

**THE LOMBARDO CASE ROUND II:  
AND NOW IT'S AAR V. THE REAL ESTATE COMMISSIONER!  
by: J. Robert Eckley**

There is an ugly political fight shaping up lately in the Arizona professional real estate community and it is one that ought to be watched closely and understood thoroughly by the rest of us, since the side which is ultimately designated as "winner" or "loser" in this one is going to have a lot of influence upon how we ply our trade for the next decade or beyond. Until recently, the battle has masqueraded itself as one of those innocent "family quarrels" which often erupt in our business. The kind where, after everyone vents their frustration, each still remains friends afterwards. That's not the present case: On the inside of this one, it is open warfare and a swift, merciless shot in the back of the head for anyone so unfortunate as to fall prisoner of the other.

In the right corner we have various leaders of the state and local organized Realtor community. The decision-makers whom we, as Realtors, have elected to office or employed as executives and assigned to look after our objectives, including the enforcement of the higher Realtor professional standards to which we have sworn. In the left corner we have Jerry Holt, the state Real Estate Commissioner, the person charged by the state with keeping and enforcing the professional laws and regulations governing our industry, especially the majority of licensees who are members of the Realtor community. Believing themselves "on the same page," these players have in the past joined efforts for worthy legal causes and enjoyed some mutual victories. That era of cooperation seems to have silently died about two years ago--but more openly within the last six months as the "war behind the scenes" has finally, inevitably, burst into the media.

During the last six months, Realtor spokespersons have gone to print complaining that the Commissioner will not prosecute the true "bad guys" in the industry and has used that contention to support "stacking" the Commissioner's Advisory Board with more industry (as opposed to consumer) members. The Commissioner has reported that he is not "soft" on the "bad guys" and that what is really irking the Realtor leadership is simply his refusal to become, without due process, an executioner for this lobby's political outcasts, something a Commissioner obviously cannot do. Some pretty rough jabs both ways. Yet it cranks up even more from there.

Now from the Arizona Court of Appeals comes the final round for the pugilists in this struggle: *Lombardo v. Albu*, et al.. In a nutshell, this case holds, inter alia, that a key Commissioner's rule, R4-28-1101 (B), the rule that requires the licensee's disclosure to even a non-client party of known material matters which may affect the transaction, the decision to enter it, or the ability of a party to perform it does not generate a civil cause of action for suit against any licensee who violates it. This completely reverses former law (where the disclosure duty did not vary between client and non-client) and there is significant question whether it is correct and certainly whether it is a desirable consumer policy. But there is the latest and greatest battlefield: AAR says the Lombardo holding is meritorious; the Commissioner says that it is not. It's on its way to the Arizona Supreme Court with each side to file an amicus brief. The loser in this tug-of-war for leadership has surely met it's political Waterloo...and each side knows it.

In addition to joining the notion that the Rules were only for licensure enforcement and not grounds for civil suit, AAR has argued in part that this particular Rule was put there originally to

protect unrepresented buyers during the days when the selling agent was a subagent of the seller and not a buyer's representative--a bygone day and a fear AAR suggests is now moot because of the widespread extent of buyer agency. It concludes in a wider remark that non-client parties no longer need to be protected, since they each tend to have their own agent to do that for them.

The Commissioner disputes that and contends that AAR's argument, if it prevails, guts a critical prong of the policing power of the Rules--as a basis for sanctions for adverse licensee conduct not only in those few instances when the Commissioner happens to catch the culprit, but in those far more numerous incidents coming to the attention only of the civil courts. He insists that the Rule was put there to make it crystal clear in the Age of Light that all licensees in the transaction owe honesty to the consumer and even to the licensee on the other side of the deal over and above hard-core client advocacy. He holds that to do less would be a retreat to that malevolent professional environment of yesteryear in which real estate predation gave Arizona a bad name which even today lingers across the nation. The Commissioner concludes that the Rules were intended as standards of care with a power to regulate conduct in all areas including civil practice and not just grounds for licensure action. He swears that the Department has directed the Attorney General to file an amicus brief directly opposing Lombardo ...and AAR. (Strangely, as of this writing, that brief has yet to come and time for it wanes.)

The cannonade hasn't stopped there. The Commissioner stated categorically in a recent monthly ADRE Bulletin that if anyone with a license takes the present holding of the Lombardo case seriously in his or her practice, they would be "stepping on the business end of a rake" with the Department. Nothing left to the imagination there! In immediate response, AAR retorted in its monthly newsletter (in substance) that the Commissioner is not only shrilly off-base, but now ranting insultingly. Pretty certain where the line in the sand is there, too!

Now for the bombshell: Unlike the periodic skirmishes of yesteryear where the Realtor organization and its affiliated professionals marched to various confrontations in mass and in tandem, it is likely that in this Realtor lobby confrontation with an officer of the state of Arizona most of the real estate instructors, most of the more real estate lawyers, most of the consumer lobbies and a major portion of the Realtor rank and file are probably, either directly or functionally....on the *Commissioner's* side! That's what I said.

And it's not surprising: A generation of licensees, mostly Realtors, have been trained by their Board, their instructors and their industry lawyers that open and bilateral disclosure of genuinely material adversities is their duty, their liability and a matter of their sworn professional integrity. It is predictable that they would side with disclosure of adverse matters to the seller and buyer no matter what side of the deal they are working, including disclosure to the licensee on the other side of the deal who will get crucified by his own client if he isn't told about something material of which the other side is solely aware from its own transactional vantage point. The majority do not support pitching foul balls to the public; they almost uniformly abhor "set-ups" against hapless colleagues...which they fully realize would in one deal or another inevitably and finally be **them**. Law, duty and honor, yes. Self-preservation, absolutely.

There is a legitimate question as to whether the people in the trenches on both sides of this battle are being polled before the political din of their respective leaderships was unleashed. In point of

fact, most are afraid to even step forward with their viewpoints for fear of drawing fire from one faction or the other. They carry their opinions and render their support very discretely. In a blind vote, each camp would probably be surprised at the number and identity of defectors in its own ranks.

So after months of firefights, ambushes and hits-and-runs, each side--the AAR leadership and the Commissioner--has now tossed the final gauntlet...at each other. The Lombardo battle will be fought and probably has to be at this late point. And on this battlefield more than a mere case loss will be suffered by the loser.

It can be openly hoped that the fight is predicated on the right reasons. It must be for a clarion call to integrity between members of the real estate profession and, overall, to the good of the general public which all licensees are duty-bound to serve. It has to be to establish the "high road" or it should not be fought as enemies between these traditional allies. This is a watershed in which all those commitments to "higher values" we hear coming from both corners will be tested. A point where the explanation for war rather than unity between them is owed all of us.

Yet as the cataclysm is poised, it has a terrible risk of becoming precisely the opposite. As the threats between the corners become more shrill one detects a whiff of that notorious political objective expressed by the Cheshire Cat to Alice in Lewis Carrol's Alice in Wonderland:

*"Whenever I say a word, it means just what I want it to mean," said the Cat.*

*"The question is," said Alice, "whether you can make a word mean so many different things."*

*"No," said the Cat. "The question is who is to be **master** , that is all."*

I am reminded of the excerpt above only because--with all due respect to the litigants and the Court's amicus--there is a pressing and entirely legitimate argument in all of this that the Commissioner and AAR should have been on the same side in opposing Lombardo as a retreat from that " *..first, do no harm to **anyone** . .*" principle we have all been carefully educated by our own industry for the last 20 years to hold as sacred in this business. You know. ***T hat "full disclosure" promise printed in every single exclusive listing agreement, AAR agency notice and transactional form?***

One wonders. One truly wonders what is really afoot here.

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