

Legislative/Legal Hotline Update and Frequently Asked Questions

In an effort to assist REALTORS® become more productive and successful, SCAR operates a legal hotline so you can get immediate and effective answers to your legal and ethical questions. The toll free number is 1-800-233-6381 or 772-5206 in Columbia. Email your questions if you prefer to BYRON@SCREALTORS.COM. Your dues pay all costs for the legal hotline. Call anytime with any real estate or REALTOR® related questions.

Below is a summary of the legal hotline calls and emails that SCAR has received during the period from January 10, 2003 through February 26, 2003.

Vacation Rental Act

With warmer weather fast approaching, the Vacation Rental Act has been the subject of several calls. The idea behind this new law is to protect tourists visiting South Carolina from losing their vacation accommodations because a new owner decides not to rent the property even though reservations and deposits were made with the prior owner. The renters' reservations are protected for **90 days after the recording of the deed at the county**. Recording the deed starts the clock ticking. Until that time expires, all renters can enforce their rental agreement. After the 90 days have expired, no party may enforce the rental agreement. The new owner can certainly re-ratify the rental agreement and rent the property even after 90 days have expired. Or the new owner can choose not to rent the property after the 90 days have expired. If the new owner chooses not to rent the property, all deposits and refunds must be sent to the prospective renter within 45 days of recording the deed at the county. Before the Contract is signed, the seller must disclose all rental agreements. Within 14 days of the contract signing, the seller must give the property management company the buyers' name and address. Within 14 days of closing the seller must give the property management company the buyers' name, address, and the date that the deed was recorded with the county. Penalties for violation include actual damages, court costs, and attorneys fees.

Earnest Money Disputes

Another new law is the Interpleader Act which creates a relatively inexpensive way for Brokers-in-Charge to handle earnest money disputes. If the buyer and seller refuse to sign releases for the earnest money after a sale fails to close, the BIC cannot disburse the escrow money without some exposure short of having a magistrate or court of common pleas judicial order. Magistrate Court is the least expensive option. Like the "Peoples' Court," you do not need an attorney to try a case. Magistrate Court staff are comfortable with private citizens representing themselves and are usually friendly about helping with court paperwork and giving advice. The BIC fills out the paperwork as the plaintiff and files the complaint in a county where either the buyer or seller resides. Buyer and Seller are the defendants and will be served with a summons and complaint. Cost to file is \$65 and includes service of process on the defendants. The court staff can

help you complete the proper forms and tell you what supporting evidence/documents you need to file.

Seller Disclosure Law

Seller disclosure was probably the most called about issue. Remember that the Seller Disclosure Form is an awesome REALTOR® liability shield. It has taken years and lots of SCAR lobbying hours to get this bill passed. Now REALTORS® have a form filled out and signed by the seller which will shield the REALTOR® from buyer lawsuits. Some REALTORS® have created their own forms with additional disclosures, this is fine. The state form covers only the most important disclosures in order to fit on three pages. The disclosure must be given to the buyer before the contract is signed or **as otherwise agreed in the real estate contract**. This means that you can still sell properties “as is” so long as that is the contractual agreement, and therefore there is no seller disclosure is required. It also means that if you are have a buyer and cannot track down the seller disclosure form, you can make an offer contingent upon receiving and approving the seller disclosure form. The law also exempts properties sold under other categories such as foreclosure, bankruptcy, estate sales, some intra-familial sales, tax sales, government sales, **new construction, vacant land, commercial property, and between parties who agree not to have a seller disclosure completed**. Remember that your BIC can place more stringent rules about disclosure than state law requires for risk management and business purposes. (SCAR is working on tailoring the seller disclosure for condominiums so that the legislator can amend the law.) Repaired items that are functioning properly do not require disclosure if they are no longer a problem.

Multiple Offers

Multiple Offer situations generated many hotline calls and emails. The problem with multiple offers is that some buyer is going to be upset. Unless you follow your ethical guidelines to the letter, an upset buyer can ruin your day by filing ethical complaints against you. In SC, the listing agent is required to disclose all offers (written and verbal) to the seller until the closing. As listing agent, you biggest fear is that your client may inadvertently create more than one enforceable contract. Make sure that you get written permission from your seller that includes language about disclosing multiple offers to all the prospective buyers/their agents. It is best if you can get the seller to sign a written agreement detailing how multiple offers will be handled prior to the situation arising. Ensure that you inform all buyers/their agents that there is a multiple offer situation and it is not an auction, so they should put their best and final offer forward at the presentation of offers. Communicate with all parties about when and where the presentation shall be made to the seller. Buyers/their agents are allowed to present their offers. Do not allow your seller to talk to them. Have the seller write down any questions and pass these questions to you so you can decide the best approach to elicit the information. Then, take the seller to a private area to discuss all the nuances of each offer. Pick one contract

to counter/accept and make the other offers back up contracts. Write down times and dates that all documents are signed and notification is made.

RESPA and Dual Contracts

During the closing, be aware that nice and proper appearing lenders may be committing crimes as you sit at the closing table. RESPA and SC law prohibit referral fees and kickbacks to third parties. The reason they are prohibited is that they drive up the cost to purchase real estate because they take free market choice and competition out of the equation. REALTORS® can accept referral fees from relocation companies due to a statutory RESPA exception for BIC to BIC payments. REALTORS® can give their clients money as a reward for using their services. Lenders cannot give REALTORS® payments/gifts to refer business to the lender.

Another law that may be broken at closing is bank fraud. If you realize the lender wants to increase the contract sales price so that the buyer will not have to bring money to closing, be very wary. The lender is asking you to create dual contracts and is probably defrauding the bank. Remember many lenders are independent contractors loaning the bank or investor's money. The lender at the table may not even know it is fraud. They might think, "this is creative financing." HUD is adding investigators and the penalties for conspiracy to commit bank fraud are severe. One deal closing is not worth your license. You worked hard to get your license. Keep in mind that everyone involved in the transaction may not know as much about real estate as you do. Do not be afraid to casually query lenders, paralegals, attorneys, and other agents about their experience level. Lower experience levels in the transaction mean that you have to be more aware and pay more attention to all of the details involved in a real estate transaction.

Termination of Employment

If you are leaving your Broker for another real estate company or your Broker is going out of business, please refer to your Independent Contractor Agreement which should delineate how commissions and listings will be handled. Basically, the Broker owns the listings. The Broker can release the listings and each MLS has a different release form that will be signed by the Broker and Seller. After the Broker releases the Seller, the Seller is free to list with anyone. If you are concerned about listings and commissions for closings that are about to occur, you may be better off delaying your departure until after the transactions close and you receive your pay.

Disclose, Disclose, Disclose

While dealing with the public, create a paper trail of agreements and disclosures. Several hotline calls involved REALTORS® who did not pay attention to detail in getting agency disclosures, buyer agency agreements, seller listing agreements, seller disclosures, and dual agency forms signed. These oversights can cost you

money or result in fines, remedial educational courses, reprimands, license suspension, probation, and commission checks.

Home inspection, appraisal, and other inspection reports are often proprietary material owned by the creator. If you would like to use one of these reports with a different buyer, please contact the report creator to get permission to use them. Most are happy to oblige unless their ethical rules prevent them or may charge a nominal fee. Inspections are another REALTOR® liability shield. One possible method of protecting yourself is to make a sheet listing all the types of inspections that you can imagine. At the top, write a paragraph that you highly recommend all of these inspections. Then when presenting the form to your client, say that you understand that all the inspections may be cost prohibitive. Have them initial the inspections that they want to have made and sign the bottom. Keep this form in your file to order the inspections and to defend against any future lawsuits.

Out of state sellers

For out of state sellers, please realize that the SC Department of Revenue has made buyers into revenue collection agents. The seller must sign an affidavit of gain on the sale and the buyer is responsible for collecting 7% of these monies and having them sent to the SC Department of Revenue. Generally, the closing attorney performs this task for the buyer. Give your out of state sellers a heads up on this issue. They can talk to their tax accountant to determine their gain on the property. To apply for any refund, the sellers will fill out a SC income tax return just like the rest of us.

Expert advice

Watch what you say to clients in order to avoid problems. Do not be shy about referring clients to experts. Do not try to give tax advice, legal advice, appraisal advice, home inspector advice, etc. Be careful how you talk about neighborhoods, race, religion, sex, etc. The reality is that you may know what is assumed about a community, but the real answer lies in statistics provided by the census bureau and the sheriff's department. Refer clients to these databases in order to avoid making any Fair Housing violations.

Stigmatized Property

Stigmatized property includes property where someone died or was murdered there. Although state law only says that you need disclose upon direct questioning, you should be very wary of just following the letter of the law. You are in the real estate business and your reputation and referral network are important. You may want to point the buyers toward the internet or inspections so they know what they are getting into. Psychological stigma can become undisclosed physical defects very quickly. For instance, a gunshot suicide can leave residual blood (a biohazard) in the carpet padding or sheetrock. This is a liability issue and just following state law may get you into trouble.

Remember, you never HAVE to take a listing. Do not let a seller bully you into violating the law or REALTOR® ethics.

We have received several calls regarding disputes between REALTORS®. Procuring cause, earnest money problems, real estate sales commissions, and miscommunications have been the primary disputes. Please do your best to maintain decorum and professionalism during disputes. If the dispute involves a commission, do not hold up a closing. Allow the closing to proceed and let the attorney know that the commission is in dispute and heading toward mediation/arbitration. The attorney may be able to escrow the money until the dispute is resolved. Try to compromise in order to head off a small issue from becoming a big issue. The next step is to have your BIC talk to the other agent's BIC in an effort to resolve the dispute. If legal information is required, feel free to call SCAR's legal hotline. If the dispute requires you to acquire legal representation, you need to let your BIC know about the problem and get the BIC's attorney involved.