

INTEGRITY REVISITED

By J. Robert Eckley

Everyone has seen that cartoon: Wiley Coyote, in his zeal to accomplish his goal, chases the Roadrunner over a cliff.....and doesn't fall! At least not until he suddenly notices that he has a mile of thin air beneath him! The obvious message: "If you don't heed the adverse circumstances piling up against you, you need not fear them." Or, stated another way, "you are only wrong if caught." I'm bothered by that state of mind since I am seeing evidence that it may be lurking near the top of our local real estate industry of late. Evidence of it virtually leaps out of the current controversy in the local industry over the balance between a licensee's duty of confidentiality to a client and a licensee's full disclosure duties to all parties to avoid aiding a misrepresentation.

The Wiley Coyotes at various helms--starting with some members of Forms Committees and some members of larger brokerages and industry associations now (and consistently) before the Courts--have single-mindedly moved in directions having the single objective of ultimately immunizing any form of licensee malpractice, regardless of how egregious, from civil suit. Hence, the purchase agreements and related documents are crafted to exonerate the licensee from any responsibility to exercise any care for the protection of anyone in the transaction, fiduciary or otherwise. In fact, the purchase forms dupe the seller and buyer into actually agreeing to indemnify the licensee from his own malpractice against them (now there's some fiduciary cheek)! Lately, the Wiley Coyotes are all allied on what is (after slaking away all of the noble rhetoric about "serving the public") a retrograde return to the caveat emptor doctrine (known in the vernacular as the "screw 'em") side of real estate law, a principle last popular during the Jurassic period of real estate fraud about 20 years ago. Witness in further point the infamous *Lombardo v. Albu* case pending in the state Supreme Court. More about that in a minute.

On the other side of *Lombardo* is the Roadrunner that Wiley Coyote really seeks to eat, after (with the spotlight now shown upon him) all of the innocent and drooling protestations to the contrary. The Roadrunner is all of those consumers who have been injured and will be injured when licensees fail to disclose or help to conceal material adversities about the property or deal, no matter under what excuse, what escape clause or legal subterfuge. The Roadrunner is the moms and pops staking their savings on the honesty of their licensee's encouragement and the quality of his or her judgment-calls. He is the licensee's clients disserved when the licensee leads them into a lawsuit and he is the licensee on the other side of the deal who takes the fall when he is not alerted by his colleagues to defects in the property or the deal.

Time now to review briefly the watershed *Lombardo v. Albu* case that is currently pending in the state Supreme Court. The gravamen of this case is whether or not a licensee's violation of the Commissioner's Rules--particularly the duty to be fundamentally fair to all and to disclose material facts to all parties--creates grounds for a private cause of action against the licensee in a civil court. There is a line of cases and several statutes that suggest it does. These have been met with other arguments that it does not.

The more informative drama in this collision is not just the misery (which is considerable and shameful) the licensees in this case caused the seller and buyer by non-disclosure (and hundreds like it yet to be heard) nor with the esoteric legal arguments that are being raised on each side

(whether the egg should be opened at the little end or the big), but just who on which side is wearing the big ears and baring the shiny teeth and what, at bottom, is the real, bare-bones, practical objective of the industry after cleaving through all the puffing, public posturing and legalese. Well, the fact is: Our industry is not there arguing for the crushed seller and buyer. It is instead arguing that the agent practices that destroyed them and the licensees who had (but would not use) the power to save them from this disaster, ought not be subject to civil responsible for it in damages. Short and sweet. Nothing more "Olympian" than that.

And not even happy with that rather shocking purpose, the industry goes further. It contends in sum that client confidentiality outweighs the duty to disclose adverse information. It's the "devil made me do it" defense and the industry is asking for a medal of valor for it! And since the upshot of this even more bizarre argument is that one side or the other of every deal always gets burned by it, it means in practice that the industry sees two publics out there, not one: 50% of it is client. And the 50% is.... prey!

So after all the noble talk about the serving and protecting the public, promoting honest and knowledgeable commerce in real property, setting above all self-interest the freedom and sanctity of property ownership, after the legalese, the precedents and the esoteric arguments reaching ever higher to heaven, all one really sees behind the smoke and mirrors is the hell both the sellers and buyers have been put through by the licensees in Lombardo case. A hell that disclosure would have prevented. So here they writhe: Victims heaved upon the cross of tragedy and needless sacrifice by the noble nails of "confidentiality." And dead all the same.

Blow away the B.S. and the question comes to this: What is the real level of the community integrity the leaders of the local industry are willing to put on the line; what is the real level of honesty the titans are ready to muster for the public; and, most importantly of all, what sense of responsibility is our industry really willing to invest in return for the magnificent public trust and honor placed upon us with the grant of a real estate license conferred by the people-- all the people (not just the 50% who are clients but the entire property-buying public, all 100%)--of the state of Arizona? Are all of our halcyon platitudes about honesty and integrity true? Or are they a cloak for a genuinely anti-social "me, first," "screw 'em" devilry of the most pernicious kind? Ears and teeth swaddled beneath a rousing Madison Avenue hype?

Since Lombardo, I have been taking polls in the real estate licensure classes I teach, asking the people from the trenches, the rank and file in our industry who attend them--not the local industry titans--what THEY think of hiding material issues behind the cloak of "client confidentiality." They haven't cared what the legal arguments were, whether the Commissioner's Rules should grant private causes of action or even what an "Albu" was. They lean on the NAR Code of Ethics and their own sense of American fair play. It was usually unanimous: They think that truth and disclosure should be paramount and vowed they would practice that way, no matter with what dogs various members of the "industry leadership" chose to sleep.

Fairness and honesty to all in real estate transactions. Personal integrity as a point of pride and professional commitment. Clients and customers who return to you and send referrals because they get a fair deal from you every time. No desire and, most importantly, no need to skulk for a consumer ambush behind "release" and "indemnity" clauses. What is so terribly wrong with this

legal, ethical and economic picture? Ask your colleagues. Ask the public. It's shocking that there is any debate on it, at all. Worse and more telling: At the very top, those who side with the Roadrunners are routinely called "industry mavericks." Wow! When honesty and integrity has become a "dirty problem" and when no one even feels comfortable endorsing these virtues openly, the "industry fix" is truly in, the leadership harbors some true scoundrels and we deserve every rebuke, every lawsuit, every revocation and every sanction we get!

Tellingly, the point that is missed in this almost malicious mind-set is found finally by returning to my Wiley Coyote analogy. One needs to take heed that, sooner or later and no matter how oblivious one is to the risks, the law of physics--truth--ALWAYS finally takes over. Wiley Coyote ALWAYS falls. He ALWAYS gets hurt. He ALWAYS, inevitably, in the end....**LOSES BIG.**

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