

The Great Inspection Gap of 2002: And the Band Played On

By J. Robert Eckley

Haven't we all at some time in our lives tried to dance with a new partner who seems to be cha-cha-ing to our fox trot? The embarrassment alone is often more memorable than the pain of stubbed toes and bruised shins. Yet if the partner is one just met at the local disco and never seen again, the embarrassment will often fade within hours. Great black ominous clouds loom for the parties, however, when the partner is one's new spouse and it's the wedding dance.

A parallel can be found in the "new dance partners" forged legislatively between home inspectors and the real estate construction and sales industry last year. Phasing in during 2002 and effectively 2003, home inspectors will be required to be registered before the Arizona Board of Technical Registration ("BOTR"), and as Registrants will be held accountable to generate a competent and thorough inspection, but now with a more narrowly defined technical scope than the helter-skelter parameters of past and present. At the same time, there have been legal, policy and transactional form developments in the real estate and home building industry which wrongly assume that BOTR regulation will expand the scope of inspection. Add to this mix the BOTR's higher standard of ethics--translated into some very scrupulous inspection reports that will be required by law to call a spade exactly that--and when this mis-match starts stumbling on the dance floor in 2002, it will definitely be more painful than just the cha-cha butting squarely into the fox trot and a lot more embarrassing than a mere mis-marriage. The gap between what is expected and what can and will be delivered is a wholesale prescription for domestic violence.

To minimize the blood-letting, it is informative to identify the "expectation gaps" and suggest what one can do about them.

Gap One: Due Diligence: Surprise! There Still is No "Get Out of Jail Free Card" in a Home Inspection.

Commissioner's Rule R4-28-1101 B requires the licensee to disclose any known condition in the property or the deal that could tend to effect a party's decision to engage in the transaction or to pay or accept a certain consideration. The issue generating controversy has always been the licensee's duty to discover these issues needing disclosure. Aside from the licensure prohibition against falling below the professional standards of care or the failure to observe for "red flags" contained in ARS 32-2153 A and elsewhere, until this year the Commissioner always opined in his Substantive Policy Statement Number 2 (defining the application of R4-28-1101 B, et al) that the licensee was on the hook to verify pertinent information and that obtaining a professional inspection was "one" of the ways to do that, but not necessarily as a "get out of jail free card" for the licensee. The licensee could still be held accountable if he failed to use reasonable means to discovery discoverable matters.

This was prior to BOTR regulation of inspectors. When they became regulated, both the Commissioner and the real estate industry wrongly assumed that the inspectors would now be entirely on the hook by law and they changed Substantive Policy Statement Number 2 to provide, in essence, that referral to a home inspector for all of the inspection described on the AAR purchase forms or otherwise completely discharged the licensee's discovery duty, even

when the inspector's report turns out to be wrong. Aside from running against a huge body of common law that continues to hold the licensee liable for a wide panorama of skill in detecting property defects, the problem is, of course, that the inspector will not, by BOTR law and regulation, render such an inspection and so the referral for that purpose is not only moot, not only negligent but probably, if the client or customer is sent thinking that us what he is getting when he is not, licensee fraud.

The fact is that inspectors will by law inspect for less than 50% of what is contained in the AAR inspection clause. There is even an argument that to inspect for more is going outside of their lawful Registration, but this effect will only become more clear as time goes on. Leave it this way: The inspection will NOT be the "get out of jail free card" that it has been touted to be in recent industry publications.

Gap Two: Ethics: Another Surprise! It's Not Going to Be Cards with "The Usual Dealer and the Usual Deck."

The Ethics Gap continues from the above Due Diligence Gap. Just as the construction and sales lobby wrongly assumes that the BOTR-regulated inspector will inspect for everything and take the full hit of any defect oversight, it also wrongly assumes that the conduct of an inspection business will, otherwise, be "as usual." This is a serious miscalculation. Along with BOTR registration will not only come limitations of technical scope, but elevated and quite specific ethical standards. One of the most significant ethical changes will be the commandment for "inspector autonomy." No more incestuous "backing-scratching" between builders, licensees and inspectors (most of which the inspectors, themselves, have long complained of). The inspectors will be strictly prohibited from conflicts of interest (real or in appearance) which would impair the autonomy of their opinions.

That means the following will likely be unacceptable inspector trade practices: Fees or kickbacks for referrals, discounts or "gratuities" for referrals, fees for in-house advertising, any affinity between inspector and other transactional players by mutual business interest, blood or marriage, the inspector offering or being required to co-insure the builder whose property he is inspecting or the real estate office who is referring him. All of these are major conflicts of interest. None of them, since they are flatly prohibited, are simply matters requiring disclosure under RESPA.

These are ethical matters coming from the mandates adopted by the BOTR. If the inspector cannot by state law violate them then for the inspector to violate them or for a contractor or real estate licensee to ask or direct the inspector to violate the state law would, aside from the BOTR ramifications, be a Consumer Fraud under ARS Chapter 44 at least and possibly, if done repetitively, even an act of Civil Racketeering under ARS Chapter 13. It would most definitely violate both construction and real estate licensure laws which prohibit the builder and real estate salesperson from violating or adding in the violation of any state laws.

Gap Three: Surprise, Again! There's a Lot More!

There are a number of other current real estate practices that simply will not be acceptable (presuming they ever were) when the registration comes into full swing. For example: Under the

ethical standard for client confidentiality, when the inspector reserves confidentiality in his report, his report cannot be circulated to others (inclusive of later potential buyers) by any licensee without the inspector's and his client's express written permission. Confidentiality has BOTR, i.e. legal, support. Another example: Since the BOTR scope is much narrower than that in the SPDS, the inspection report cannot, even where approved by the inspector and his client, be honestly held out by the licensee as a substitute for an SPDS. It would exceed BOTR technical guidelines and probably constitute "professional real estate services" requiring the inspector to have a real estate license under ARS Chapter 32. It would certainly expose the real estate licensee to liability for using it in this improper way. There are, of course, many more examples

Stretcher-Bearers Are Standing By

The fact is that the music has clearly started in Arizona with inspector registration and at this point it is so contemporary, perhaps even revolutionary, that the dancers have yet to get down it's step. It even appears they are still arguing whether it's even a song. The potential for domestic disharmony looms.

It may be too early in 2001 to break out the iodine and bandages for this, but the safe bet from the over- and under-stepping observed on the dance floor is that medical triage will, indeed, be needed as the fights inevitably break out. As always, the din of unmet expectations and the subsequent calamity and rampage will sound a "911 Concerto" for the lawyers.

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J. Robert Eckley is a real estate, construction and inspection attorney, Realtor, member of the American Society of Testing & Materials E50 Committee ("ASHI"), the national organization which sets real estate environmental standards, and General Counsel for the American Society of Home Inspectors - Arizona Chapter ("ASHI"), the largest and most influential home inspector's organization in the nation. He can be reached locally at (602) 952-1177.