



D.R. Legal News

The Illinois real estate managing broker's trusted source for current legal, management and housing market issues



Happy New Year

By Steve Bochenek, IAR Chief Legal Counsel

With the beginning of the 2012 New Year we celebrate new opportunities that will present themselves in the coming year. Our hope is that your brokerage company will be presented with new opportunities that will help your company prosper in 2012. So what does this have to do with the legal issues we typically discuss here? Plenty, as you will see in the following paragraphs.

In order for your company to be able to take advantage of new opportunities, you need to have people properly licensed under the Real Estate License Act of 2000 working for you. As you read this article, there are less than 85 days left for licensees to take a proficiency exam. The last day for taking the proficiency exam is March 15, 2012. Who needs to and why do you need to take the proficiency exam?

As of April 30, 2012, all of your sponsored licensees holding a salesperson's license **MUST** have transitioned to a broker's license. If they have not, they will not be able to work for your brokerage company and will need to start from scratch to obtain a new license. To transition to the broker's license, a salesperson will either need to have taken the proficiency exam by March 15, 2012 and pass that exam or take a 30-hour transition course and pass the school's exam before April 30, 2012.

Another group that must transition by April 30, 2012 is sole proprietors. If you are a self-sponsored broker, without a legal entity serving as your sponsoring brokerage company, you **MUST** transition to a managing broker license by April 30, 2012. This would be accepted either by taking and passing the proficiency exam by March 15, 2012, or by taking a 45-hour transition course and passing the school's exam before April 30, 2012. If you do not transition to a managing broker license by April 30, 2012, you will not be able to be self-sponsored and will need to be sponsored by a licensed entity or a person holding a managing broker license.

The third category of licensee that **MUST** transition by April 30, 2012 is brokers who are acting as managing brokers for a brokerage company. Remember that all licensed entities must have at least one managing broker or the entity will lose its license. All licensees who are or will be a managing broker as of April 30, 2012 **MUST** transition to a managing broker license. This can be done by successfully completing the proficiency exam by March 15, 2012, or by taking a 45-hour transition course and passing the school's exam by April 30, 2012.

Other licensees may also choose to transition. However, the **MUST**-transition categories are (1) those individuals licensed as a salesperson, (2) self-sponsored brokers (sole proprietors) and (3) licensees who will be managing brokers on May 1, 2012.

Another important point is that you should apply for your new license as soon as possible. In every case you must apply for the new license as of April 30, 2012. This means that you need to submit the application even if you do not have your exam results back. Applications for a new license obtained through the transition process will not be accepted by the Illinois Department of Financial and Professional Regulation (IDFPR) after April 30, 2012. If you submit your application after April 30, 2012, your application will be denied and you will need to start from scratch, i.e. obtain all of the required education before you can take a new licensing exam.

One important item sometimes lost in the transition process is that April 30, 2012, is also the date for all those holding a broker's license or obtaining a broker's license through the transition process (proficiency exam or 30-hour transition course) to renew the broker's license. This means you will need to submit a renewal application with the proper fee and have the required continuing education hours.

How many CE hours will you need? If you had a salesperson's license and took a proficiency exam to transition, you will need 18 hours of CE to renew. If you had a salesperson's license and took the 30-hour course to transition, you will not need any additional CE hours. If you had and continue to have a broker's license (no transition to a new license was needed), you will need 12 hours of CE. All of these hours of CE will need to be completed by April 30, 2012.

Don't wait until it is too late. Make sure your sponsored licensees are transitioning now. You certainly want and need to have the licensees necessary to take advantage of those opportunities your company will have in 2012. ●

www.IARlicenseelaw.org

Find transition charts, CE requirements, IAR Legal Webinars and more at the [Illinois Association of REALTORS® official website](http://www.illinoisrealtor.org) for the Illinois real estate transition process. Also see IDFPR's Online Real Estate Transition Guide, www.idfpr.com/DPR/RE/RETransition.asp.



Legal Case Studies

Insurance company has duty to defend a Seller against Buyers' claim that he made a negligent misrepresentation regarding basement water infiltration. *USAA Casualty Insurance Co. v. McInerney*, 2011 Ill.App. (2nd) 100970 (October 31, 2011). Sellers sold their residence in July 2006. On the Residential Real Property Disclosure Report they indicated that they were "aware of flooding or recurring leakage problems in [the] crawl space of basement." The Sellers supplemented the disclosure and said that during heavy rain slight seepage had occurred but that new landscaping and two drains had provided a remedy to the occurrence, but that on rare occasions slight seepage was experienced. In March 2007 the Buyers experienced significant water infiltration and flooding in the basement home which lead to the Buyers' children experiencing mold-related illnesses. In June 2007, the Buyers sued the Sellers for rescission of the contract or in the alternative for monetary damages. The



Sellers tendered the claim to their insurance company to defend them. The insurance company denied coverage for a variety of reasons including that this was a claim based on a contract (contract liability was excluded from coverage) and that the complaint also alleged intentional misrepresentation (also excluded from the insurance policy). Litigation then ensued between the Sellers and their insurance company over whether the insurance company had a duty to defend the Sellers in the lawsuit filed by the Buyers against the Sellers. The court ruled in favor of the Sellers and said that the insurance company had a duty to defend. Because the complaint against the Sellers alleged negligent misrepresentation, the insurance company had a duty to defend against negligence. Therefore, even though the insurance company believed that the Sellers' actions may have been intentional misrepresentation, the duty to defend is based upon the allegations found in the complaint. The insurance company was held responsible for \$177,000 in defense costs that Sellers had incurred.

Tennessee court rules that real estate firm was not entitled to a commission where property was not shown until the day after the listing agreement expired. *Crye-Leike, Inc. v. Carver*, 2011 WL 2112768 (May 26, 2011). In this case, the real estate firm that had an exclusive right to sell listing agreement, filed a lawsuit asserting it was entitled to a commission. The brokerage firm argued that it had "shown" the property to the purchasers prior to the expiration of the listing agreement (which was August 21, 2007) or in the alternative that the parties to the listing agreement had orally extended the agreement. The listing agreement contained language that if the property was sold to anyone to whom the property was shown within 90 days after termination of the listing agreement, the real estate firm would still be entitled to a 7% commission. The listing agreement also contained language stating that "(A)ny amendments to this agreement shall be made in writing, signed by both parties and shall be attached to this original agreement and all other copies hereof." In this case, the eventual Buyer contacted a different real estate brokerage company to work with him in finding a property. The agent working with the Buyer contacted the listing real estate firm and arranged for a showing. The showing occurred on the morning of August 22, 2007 with the Buyer walking through the property. The Buyer did not make an immediate offer. However, in October of 2007 the Buyer met with the Seller and negotiated a contract. The sale closed on October 22, 2007 for a purchase price of \$460,000. The listing firm claimed that it was entitled to a commission and argued that it had "shown" the property to the Buyer through the multiple listing service and Internet websites available to the public which the Buyer had purportedly seen. The court, however, ruled against the listing firm and ruled that the listing agent had not shown the property to the Buyers under the terms of the listing agreement. To have "shown" the property, the court held, there needed to be more than just multiple listing service activities and the property being available on websites accessible to the public. The court stated that there needed to be more of a physical presence of the listing broker and physical presentation of the property to the Buyers. The court admitted that the language in the listing agreement could possibly have meant that "shown" included activities such as viewing property on a website, but that the language in the listing agreement was not absolutely clear that "shown" could be construed so broadly. The language was ambiguous. When language is ambiguous, it is construed against the person that drafted the language, which in this case was the listing firm. Therefore, the language was construed narrowly and against the listing firm in favor of the Seller who argued that there needed to be



more of a physical connection between the listing agent, the property, and the Buyer in order to meet the definition of “shown.” Additionally the court ruled against the listing firm in its argument about an oral extension of the listing agreement. Because the listing agreement itself said that it had to be amended in writing, and because there was no written amendment, the listing agreement was not extended. Finally, the listing firm argued that it was the procuring cause of the sale. The court rejected this argument. The court ruled that the exclusive right to sell agreement contained all of the terms under which the parties contemplated compensation being paid to the listing broker. This precluded any argument regarding procuring cause because the issue of procuring cause was not covered in the listing agreement. One interesting note from the case came from a judge who agreed with the majority opinion but wrote a short separate concurring opinion expressing the idea that under different facts, or if the listing agreement had been written differently, that the term “shown” could in some cases include on-line presentation of property “given the evolving importance [of] online presentation of property and the fact that properties are sometimes purchased by buyers who never view the property in person . . .”.

Court finds that broker could be liable to Seller for not disclosing that the broker also had a listing agreement in place for the Buyer who had a contract to resell the property.

Estate of Eller v. Bartron, 2011 WL 5357819 November 8, 2011). This case is out of the State of Delaware where the law governing real estate licensees differs from Illinois, however, the writer believes that this case is relevant in Illinois. Real estate agent entered into a listing agreement with Seller. The Seller signed a waiver allowing the real estate agent to act as a dual agent under Delaware law. The agent found a Buyer for the property. At the same time that the contract was being negotiated, the Buyer and agent entered into a listing agreement whereby the agent would act as the listing agent for the Buyer in a quick resale of the property. The Seller and Buyer entered into the contract to sell the property for \$96,000. The Buyer also entered into a contract (prior to closing on the first sale) to resell the same property for \$130,000. The real estate agent never disclosed to the Seller he also was the listing agent for the Buyer and that there was a second contract where Buyer would be reselling the property for a higher purchase price. Both sales were closed on the same day. Real estate agent received a commission as listing agent on both sales. It was not until several months after the closing that the original Seller learned that the property was resold the same day for a higher purchase price and that the same real estate agent was the listing agent on the resale. The original Seller sued the real estate agent for breach of duty that the agent owed to the Seller. Although the trial court found in favor of the real estate agent and granted a motion for directed verdict after trial, on appeal, the Appellate Court held that the Trial Court was in error and that the matter should have gone to the jury to decide whether or not the agent was liable for breach of duties to the Seller. The Appellate Court found that the real estate agent possibly breached his duty owed to the Seller by failing to disclose that: (1) he was serving as listing agent for the Buyer in a resale of the property, and (2) there was going to be an immediate resale of the property. The court found that the Seller’s consent to dual agency did not amount to a consent whereby the Seller could represent the Buyer as Buyer’s listing agent in a separate transaction without that fact being disclosed to the original Seller. Therefore the listing agent could not rely on consent to dual agency to exculpate himself in this situation. The court also stated that even if the higher price in the second sale was justified by some

reason, this still did not alleviate the agent's duty to disclose this to the original Seller. The court in this case stated that the jury could very well find that the real estate agent had put his/her own interest ahead of the client's. Therefore, the case was remanded for a new trial. ●

Play Catch-Up: IAR Legal Webinars

By IAR Legal Hotline Attorney Betsy Urbance

Each month IAR legal counsel presents a one-hour webinar on hot topics of the day. IAR members can download the programs at www.illinoisrealtor.org/legal/webinars. (Note: Member login required for this exclusive IAR member benefit.) **The next IAR Legal Webinar will be held January 17, 2012.**

- **“The End (of Transition) Is Near”** (October 2011) covered issues related to the transition period for getting a broker or managing broker license (if required), the options for transitioning and the continuing education requirements to renew licenses once the transition is complete.
- **“Who Needs to Sign Brokerage Agreements After Civil Unions Transfer on Death Instruments”** (November 2011) covered signatures needed on their brokerage agreements that give brokers the proper authority to market property and earn their commissions. There is significant time spent on the effect of the new statutes regarding civil unions and transfer on death instruments (TODIs).
- **“A Look Back...and Forward”** (December 2011) covered a quick review of legislation, transition, record keeping, cases and what may be on the horizon for 2012, including the new authority of the Illinois Attorney Registration and Disciplinary Commission (ARDC) to investigate and prosecute the unauthorized practice of law. ●

Real Estate Disciplines

Following are recent disciplinary actions taken by the Real Estate Division of the Illinois Department of Financial and Professional Regulation, www.idfpr.com/News/Disciplines/DiscReports.asp

- A licensed real estate leasing agent license was issued with reprimand and fined \$100 for failure to indicate on the application that the licensee had been denied a permanent employee registration card in 2000.
- A real estate broker license was suspended for three months and fined \$1,500 for depositing a \$1,775 payment from a property owner into the licensee's personal account.
- A real estate broker license was placed in refuse to renew status for failure to return \$5,000 in escrow money in a timely manner.
- A real estate broker license was indefinitely suspended for failure to file and/or pay Illinois state income taxes.

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- A real estate broker license was placed on probation for five years and restricted from licensure as managing broker for five years due to a 1985 felony conviction.
- A real estate broker license was reprimanded and fined \$500 for practicing as a real estate broker while the license was in inoperative status.
- A real estate salesperson license was reprimanded and fined \$500 after practicing on an expired license and advertising services under an unregistered name. ●

RVOICE: IAR to Battle Home Rule

By Mike Scobey, Assistant Director - Advocacy and Local Issues

RVOICE has learned that five municipalities in Illinois (Clarendon Hills, Princeton, Elburn, Itasca and Prospect Heights) will seek to become home rule units. This will require a referendum in these five towns in the March 20, 2012 Primary Election. IAR is frequently wary of municipalities that seek to become home rule units because with that status, municipalities have huge powers to regulate housing, real estate transfers and new development. Also, home rule units are exempt from the state law regarding property tax caps. There may be additional municipalities that will seek home rule status in the March primary; municipalities have until the end of January to pass a resolution to put home rule on their ballots. In the coming months, IAR's Local Government Affairs Directors (GADs) will learn more about the motivations of these municipalities' desire to become home rule. Direct mail campaigns, funded by RVOICE, will provide information to REALTORS® and voters on the March referenda. Stay tuned!

> *[RVOICE](#) is the new name of the Illinois Association of REALTORS® Advocacy Program. This program, established in 2006, ensures that the interests of REALTORS® and property owners are well represented before state and local governments throughout Illinois. RVOICE commissions independent research, legal analyses, public opinion surveys and other information to help bring our industry and the rights of private property owners to the forefront of public policy debates. ●*

IAR: A Local Government Resource

By Mike Scobey, Assistant Director - Advocacy and Local Issues

IAR can be a great source of information to local governments. IAR has market information (including the [“Why I Buy” website](#)), data on economic indicators, timely information on state legislation as well as on housing opportunity/economic development. All of this is being shared with local government officials in the form of a new RVOICE-funded newsletter, called [On Common Ground in Illinois](#). IAR's GAD team often find themselves in an adversarial position with local government officials because of the nature of the issues that come up. Many of the municipal proposals involve heavy regulation of real estate transactions. The GADs have tried to change that adversarial role by being a source of helpful

information with the municipalities. This newsletter will help in the effort to get local governments to see REALTORS® as a resource on public policy. For a copy, contact Aimee Bick at abick@iar.org. ●

Cook County Vacant Building Ordinance Passes

By Mike Scobey, Assistant Director - Advocacy and Local Issues

Municipalities are increasingly concerned about the high number of vacant properties in their jurisdictions. IAR has been dealing with this issue in the Illinois General Assembly as well as in cities and villages where there has been an onslaught of proposed ordinances to regulate in this area. The biggest trend has been for municipalities to pass a vacant property registry ordinance. Local officials have asserted their need to know where these properties are, and to have point of contact on each. Recently, Cook County got in on the act. The main motivation at the county was to place greater responsibility on mortgagees in the case of vacant and foreclosed homes. On December 14, the Cook County Board of Commissioners passed a new ordinance which requires properties with vacant buildings to be registered with either the county (if the property is in unincorporated Cook County) or the municipality (if the municipality where the property is located chooses to partner with the county). The ordinance takes effect February 14, 2012. IAR worked with the sponsors of this county proposal to ensure that the registration fee was not too high (the board reduced it from the original \$500 to \$250) and that there could be some flexibility on the type of liability insurance that has to be purchased. [Learn more](#). ●

NEW! "Getting It Sold" Brochure

"Getting It Sold - Your Resource for Staging Curb Appeal and Selling Success!" addresses the seller's side of the changing real estate market with information on what consumers can do to improve their chances of attracting a buyer and get their home in selling shape so that REALTORS® can do their job marketing the property. It includes a do's and don'ts showing checklist and five ways to improve curb appeal. Order FREE brochures in packs of 25 from the [IAR REALTOR® Store](#) (shipping charges apply) or download from RVOICE www.illinoisrealtor.org/advocacy/downloads (member login applies).

Resolve to Be Involved!

2012 is an election year! Make one of your New Year's resolutions getting active in governmental affairs at your local board or with IAR. Call 217-529-2600 or e-mail iaraccess@iar.org to learn more.

- Attend the [March 27 Illinois REALTOR® Lobby Day](#) at the State Capitol
- Managing brokers, sign up for the [Broker Involvement Program](#) for Call to Action alerts automatically sent to your agents

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- Answer the next IAR or NAR Call to Action
- Donate \$20 to <http://www.rpacnow.com/> or set up monthly payments as a Major Investor

Housing Market Forecast

By Economist Geoffrey J.D. Hewings, Ph.D., Director of the University of Illinois Regional Economics Applications Laboratory, www.illinoisrealtor.org/marketstats.

REAL has produced audio and print versions of its forecast for the Illinois housing market in 2012. Below are the links to follow:

- [Illinois Housing Market 2012](#)
- [Jobs+Consumer Confidence=Housing Market Recovery](#)
- [IAR's December/Year End housing data report](#) will be released January 20, 2012.

IAR Calendar

Find event details at www.illinoisrealtor.org/events.

- January 24-26 - IAR Public Policy Meetings, East Peoria
- January 24 - RPAC Auction, East Peoria
- February 6-7 - IAR Leadership Training Academy, Oak Brook
- March 26 - Housing Summit, Springfield
- March 27 - IAR Capitol Conference, Springfield
- March 27-29 - IAR Business Meetings, Springfield
- March 28 - Illinois REALTOR® of the Year Banquet, Springfield
- April 18 - IAR Multicultural Summit - Europe and Russia, location TBA
- May 2-3 - IAR Spring Conference & Expo, Collinsville
- May 14-19 - NAR Midyear Legislative Meetings, Washington, D.C.
- June 13-15 - IAR AE Institute, Bloomington
- August 20-21 - NAR Leadership Summit, Chicago
- October 1-3 - IAR Business Meetings, St. Charles
- October 2-4 - IAR Fall Conference & Expo, St. Charles
- November 7-12 - REALTORS® Conference & Meetings, Orlando

New Schedule! D.R. Legal News

The D.R. Legal News will be published six times a year, delivered by e-mail to the "Designated REALTOR®" member from each member office. Please forward and share!

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