" to dual agency arrangements.

While listing a property he owns in Colorado, he says he was disclosed by the listing agent that if the brokerage or the agent found a buyer that their fiduciary relationship would change to a facilitator relationship for both parties, with his permission.

"He said that to the wrong person," says Wagstaff. "I said that wasn't going to happen."

The agent didn't really mention that one of Wagstaff's options would be to continue a fiduciary relationship —until he insisted on it.

"I'm sophisticated," says Wagstaff, "but the average buyer out there might not be, especially first-time buyers. How can a dual agent, who is representing the seller to get the highest price for the home be working in the buyer's interest?"

That's why, this time, proponents of dual agency might not be so lucky as to get by with red faces and writing big checks.

Wagstaff has asked the Superior Court judge to assign class action status to the lawsuit. Class action would invite others who have purchased property with Prudential Vista or Prudential Jack White to contact the attorneys.

The court has not yet responded on the request for class action status, and possibly will not for about six months.

Educate your buyers about important documents

by K. Michelle Lind
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Most buyers' brokers explain to their buyers the importance of reading the purchase contract and the home inspection report when buying a home. However, the importance of some of the other documents involved in a home purchase may be barely discussed. Although it may seem overwhelming, buyers should review all of the documents involved in a home purchase.

Understanding the purpose of the documents can help make the buyer's task much easier. Explain to the buyer that some documents should be reviewed as soon as they are received. In fact, a buyer may need to read certain documents before even signing the purchase contract. Be aware that if a purchase contract has already been signed, the buyer's rights will differ dramatically depending on whether the contract is a typical new home purchase contract or an Arizona Association of Realtors Residential Resale Purchase Contract ("AAR Resale Contract").

MLS Printout

Explain to the buyer that the Multiple Listing Service ("MLS") printout is similar to an advertisement. The MLS information was probably secured from the seller, builder, or a governmental agency and could be inacurate—so the buyer must verify anything important. Also emphasize that the MLS printout is not a part of the purchase contract. Therefore, even if the printout says that the refrigerator or some other item will be sold with the home, it must be written into the purchase contract, unless the item is already incorporated in the contract's list of fixtures and personal property included in the sale. (See AAR Resale Contract, lines 19-27).

Public Report

Sellers are required to give new home buyers in a subdivision an Arizona Department of Real Estate Public Report. Explain that the purpose of the Public Report is to point out important information about the home and the subdivision that may affect a buyer's decision to purchase. For example, the Public Report may tell the buyer that the home was built on expansive soils or that neighboring properties may cause a noise or dust problem. Emphasize that the buyer must read the Public Report before signing any contract to buy a new home; afterwards is too late.

Sellers Property Disclosure Statement (SPDS)

Most sellers in a resale transaction provide a SPDS; most new home sellers do not. The SPDS covers a variety of questions for the seller to answer about the property and its condition. Explain to the buyer that the SPDS is a disclosure of what the seller actually knows; it is not a representation of every possible defect. Inform the buyer to carefully review the SPDS and verify any important information during the Inspection Period. (See AAR Resale Contract, lines 141-142).

Covenants, Conditions and Restrictions (CC&Rs)

A timely review of the CC&Rs is often overlooked. Inform the buyer that CC&Rs are recorded at the county recorder's office and generally control certain aspects of the homes within a subdivision. By purchasing a home in such a subdivision, the buyer agrees to comply with the CC&Rs.

Explain to the buyer that the CC&Rs may restrict home improvements, how many pets can live in the home, where the buyer can park a car and any number of other matters that may affect the buyer's daily life. Therefore, it is essential for a buyer of a new home to read and agree to these restrictions before signing a purchase contract; most new home contracts do not allow a buyer to cancel simply because the buyer does not like the CC&Rs.

In a resale transaction using the AAR Resale Contract, inform the buyer that the CC&Rs must be reviewed within five days because the Buyer generally has only five days after receipt of the CC&Rs to provide notice of reasonable disapproval and cancel the transaction. (See AAR Resale Contract, lines 114-116 and 158-159).

Other Homeowner's Association ("HOA") Documents: In addition to CC&Rs, HOAs may be governed by articles of incorporation, bylaws, rules and regulations, and often, architectural control standards. If purchasing a resale home in a condominium or planned community, the seller (if fewer than 50 homes in the community) or

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Multiple offers

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ed to cooperative transactions and potential cooperative transactions. Much of the frustration that occurs in multiple offer situations results from cooperating brokers being unaware of the status of offers they have procured. Listing brokers should make reasonable efforts to keep cooperating brokers informed. Similarly, buyer brokers should make reasonable efforts to keep listing brokers informed about the status of counter-offers their seller-clients have made. (Revised 05/01)

Realize that in multiple offer situations only one offer will result in a sale and one (or more) potential purchasers will be disappointed that their offer was not accepted. While little can be done to assuage their disappointment, fair and honest treatment throughout the process; coupled with prompt, ongoing and open communication, will enhance the likelihood they will feel they were treated fairly and honestly. In this regard, "…Realtors can take no safer guide than that which has been handed down through the centuries, embodied in the Golden Rule, 'Whatsoever ye would that others should do to you, do ye even so to them.' " (from the Preamble to the Code of Ethics).

Important documents

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the HOA (if there are 50 or more homes) must provide the buyer with a disclosure containing a variety of information: the contact person for the association, assessments, the association's financial condition and, if the statement is furnished by the association, whether the association records reflect any alterations or improvements to the home that violate the CC&Rs. Again, explain that under the AAR Resale Contract, a buyer has only five days after receiving this disclosure to provide notice of reasonable disapproval. (AAR Resale Contract, lines 158-159).

Title Report or Commitment

Emphasize to the buyer that the title report or commitment contains important information. The title or escrow company providing title insurance will give the buyer a title report or title commitment listing restrictions, easements and liens recorded against the property ("Schedule B Exceptions"). Make sure that the buyer receives and reviews all of the listed Schedule B Exceptions. Some of these Exceptions may affect the use of the property, such as the ability to build an addition or add a swimming pool. In-the AAR Resale Contract, a buyer has five days to disapprove of the title report or commitment. (See AAR Resale Contract lines 114-116). In a new home sale, the buyer will not likely have such a right.

As a buyer's broker, you can assist your clients in becoming more informed buyers by educating them on the purpose of the documents involved in a home purchase. A well-informed, buyer will be less likely to encounter objectionable surprises about the home after close of escrow, resulting in less liability and more satisfied clients.

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