

MONTANA DEPARTMENT OF LABOR & INDUSTRY  
**BOARD OF REALTY REGULATION**  
**NEWSLETTER**

VOLUME 2. ISSUE 3.....OCTOBER 2010

**When Do You Need a Buyer Broker Agreement Signed?**

One of the most asked questions in the real estate industry may be: When do you have to get a buyer broker agreement signed? If you ask 100 agents, you will get 98 different answers. I think we can all agree to the fact that we need to have a signed buyer broker agreement at least by the time negotiations commence. So at what point do negotiations commence? Why don't we see if we can get a better understanding? According to **MCA 37-51-102(15), "Negotiations" means:**

- (a) efforts to act as an intermediary between parties to a real estate transaction;**
- (b) facilitating and participating in contract discussions;**
- (c) completing forms for offers, counteroffers, addendums, and other writings; and**
- (d) presenting offers and counteroffers.**

The moment you set an appointment to see a property, are you not acting as an intermediary between parties to a real estate transaction? If so, you probably have commenced 'negotiations'. Did you get that broker agreement signed? But let's step back. Could you have been a buyer agent even before you set up an appointment to see a property? In order to more precisely determine when we are or are not a buyer agent, let's look at some definitions and requirements of a buyer agent.

**37-51-102. Definitions (7) "Buyer broker agreement" means a written agreement in which a prospective buyer employs a broker to locate real estate of the type and with terms and conditions as designated in the written agreement.**

Of what significance is the phrase "*of the type and with terms and conditions*"? Well, in order to find the right property for a prospective buyer, don't you need to discuss what they are looking for, what similar properties are selling for, the days on the market in your area, and so on? If you are gathering this information, are you not setting yourself up at this point to being employed by the buyer? Hence, could you be considered a buyer broker when you first start asking questions about the buyer's needs? Arguably, 'yes'.

Additionally, MCA 37-51-102(24)(b) says that you are presumed to be a statutory broker unless you have entered into another type of broker agreement such as a buyer broker agreement or a listing agreement. How far can you go as a statutory broker before you are actually engaging in some form of negotiation? According to the above definition of "Negotiation," it's pretty early on. (continued on Page 3)

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# BRR MEMBERS, STAFF & UPDATES

## BOARD OF REALTY REGULATION MEMBERS

\*\*\*

The Governor with Senate confirmation appoints board members. Members serve 4 year terms with a 2-term limit.

\*\*\*

**CINDY WILLIS**  
BOARD CHAIR  
RE INDUSTRY MEMBER  
POLSON, MT  
Term Expires: 5/9/2013

**SHIRLEY MCDERMOTT**  
PUBLIC MEMBER  
LAUREL, MT  
Term Expires: 5/9/2011

**LARRY MILLESS**  
RE INDUSTRY MEMBER  
CORVALLIS, MT  
Term Expires: 5/9/2011

**C.E. "ABE" ABRAMSON**  
RE INDUSTRY MEMBER  
MISSOULA, MT  
Term Expires: 5/9/2011

**CONNIE WARDELL**  
RE INDUSTRY MEMBER  
BILLINGS, MT  
Term Expires: 5/9/2011

**PAT GOODOVER**  
RE INDUSTRY MEMBER  
GREAT FALLS, MT  
Term Expires: 5/9/2012

**STEPHEN HESS**  
PUBLIC MEMBER  
Butte, MT  
Term Expires: 5/9/2014

## HAVE YOU MOVED? MAKE SURE TO GET YOUR CHANGE OF ADDRESS TO US!

[www.realestate.mt.gov](http://www.realestate.mt.gov) :  
Forms: General Forms:  
Change Form

### The Honorable Brian Schweitzer, Governor BOARD ADDRESS & CONTACT INFORMATION

BOARD OF REALTY REGULATION  
301 S. PARK, 4<sup>TH</sup> FLOOR/ PO BOX 200513  
HELENA, MT 59620-0513  
FAX: 406-841-2323  
EMAIL: [dlibsdrre@mt.gov](mailto:dlibsdrre@mt.gov)  
WEBSITE: [www.realestate.mt.gov](http://www.realestate.mt.gov)

#### For real estate licensing questions and information, contact:

Barb McAlmond, Program Manager 406-841-2325  
Becky Zaharko, Licensing Tech. 406-841-2354

#### For information regarding education, contact:

Stacey Fossum, Education Director 406-841-2324

#### For information regarding audits, contact:

Marilyn Willson, Auditor 406-841-2321

#### For information regarding complaints, contact:

Teri Ray, Compliance Specialist 406-841-2336

## When Do You Need a Buyer Broker Agreement Signed? (con't)

(con't from Page 1) Obviously, this could be a gray area and rather risky for all parties. Look at it from the buyer's point of view. Could they perceive from your actions that you are working for them? On December 21, 2009, the Montana Supreme Court stated in the Zuazua case that a licensee cannot show the same property to more than one buyer client at the same time. That could make it rather difficult to effectively help someone find a property.

However, the legislature subsequently amended 37-51-313(4) to provide for an exception to the prohibition announced in the Zuazua case. The language of 313(4) now reads:

### **37-51-313. Duties, duration, and termination of relationship between broker or salesperson and buyer or seller.**

**(4) A buyer agent is obligated to the buyer to: (a) act solely in the best interests of the buyer, except that a buyer agent, after written disclosure to the buyer and with the buyer's written consent, may represent multiple buyers interested in buying the same property or properties similar to the property in which the buyer is interested or show properties in which the buyer is interested to other prospective buyers without breaching any obligation to the buyer;**

Therefore, with a buyer broker agreement that includes the above provision allowing multiple representation, you can represent more than one buyer and you can even show the same property to more than one buyer. However, without the protection of a buyer broker agreement containing the multiple representation language, you will fall under the general rule announced in Zuazua that forbids multiple representation.

MCA 37-51-313(4)(b) requires a buyer agent to obey promptly and efficiently all lawful instructions of the buyer. Have you ever had a buyer tell you one thing yesterday and change their mind today?

Or, have you ever had a buyer request something thinking they had asked for something else? Or have you ever wondered if you understood exactly what the buyer wanted? Or what about this: have you ever had a buyer request something you couldn't do because it was unlawful, maybe against Fair Housing regulations? Without getting a signed buyer broker agreement how do you know what the buyer is expecting you to do so you can "promptly and efficiently obey" all their lawful instructions?

A buyer agent must also safeguard the buyer's confidences. *MCA 37-51-313(4)(d)*. If you are gathering information that needs to be safeguarded, you are definitely laying the groundwork for negotiation.

Lastly, the Administrative Rules of Montana defines unprofessional conduct to include 'acting as a buyer agent without a written buyer broker agreement'. *A.R.M. 24.210.641(5)(a)*.

Yes, it is safe to say that it is unprofessional conduct to act as a buyer agent without a written agreement. It is my opinion that you should get the agreement when you first start talking to a buyer about any property. That would normally mean the first time you talk to a person face to face.

The old saying "If it walks like a duck and talks like a duck, it is a duck" could apply here. If you talk like a buyer's agent and you act like a buyer's agent, then you are – a buyer's agent.

I hope that I have clearly laid out just when buyer broker agency might begin and when you should ask your prospective buyer to become your client and sign a buyer broker agreement. Do it early. It's safer for you AND your client.

With the information given here and if we all adhere to the new generally accepted standards of practice, it should become easier to obtain that buyer broker agreement before you show that first property. Be professional and be safe.

Just one member's opinion. . . Keep on Pickin'! By Larry Milless, Member, Board of Realty Regulation



## Summers vs. Crestview Apartments (cont. from Page 4)

*Whether the Landlord and Tenant Act prohibits a lease agreement from imposing an obligation on the tenant to pay the landlord's attorney fees.* The Crestview lease agreement purported to require the tenant to pay the landlord's attorney fees if the tenant breached the lease. The Landlord and Tenant Act specifically provides that "reasonable attorney fees...may be awarded to the prevailing party notwithstanding an agreement to the contrary." § 70-24-442(1), MCA. The Court determined that the attorney fee terms in the Crestview lease agreement directly violate the Landlord and Tenant Act by binding the tenant to an absolute attorney fee obligation and attempting to avoid a discretionary award of attorney fees to the prevailing party as provided in the Act.

The Court then discussed the enforceability of the Crestview lease agreement. Normally, when a court concludes that a provision of a rental agreement is unlawful, the court may still enforce the remainder of the agreement. However, the court may refuse to enforce the remainder of the agreement in order to avoid an unconscionable result. The Court said that to enforce the Crestview rental agreement even without the unlawful provisions would lead to an unconscionable result. The Court felt that such unlawful provisions as contained in the Crestview lease would continue to appear in leases if the only legal repercussion was to sever such prohibited clauses from the agreement. Landlords would have little incentive to change their practices. Consequently the Court held that the entire lease agreement was unenforceable by Crestview.

The Court also observed that the Landlord and Tenant Act provides that if a party purposefully uses a rental agreement containing provisions known by him to be prohibited, the other party may recover up to three months rent in addition to his actual damages. § 70-24-403(2), MCA. Therefore, said the Court, this tenant may be entitled to damages from Crestview. The Court remanded the matter back to the district court in order to determine the damages, attorney fees and costs owed to the tenant.

In short, the Court held:

A landlord cannot deduct future unpaid rent from the security deposit;

Any provision prohibited by 70-24-202 which is included in a rental agreement is unenforceable. 70-24-403(1), MCA.

A provision for accelerated rent upon breach is unconscionable and unenforceable;

A contractual obligation to bind a tenant to an absolute attorney fee obligation and to attempt to avoid a discretionary award of attorney fees to the prevailing party is in violation of Montana law;

Enforcement of the remainder of the lease agreement even without the unlawful provisions would lead to an unconscionable result because it would tell other landlords that they could keep the unenforceable provision in their agreements. The only consequence would be that a reviewing court would hold that one provision unenforceable. The Court wanted to send a message to all landlords that inclusion of such a provision might lead to loss of the entire agreement. Therefore, the Court concluded that the entire lease agreement is unconscionable and unenforceable.

The Court found that the tenant is the prevailing party entitled to attorney fees and may also be entitled to a penalty of three month's rent.

The Court sent the case back to the district court so that the district court could determine the amount of attorney fees and penalties that the landlord must pay to the tenant.

**DON'T  
FORGET!**



**THE DEADLINE FOR  
RENEWALS IS  
OCTOBER 31, 2010**

## NEW DATABASE, BUT NO NEW FEES

The Department of Labor & Industry, Business Standards Division received approval from the 2009 Legislature to purchase a new licensing and compliance database for the licensing boards in the Division. The Legislature approved up to a \$2.5 million price tag. The current database is about 12 years old and is no longer supported by the State IT Division. The new database isn't a luxury but a necessity.

The Division got busy, outlining business needs, determining similarities and differences among the various licensing board and how to best proceed. The decision was made to go with a COTS (Commercial Off the Shelf) database system that would meet the needs of the Division and the boards. The Board of Realty Regulation added a number of items to the wish list for the new system. First and foremost was the ability to display relationships in the licensee lookup on the website. The Board has heard from both licensees and consumers that this is an important feature that is lacking with the current system. Additionally, one of the goals of the Division is to move to an electronic web based application process. This will streamline the license application process and allow applicants to track the progress of their application.

The Division reviewed proposals from two different companies. Each offered innovative features that would assist in moving the Division's electronic capabilities forward. They selected Accela as the new database vendor.

Of course every advancement comes with a price tag. The system bid came in at \$1.5 million, well below the approved authority from the legislature. The boards were assessed a share of the cost of the database purchase on a per licensee record basis. That formula equitably spread the cost of the database to all boards. The Board of Realty Regulation's share of the purchase price is \$113,000. That expense is being spread out over two years.

The Board weighed their options on how to cover the additional cash expenditure. During this difficult economic climate they did not want to assess additional fees to licensees. They determined they would transfer the cash from the Real Estate Recovery Account as allowed in MCA, 37-51-501 for expenditures made for fiscal year 2010 education programs conducted by the board or paid out through the education grant program. This would help replace the cash that was spent on the database. The Board transferred approximately \$79,000 cash into the State Special Revenue account of the Board from the Real Estate Recovery Account. They intend to do the same in the current fiscal year to help fund the database purchase.

The Board is happy to have an alternative available to them for covering the expense of the new database. The Board works hard to ensure that revenue generated from the licensees is spent in a responsible manner.



# AUDIT ALLSTARS



\*\*\*THE FOLLOWING LICENSEES HAD NO EXCEPTIONS  
ON THEIR RECENT AUDITS\*\*\*\*\*

Mark Sommer – Broker  
American Public Land Exchange  
Missoula, MT

Gary Keaster – Broker  
Belt Valley Properties  
Belt, MT

Laura Scheetz  
Laura Scheetz Brokerage  
Billings, MT

Kerry Simac – Broker  
Kerry Simace Jordan Land  
Management  
Billings, MT

## WAY TO GO!

## RENEWAL REMINDERS

- **All Active Licensees:** Make sure all of your CE for 2010 has been taken and reported before you renew ([www.realestate.mt.gov](http://www.realestate.mt.gov): CE: View Your online CE credits). Please contact the provider/instructor if you don't see a class reported within 20 days after you complete it.
- **All Active Licensees:** If you choose to renew online, you will need to set up an ePass account before doing so. An explanation of ePass and directions for its can be found online at [www.realestate.mt.gov](http://www.realestate.mt.gov): License Info: License Renewal Information: ePass Information.
- **Supervising Brokers:** If you want to maintain your ability to supervise salespeople, please make sure you have taken 4 hours of designated supervising broker CE (designated courses will have the words "Supervising Broker" in their title).
- **Inactive Licensees:** Remember that you still must renew your license (and pay the renewal fee) by October 31, 2010 or it will expire. Late renewal fees do apply to inactive license renewals.

# DISCIPLINARY ACTION (January-April 2010)

\*\*\*\*All disciplinary action is now reported in the newsletter\*\*\*\*

## **Mary Fuller Tripard #2010-041-RRE**

On October 19, 2009, a complaint was filed against Ms. Fuller Tripard alleging that she misappropriated a tenant's security deposit at her previous place of employment and that she also used forms in her new business identical to those created by her former employer's company. The screening panel of the Board of Realty Regulation ordered a formal Notice of Proposed Board Action and Opportunity for Hearing to be served on Ms. Tripard for violation of MCA 37-1-316(13) and MCA 37-1-316(18).

Ms. Tripard failed to request a hearing and the department entered her default. The adjudication panel of the board ordered that licensee's property manager license #774 is REVOKED. No request for a new license application will be considered by the Board for a period of five years from the date the Final Order is signed in this matter.

## **Sandra Torgerson-Gould #2009-075-RRE**

On October 31, 2008, Ms. Torgerson-Gould submitted her Broker Renewal Application in which she answered "Yes" to the question asking whether she had completed the required 12 hours of continuing education. Information received by the Board revealed that licensee did not complete six of her 2008 continuing education credits until December 30, 2008. The screening panel of the Board of Realty Regulation ordered a formal Notice of Proposed Board Action and Opportunity for Hearing to be served on Ms. Torgerson-Gould for violation of MCA 37-51-321(q), ARM 24.210.641(4), (5)(g) and (i).

Ms. Torgerson-Gould failed to request a hearing and the department entered her default. The adjudication panel of the board ordered that licensee be fined \$200.00 and publically censured for the above violations.

## **Vana L Taylor #2008-014-RRE**

In 2008, a complaint was filed against Ms. Vana L. Taylor alleging that she had failed to disclose to her client adverse information regarding a septic system on the property he purchased. The screening panel of the Board of Realty Regulation ordered a formal Notice of Proposed Board Action and Opportunity for Hearing to be served on Ms. Taylor For violation of MCA 37-1-316(18), MCA 37-51-102(2)(a)(i)(ii), MCA 37-51-102(6), MCA 37-51-102(6), MCA 37-51-313(4)(a), (b), (c), (d), (e), (f) and (g)

Ms. Taylor failed to request a hearing and the department entered her default. The adjudication panel of the board ordered that Ms. Taylor shall complete an additional four hours of approved continuing education in the area of forms and disclosures. Proof of completion must be submitted to the Department. Ms. Taylor completed the additional four hours of education prior to the meeting of the adjudication panel.

**BE SURE TO CHECK THE  
BOARD OF REALTY  
REGULATION'S WEBSITE  
([www.realestate.mt.gov](http://www.realestate.mt.gov))  
AT LEAST ONCE A  
MONTH TO KEEP UP ON:**

- **RULE CHANGES**
- **UPDATED FORMS**
- **INFORMATION AND AGENDAS  
FOR UPCOMING BOARD  
MEETINGS**

# FTC's Consumer Alert

\*\*\*Reprinted with permission from ARELLO Boundaries Newsletter\*\*\*

In a recent consumer alert entitled "[Forensic Mortgage Loan Audit Scams: A New Twist on Foreclosure Fraud Relief](#)", the FTC explains that forensic mortgage loan audits are the latest foreclosure rescue scams to target financially distressed homeowners. In exchange for an upfront fee, so-called "forensic loan auditors", "mortgage loan auditors" or "foreclosure prevention auditors", backed by "forensic attorneys", offer to review mortgage loan documents for lender compliance with state and federal mortgage lending laws. Consumers are told that the audit results can be used to avoid foreclosure, accelerate the loan modification process, reduce loan principal or even cancel a loan.

According to the FTC, nothing could be further from the truth:

- There is no evidence that forensic loan audits will result in loan modifications or any other foreclosure relief, even if conducted by licensed, legitimate and trained auditors, mortgage professionals or lawyers.
- Some federal laws allow mortgagor lawsuits based on loan document errors but the remedies do not include modification of loans simply to make the payments more affordable.
- If a homeowner cancels a loan, the home will be lost and the debt will still be owned.

## BRR CALENDAR

### OCTOBER

**11<sup>th</sup>** : State Holiday  
**14-15<sup>th</sup>** : Final Rookie class in Helena  
**26<sup>th</sup>**:  
9:00am Rules Committee (Open)  
1:00pm Screening Panel (Closed)  
2:00pm Education Committee (Open)  
**27<sup>th</sup>** :  
9:00 Full Board Meeting (Open)  
**31<sup>st</sup>**: **RENEWAL DEADLINE**

### NOVEMBER

**2<sup>nd</sup>** : State Holiday  
**11<sup>th</sup>** : State Holiday  
**25<sup>th</sup>**: Thanksgiving (State Holiday)



### DECEMBER

**9<sup>th</sup>** :  
9:00am Rules Committee (Open)  
1:00pm Screening Panel (Closed)  
2:00pm Education Committee (Open)  
**10<sup>th</sup>** :  
9:00 Full Board Meeting (Open)  
**24<sup>th</sup>**: State Holiday  
**31<sup>st</sup>**: State Holiday