



Brown, Hay & Stephens, LLP
Legal Counsel

MEMORANDUM

To: Members and Affiliate Members – Capital Area REALTORS®

From: J. Patrick Joyce, Jr.

Re: Prohibited Practices

Date: July 28, 2016

A letter dated June 17, 2016, from both the President and the Chief Executive Officer of Capital Area REALTORS® (CAR) to CAR Members and Affiliate Members, reminded such Members that CAR forms and contracts are copyrighted and that any Member who provides forms and contracts in For Sale By Owner (FSBO) transactions where the professional services of a REALTOR® are not being utilized are violating CAR's copyright.

The letter also reminded CAR's Members that CAR forms and contracts are to be used only in the context of providing brokerage services, and that CAR Members that provide a CAR form or contract to a party in a real estate transaction without providing brokerage service is in violation of CAR's terms of use. The letter further reminded Affiliate Members that they are not authorized to use CAR forms and contracts, or to provide CAR forms or contracts to customers to use. The letter advised that the unlawful use or copying of CAR forms and contracts constitutes copyright infringement in violation of the United States copyright laws. The consequences of copyright infringement include statutory damages between \$750.00 and \$30,000.00 per work, and damages up to \$150,000.00 per work for willful infringement.

CAR is also concerned about the potential unauthorized practice of law by its Members and Affiliate Members. Illinois law in regard to brokers engaging in unauthorized practice of law in real estate transactions has been clear since the time that the Illinois Supreme Court rendered the decision in the 1966 case of *Chicago Bar Ass'n v. Quinlan & Tyson, Inc.* That case, along with subsequent cases, holds that real estate brokers may prepare preliminary contracts or purchase offers which require only filling in blanks with factual information. Thus, CAR REALTOR® Members with input from seller or buyer can complete CAR forms without engaging in the unauthorized practice of law by filling in factual information in blanks in CAR's approved real estate contract forms and addenda on behalf of clients buying or selling real estate. If a form real estate contract or addenda does not meet the needs of the client, CAR Members should refer such client to an attorney.

Agreements between a real estate broker and a client, such as a listing agreement, may be modified by the broker since such action would be considered a *pro se* exception the *Quinlan & Tyson* decision because that form is being filled out for the broker's own benefit since the broker is a party to the listing agreement.

A real estate broker might be accused of practicing law without a license if he or she drafts substantive language into a real estate form or addendum, drafts deeds, mortgages or other legal instruments, fills in blanks on deeds, mortgages or other legal instruments, or inserts information in a real estate contract form or addendum that consists of more than factual information, or if a broker tailors a form or addendum to fit a client's need for a particular transaction or modifies a form in some way other than inserting factual information in blanks. If a CAR Member has a question as to whether an individual action constitutes the unauthorized practice of law, such real estate broker should consult an attorney.

In regard to an Affiliate Member, such as a lender, a lender should never prepare a contract for a buyer or a seller since that action would be deemed to be practicing law. A lender certainly can prepare legal documents likes notes and mortgages for the benefit of their financial institution since that is a transaction in which the lender preparer is a party and falls under the *pro se* exception to the prohibition on the unauthorized practice of law.

Furthermore, an Affiliate Member should be cognizant of the Real Estate License Act of 2000 which prohibits individuals from performing real estate brokerage services unless such individual is licensed under the Act. Thus, lenders should not provide real estate contracts to their customers and/or assist their customers in preparing such documents. An Affiliate Member can only perform such services if it is acting on behalf of a lender that owns the real estate involved in a particular transaction. An Affiliate Member assisting sellers or buyers by preparing contract documents or other legal documents, and using CAR forms, not only violate CAR's copyrights, but also would be engaged in the unauthorized practice of law and would be violating the Real Estate License Act of 2000.

Under the Illinois Attorney Act, 705 ILCS 205/1 et seq., violations for unauthorized practice of law include, but are not limited to, appropriate equitable relief, a civil penalty of up to \$5,000.00 and any actual damages. Also, a court could hold an individual engaging in the unlicensed practice of law in contempt of court which could result in jail time. Under the Real Estate License Act of 2000, 225 ILCS 454/20-10, any person who "practices, offers to practice or holds one self out to practice as a managing broker, broker, or leasing agent without being licensed, can be subject to a civil penalty in an amount to not exceed \$25,000.00, in addition to any other penalty provided by law."

CAR understands that the vast majority of its Members and Affiliate Members adhere to the law, do not engage in the unauthorized practice of law or violate the Real Estate License Act of 2000, but CAR's Members and Affiliates need to be cognizant of the law in regard to these matters. If a situation arises in which a Member or Affiliate is unsure as to how to proceed, he or she should consult with an attorney.