

## **ADRE INVESTIGATIONS**

One of my practice areas is representing real estate agents and developers (whom I refer to collectively as “licensees” below) before the Arizona Department of Real Estate. This article discusses some “dos and don’ts” in responding to a Department investigation.

### **1. Get a copy of the entire complaint before responding.**

While the Department can, and in some cases does, start investigations on its own initiative, in most cases the Department opens an investigation only after receiving a complaint from a third party. Upon receiving the complaint, the Department will direct the licensee to provide a response, following which the Department may conduct additional inquiries based upon the facts presented.

In some cases a licensee will be asked to provide an explanation to the Department regarding a transaction or series of transactions without receiving a copy of the complaint that was filed with the Department. Or in some cases the licensee will receive part of the complaint without all of the attachments.

In all cases, one should obtain a full and complete copy of the complaint, and any supporting documents or information that was submitted to the Department, before providing your written response. There is no reason to provide a response regarding an incident or transaction(s) until you have complete knowledge as to the basis of the underlying complaint.

Depending upon the administration in place, the Department may or may not take the position that the complaint is confidential, citing Commissioner’s Rule R4-28-1303 (“The Department shall ensure that information and documents in open audits and investigations remain confidential.”) However, the Arizona statutes contain the following provision, which controls:

### **41-1010. Complaints; public record**

Notwithstanding any other law, a person shall disclose the person's name during the course of reporting an alleged violation of law or rule. During the course of an investigation or enforcement action, the name of the complainant shall be a public record unless the affected agency determines that the release of the complainant's name may result in substantial harm to any person or to the public health or safety.

A.R.S. § 41-1010.

## **2. Obtain and review all relevant documents.**

Almost any incident or transaction that is the subject of an ADRE complaint will involve a large number of documents – such as contracts, listings, correspondence, emails, escrow and title files, and real estate brokerage transaction files. Before providing a response or statement to the Department in an investigation, a licensee should be familiar with the contents of those documents. In addition, sometimes certain documents of which the licensee was not previously aware (such as documents from escrow files or emails between third parties) may contain additional information that demonstrates that the underlying complaint or complainant is making a frivolous or unfounded complaint. Lastly, regardless, the Department typically will direct a licensee to provide copies of any and all relevant documents concerning the matter of an investigation. There are few things more irritating to a Department investigator than a licensee who is unable (or apparently unwilling) to produce documents and records.

## **3. Understand and consider all applicable laws and regulations.**

Licensees are not only bound by a large volume of case law, real estate statutes, and administrative regulations (the Commissioner's Rules), they are also legally obligated to familiarize themselves and keep themselves up to date on those laws. However, real estate agents, like lawyers, are only human, and it is an entirely different matter to be knowledgeable regarding how Arizona courts have applied such rules, how the Department has interpreted or enforced them in the past, and to objectively analyze how the available facts in an investigation apply against the legal framework.

When I provide a response to the Department on behalf of a client, in most cases I will include a separate section identifying the legal issues and the particular laws, statutes, and rules that I believe are relevant. However, even in certain cases where it is deemed preferable to submit a response that sticks to the facts without elaborate legal discussions, it is absolutely imperative that the licensee or her attorney fully understands the legal framework in order to appreciate which facts and evidence should be emphasized (and perhaps which facts and evidence may be potentially of concern).

## **4. Provide your response in writing, preferably through a legal representative.**

The initial response to the Department should be in writing – not an informal interview (see below). The written response should include a narrative statement of the facts, and reference and attach the documents to which the Department can refer to confirm those facts.

The response should also (in most cases) include a “legal discussion” section that identifies the legal issues and relevant laws/statutes/rules. While the Department investigators and enforcement and compliance officers are of course quite familiar with the statutes and regulations they enforce, it is nevertheless helpful to provide such a discussion to further explain to the investigator, and the enforcement compliance section when it later receives the file, why

certain facts or documents should be seen as significant (or insignificant, as the case may be), based upon the applicable legal framework.

Having a legal representative prepare and submit the response on your behalf is absolutely recommended. Yes, attorneys cost money. The benefit, however, is having a third-party representative present the facts and applicable laws to the Department in an objective and professional manner. Most licensees are going to be unhappy about being the subject of a complaint, and understandably so. As a result they will have problems being objective and effectively presenting a coherent response to the Department investigator. Worse, they will make arguments based upon assumptions that turn out to be unsupported or misguided. I can't tell you the heartburn I have experienced representing clients who came to me after submitting their response to the Department without my involvement, or worse, after having been interviewed by the Department without sufficient preparation (see below).

**5. Interviews? Only if the Department requires it, and only after consulting with legal counsel.**

No, I'm not suggesting that a licensee should refuse to comply with a Department directive to appear for an interview. I am saying, however, that a licensee should consult with legal counsel before attending an interview, and while in some cases an interview may be appropriate, it should occur only after the licensee (and her legal counsel) fully understand the purpose of the interview, and have completed Steps 1 through 4 above.

A licensee who provides an early-stage interview without being fully knowledgeable and prepared is not helping herself or the Department investigator. A licensee who has "nothing to hide" but has an incomplete recollection without doing all of her "homework" beforehand will, at best, waste the investigator's time; and at worst, create the impression in the investigator's mind that the licensee is being evasive or untruthful.

There is another factor in participating in in-person interviews that must be appreciated. Even where a licensee is fully prepared to provide an accurate and helpful interview to the Department investigator, as I noted above, even a completely "innocent" licensee is going to be unhappy about being under investigation, and is probably irritated (to say the least) that someone filed a complaint against her. Even in the course of a completely professional and cordial interview by a Department investigator, the licensee's unhappiness may come across as subtly antagonistic to the Department or the investigator (who is only trying to do her job efficiently and professionally). Efficient questioning by the investigator may be perceived as "interrogation." As a result, it is crucial that a licensee prepare herself emotionally for the interview process, with the goal of enabling the investigator to complete the interview with maximum efficiency and minimal drama or antagonism.

**6. It won't be over quick.**

In some cases a Department investigation will be completed very quickly, as in cases where the Department reviews potential unlicensed activity by a licensee who renewed late, or where a licensee has submitted a "10-day disclosure." In most other cases, however, the

investigations take a little time. The licensee should not expect to see a resolution of the matter quickly, and it is not productive to ask the investigator for updates or estimations of “how long this will take.”