

Memo

To: Ken Joiner
From: James A. Bowditch, Boone Karlberg P.C., Missoula, Montana
Date: February 27, 2016
Subject: Form Changes from September 2015 Forms Subcommittee Meeting

The Forms Subcommittee of the Montana Association of REALTORS® met in September 2015. A description of new forms and changes to existing forms that were approved at the meeting are described below.

NEW FORMS

- I. Inspection Notice (Buyer's Withdrawal) – A new form has been created and added to the MAR Forms database entitled “Inspection Notice (Buyer's Withdrawal).” This form is to be used in situations where a buyer desires to withdraw an inspection notice the buyer has provided to a seller but that the seller has not accepted. Pursuant to the terms of the existing Inspection Notice, a buyer has the right to terminate the transaction or propose remedies as specified in the Inspection Notice that the buyer desires to negotiate. If the buyer elects the latter, an agreement must be reached between the buyer and seller by the applicable deadline set forth in the buy-sell agreement. If no such agreement is reached by the applicable deadline, pursuant to the terms of the buy-sell agreement the transaction terminates. In situations where the seller has not responded or has rejected the buyer's proposal to renegotiate, the Inspection Notice (Buyer's Withdrawal) form allows a buyer to withdraw the buyer's proposal to renegotiate thereby allowing the transaction to proceed instead of being terminated due to the buyer and seller not reaching an agreement concerning the buyer's proposal(s) set forth in the Inspection Notice.

FORM AMENDMENTS – REAL ESTATE

- I. Contingency for Sale of Buyer's Property – Amended the checkbox on line 17-18 to clarify that if this box is checked, the deadline for the contingency is the closing of the transaction between the buyer and seller for the seller's property and not the closing of the buyer's property that serves as the basis for the contingency.
- II. Owner's Property Disclosure Statement
 - a. Added a new cover page, entitled Property Disclosure Statement, to the Owner's Property Disclosure Statement. While pages 2-6 of the Owner's Property Disclosure Statement form is to be completed by the seller (and only the seller) the new first page is to be filled out by a seller's agent.

This form was created based on a recent Montana Supreme Court case concerning the interpretation of MCA § 37-51-313(3)(b) which states that a seller agent is obligated “disclose to a buyer or the buyer agent when the seller agent has no personal knowledge of the veracity of information regarding adverse

material facts that concern the property.” In that case counsel for the buyer argued that the seller agent failed to fulfill the seller agent’s duties because the seller agent had not disclosed to the buyer that the seller agent had no knowledge as to whether information the seller provided to the buyers about repair to a water leak and subsequent mold remediation was accurate.

In most situations a seller agent will not have personal knowledge concerning either (i) adverse material facts (“AMFs”) that concern the property or (ii) whether the information provided by the seller about AMFs is or is not accurate. The primary purpose of the new form is to allow a seller agent to disclose the lack of this knowledge by merely signing the form. However, if the seller agent does have personal knowledge (i) about AMFs that concern the property or (ii) that the information provided by the seller about AMFs is not accurate then the seller agent must disclose this personal knowledge on lines 26-31 and, if necessary, an attached addendum.

In reviewing and completing this new first page of the Owner’s Property Disclosure Form seller agents should remember that Montana law requires that a seller agent disclose “any adverse material facts that concern the property and that are known to the seller agent.” This obligation exists regardless of the seller’s opinions – a seller agent must therefore make an independent analysis of whether any information known to the seller agent falls within the definition of an AMF. In doing so, consistent with Montana law the seller agent should ask “if I were the buyer, is the information significant enough that it would affect my decision whether to buy the property.” If this answer is anything other than an unqualified no and if the seller has not disclosed said AMFS in the Owner’s Property Disclosure from, seller agents should disclose the information known to the seller agent by using the new form.

In general, the following are the three most likely situations a seller agent will encounter concerning this new cover page:

- A seller agent does not have personal knowledge about any AMFs and does not know whether the information provided by the seller about AMFs is or is not accurate. In this situation the seller agent would simply sign and date the form without completing lines 26-31.
- A seller agent does have personal knowledge that something stated by the seller about AMFs is not accurate. In this situation the seller agent should either convince the seller to correct the inaccurate information (which is preferred) or the seller agent should state on lines 26-31 that the seller agent has knowledge that information provided by the seller about AMFs is not accurate.
- A seller agent does have personal knowledge about an AMF that the seller has not disclosed. In this situation the seller agent should attempt to convince the seller to disclose information about the AMF (which is preferred) or the seller agent should disclose on lines 26-31 the AMF of which the seller agent has personal knowledge.

Procedurally, the Owner's Disclosure Form should probably be completed as follows:

- First, the seller agent should provide the form to the seller for the seller to complete pages 2-6 (but not the new first page);
 - Second, when the seller agent receives the completed and signed disclosure form back from the seller, the seller agent should then complete lines 26-31, if applicable, as described above, and sign and date the new first page disclosure;
 - Third, the seller agent should provide the seller with a copy of the entire owner's disclosure document, including the first page (with lines 26-31 completed, if applicable) signed and dated by the seller agent;
 - Fourth, when contacted by a buyer or buyer agent the seller agent should provide the full form including the first page (with lines 26-31 completed, if applicable) signed by the seller agent, to the buyer agent (or buyer if dual agency); and
 - Finally, the buyer then signs and dates the first page of the form and then completes, signs and dates the last page of the form. The buyer or buyer agent should then return a copy of the entire form (including the new first page) completed and signed by the buyer to the seller agent (who should provide a copy to the seller).
- b. Revised METHAMPHETAMINE section at lines 123-128 to be consistent with other forms in MAR directory. This revision did not change anything from a substantive standpoint – it was merely done to maintain consistency among all MAR forms.
- c. The “has/has not” checkboxes at lines 123-146 have been bolded to make them more obvious.

III. Owner's Property Disclosure Statement (Land)

- a. Also added a new cover page, entitled Property Disclosure Statement, to the Owner's Property Disclosure Statement (Land) form. See above for explanation.
- b. Added two new checkboxes at lines 18 and 19 for seller to be able to disclose if seller has never been to the property or if the seller has not been to the property since a certain date.

IV. Relationships/Consents in Real Estate Transactions – Shortened the initial line at the bottom of page 1.

V. Cooperating Broker Compensation Agreement – Added Listing Brokerage Form and Cooperating Brokerage Firm at lines 27-28.

VI. Commission Agreement

- a. Bolded the “has/has not” disclosure checkboxes in form to make them more obvious.
- b. Revised Seller Representations concerning Methamphetamine at lines 86-92 to be consistent with other forms in MAR directory.

VII. Statutory Broker Compensation Agreement

- a. Bolded the “has/has not” disclosure checkboxes in form to make them more obvious.
- b. Revised Seller Representations concerning Methamphetamine at lines 93-98 to be consistent with other forms in MAR directory.
- c. Inserted line for brokerage firm at line 128-129.

VIII. Listing Agreements – Residential, Commercial (Sell) and Commercial (Lease)

- a. Bolded the “has/has not” disclosure checkboxes in all three forms to make them more obvious.
- b. Revised sections concerning Methamphetamine to be consistent with other forms in MAR directory.
 - i. Residential: Lines 60-65
 - ii. Commercial (Sell): Lines 65-70
 - iii. Commercial (Lease): Lines 55-60

IX. Listing Agreement – Farm & Ranch

- a. Modified Government Programs section (lines 77-84) to update to corrected list of existing programs.
- b. Bolded the “has/has not” disclosure checkboxes in form to make them more obvious.
- c. Revised section concerning Methamphetamine at lines 113-118 to be consistent with other forms in MAR directory.

X. Buy-Sell Agreement (Commercial) – Revised Addenda section checkbox on line 369 from “Sale of Buyer’s Property” to “Contingency for Sale of Buyer’s Property.”

XI. Buy-Sell Agreement (Land)

- a. Inserted new language at lines 282-286 concerning the Agricultural Foreign Investment Disclosure Act of 1978 (AFIDA).
- b. Revised Addenda section checkbox on line 330 from “Sale of Buyer’s Property” to “Contingency for Sale of Buyer’s Property.”

XII. Buy-Sell Agreement (Farm & Ranch)

- a. Modified Government Programs section (lines 49-56) to update to corrected list of existing programs.
- b. Deleted Tax Deferred Exchange section, formerly at lines 111-121. Removed language was duplicative since 1031 language is found at lines 295-301.
- c. Inserted new language at lines 384-388 concerning the Agricultural Foreign Investment Disclosure Act of 1978 (AFIDA).
- d. Revised Addenda section checkbox on line 435 from “Sale of Buyer’s Property” to “Contingency for Sale of Buyer’s Property.”

XIII. Buy-Sell Agreements – Residential and New Construction

- a. Certain modifications were made in an attempt to comply with the new TRID regulations. Specific changes made are as follows:
 - i. Inserted language to allow for an extension of closing due to delays attributable to governmental regulations.
 1. Residential: Line 58
 2. New Construction: Lines 43-45
 - ii. Revised Loan Application
 1. Residential: Lines 98-102.
 2. New Construction: Lines 98-103.
 - iii. Revised Relationship Confirmation section to add additional information concerning what is needed for the new lender’s Closing Disclosure. Specifically, agents should note that in addition to their name, brokerage firm and who they are representing, both the buyer agent and seller agent will now need to insert into a buy-sell agreement the following information:
 1. The agent’s Montana license number;
 2. The agent’s phone number and email address; and
 3. The phone number and office or mailing address of the agent’s brokerage company.

Residential: Lines 427-451
New Construction: Lines 497-521

- b. Revised Addenda section checkbox on line 422 from “Sale of Buyer’s Property” to “Contingency for Sale of Buyer’s Property.”
 - i. Residential: Line 422
 - ii. New Construction: Line 473

FORM AMENDMENTS – PROPERTY MANAGEMENT

I. Agreement to Manage Property

- a. Added two additional blank lines at lines 11 and 12 to extend length of blank for legal description of property.
- b. Deleted existing lines 12-18 and language contained therein concerning additional properties to be managed. Based on this change additional sheets will be necessary if there are multiple properties to be managed that are owned by the same owner.
- c. Revised section entitled METHAMPHETAMINE on lines 24-29 to be consistent with other forms in MAR directory. This revision did not change anything from a substantive standpoint – it was merely done to maintain consistency among all MAR forms.
- d. Bolded the “has/has not” checkboxes in form to make them more obvious.
- e. Added a new section at line 140 stating that Manager assumes no liability for personal property left on the property by the landlord/owner.
- f. Deleted lines to insert social security number and taxpayer ID at end of NOTICES section.

II. Lead Based Paint Disclosure

- a. Added lines and language in subsection (b) to allow a lessor to itemize the reports and records provided to a lessee.
- b. Lengthened blank lines following subsections (c) and (d) to make room for initials by multiple parties.
- c. Changed signature lines to add another Lessee line, remove Owner signature line, and have only one Lessor signature at bottom of page.

III. Notice of Cleaning Required for Return of Security Deposit

- a. Inserted new lines 9 and 10 to insert to what address of tenant notice was mailed.
- b. Added five more blank lines under “Cleaning” section so that this section now has twelve blank lines.
- c. Deleted language concerning damage that was done to premises and boxes as to whether damage must be repaired since damage to rental premises is already addressed in the Statement of Deductions from the Security Deposit form.

IV. Residential Lease-Rental Agreement

- a. Lengthened blank line for Manager at line 5-6 so that it covers two full lines to allow full name of property management companies.
- b. Added a property manager licensee as a potential owner of the property at line 20.
- c. Deleted language formerly located after line 23 where licensee could also represent the tenant. Situations where a property manager was representing both the landlord and the tenant were so infrequent the MAR Property Management Subcommittee felt this language was not necessary.
- d. Deleted from description of Premises at lines 25-27 information concerning the number of bedrooms, bathrooms, smoke detectors, fire extinguishers and carbon monoxide detectors.
- e. Revised the section concerning the term of the lease at lines 33-35 and payments terms at lines 59-67 to make them clearer.
- f. Modified late charge section at lines 72-78 to allow for either a one-time late fee charge **or** daily late fee charges – the former language was “and” allowing both one-time and daily late charges and the MAR Property Management Subcommittee felt it was unlikely a court would uphold such a provision.
- g. Added “Garbage” as a checkbox on line 85 so that garbage is a utility that a tenant can be obligated to obtain and pay for if the applicable box is checked.
- h. Deleted “Sprinkler” and related checkbox on line 111 as a third-party service that a tenant is required to pay for.
- i. Deleted “Present condition of Premises”, “Statement of Intent to Rent”, and “Option to Purchase” from “RELATED DOCUMENTS” section (lines 134-141) and inserted a checkbox for “ Copy of Montana Abandoned Personal Property Statute.”

- j. Insert a new section at line 161 stating that smoking is prohibited on or about the premises.
 - k. Inserted a new sentence at the end of the Rent section (lines 160-160) and the Late Charges section (lines 171-176) stating that “[a]ll payments made by Tenant shall be applied first to any fees or charges owing and any remaining balance shall be applied to rent owing.”
 - l. Amended last sentence of Maintenance, Repairs, or Alterations section (lines 225-231) adding “fill nail holes, repair, remodel” as things a tenant may not do. Also removed language allowing the property manager to provide written consent to any such items.
 - m. Added language to Insurance section (lines 239-246) requiring the tenant to name the property manager as an additional insured on any renter’s insurance tenant may obtain and to provide the property manager proof of such.
 - n. Deleted language 337-339 requiring the tenant to have the carpets professionally cleaned and inserted blank lines so property manager could specify how carpet cleaning is to be accomplished.
- V. Statement of Deductions from the Security Deposit
- a. Inserted new lines 9 and 10 to insert to what address of tenant notice was mailed.
 - b. Lengthened blank lines preceding “=\$” and shortened blank line following “=\$” on lines 21-32 and 37-48 to allow more room for description of damages and cleaning charges, and added five more blank lines in both sections.
 - c. Deleted section for Other Charges that formerly followed the Cleaning Charges section.