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# 10 Tips to Stay Out of the Courtroom in 2011



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## Respond to Attorney General Inquiry

If a complaint is filed against you by the Attorney General's office, please respond to the alleged violation even if you believe it is a frivolous complaint. Also, if charges are filed, you will have an opportunity to resolve and possibly obtain a dismissal of the claim at a settlement conference.

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## Keep a Good File

\*Document, Document, Document

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Make Sure All Forms  
Are Completed

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# Don't Fill Out The Seller Disclosure Form

\*Only the seller should  
complete this form.

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# Do Insist On An Inspection

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# Don't Hesitate to "Fire" the Problem Client

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Diary Deadlines  
\*Don't miss them!

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Don't Give Legal Advice

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# Be Vigilant About Earnest Money

\*Get it in the trust account in a timely  
fashion!

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Get E&O Insurance

\*It pays off in the long run!

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## Red Flags of Mortgage Fraud

Be wary of mortgage fraud—everything must be on the HUD-1. Don't get dragged into a fraudulent transaction. The Indiana Bar Association's Lawyer Referral Service can assist homeowners with questions on mortgage fraud "pro bono" at (317)-269-2000.

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## Indiana Foreclosure Prevention Network

Refer homeowners to the Indiana Foreclosure Prevention Network at 1-877-438-4673 for free loan modification assistance from trained housing counselors. Don't attempt to do loan modification yourself or you may be violating "foreclosure consultant" laws in Indiana.

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## Educate

\*Educate yourself and your agents to prevent exposure to legal claims. Use common sense and do unto others as you would have them do unto you!

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# New Legal Cases Affecting Realtors®

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**SELLER'S DISCLOSURE FORM CASES**

KENT & ELIZABETH HIZER v. JAMES & REBECCA HOLT

No. 71A03-1002-

PL-127, 2010 WL 4228446, In. Ct. App.,

October 27, 2010

WAYNE & SUSAN VANDERWIER v. JOSHUA & STEPHANIE BAKER

No. 45A03-1003-CC-129, In. Ct. App., November 15, 2010

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KENT & ELIZABETH HIZER v. JAMES & REBECCA HOLT

Sellers represented to Buyers that prior prospective purchasers had the home inspected, and the inspection revealed only that shut-off valves were needed on the water fixtures.

In reliance on the Seller's representation, Buyers only had an inspection of the septic system and the outside portion of the well. Despite several requests from Buyer's agent, Sellers failed to complete and sign a Seller's Disclosure until they were at the closing table. When they did complete the form, the Sellers stated the plumbing and well were not defective, there were no hazardous conditions on the property, including no mold, and that there were no moisture and/or water problems in the basement. Sellers disclosed only that the microwave oven and ice maker in the refrigerator did not work on the Seller's Disclosure. When Buyers specifically asked Sellers about a stain on a rug in the basement, the Sellers said one of their children had spilled a drink in that location.

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KENT & ELIZABETH HIZER v. JAMES & REBECCA HOLT (cont.)

After the closing, the Buyers discovered several problems including a faulty irrigation system, inoperable water holding tank, presence of extensive mold in the attic, and a crack

in the basement wall through which water was leaking into the house. A finished wall had been constructed over the crack, and it appeared that someone had attempted to patch the crack.

The Buyers contacted someone concerning mold remediation and, coincidentally, the same person had inspected the home for the prior prospective purchasers in the sale that did not close. It was discovered then that the Sellers had been made aware of the mold and other issues prior to selling the home to the Buyers.

The Buyers sued the Sellers. The trial court originally granted the Sellers' dispositive motion and dismissed the case. Buyers appealed, and in this recent ruling from the Court of Appeals, the Court specifically overturned a prior precedent, and found in favor of the Buyers.

( overturned Dickerson v. Strand, 904 N.E.2d 711, Ind. Ct. App., 2009).

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WAYNE & SUSAN VANDERWIER V. JOSHUA & STEPHANIE BAKER  
No. 45A03-1003-CC-129, In. Ct. App., November 15, 2010

The Sellers made fraudulent misrepresentations on the Seller Disclosure form by indicating minor seepage in the garage and trying to cover up wood rot from past water damage by boxes, etc. A few months after the buyers moved in, there was a heavy rain which resulted in standing water accumulating in the basement, laundry room, bathroom and office. The homeowners knew the statements they made on this form were false, and the evidence presented at trial proved fraudulent misrepresentation. This was a pure case of fraud on the Disclosure form which resulted in liability of damages against the homeowners.

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WAYNE & SUSAN VANDERWIER V. JOSHUA & STEPHANIE BAKER (cont.)  
No. 45A03-1003-CC-129, In. Ct. App., November 15, 2010

There is good discussion by the Court in this case concerning the language in the Seller's Disclosure Statute as quoted below:

"...we could not conceive of any reason that the General Assembly would require sellers to complete the Sales Disclosure Form if sellers cannot be held liable for fraudulently misrepresenting the condition of the property on the form. Importantly, sellers "must complete and sign a disclosure form and submit the form to the prospective buyer before an offer for the sale of the residential real estate is accepted." I.C. § 32-21-5-10. We believe that the General Assembly intended for a prospective buyer to rely on the sellers' disclosure of known defects on the property when making his or her offer to purchase the property. Furthermore, Section 32-21-5-11 provides that sellers are not liable for errors, inaccuracies or omissions on the Sales Disclosure Form under certain, limited circumstances, including a lack of actual knowledge of the defect. **By implication, therefore, the General Assembly contemplated that sellers can be held liable for errors, inaccuracies, or omissions on the Sales Disclosure Form if the seller has actual knowledge of the defect.** "

For all of these reasons, we conclude that I.C. 32-21-5 abrogates any interpretation of the common law that might allow sellers to make written misrepresentations with impunity regarding the items that must be disclosed to the buyer on the Seller's Disclosure Form pursuant to Section 32-21-5-7(1).

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**ARBITRATION**

DROSCHA v. SHEPHERD

931 N.E.2d 882, In. Ct. App., August 3, 2010.

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In Droscha v. Shepherd, the Indiana Court of Appeals extended judicial and quasi-judicial immunity to arbitrators and their sponsors, or local associations. Writing for the appellate panel, Judge Cale Bradford observed that, “While judicial and/or quasi-judicial immunity in Indiana has not previously been extended to arbitrators and their sponsors, we see no reason why it should not be”.

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“Arbitral immunity” is a doctrine which allows a party functioning in a quasi-judicial role, such as an organization conducting arbitrations, to receive protection from lawsuits.

The doctrine is intended to help preserve the independence of the arbitrators, so that they do not need to be worried about lawsuits when making decisions. The doctrine extends to those who perform tasks integral to the quasi-judicial process.

This Indiana case is the first instance in which a court has extended quasi-judicial immunity to an arbitration panel of a REALTOR® Association. It is a wonderful precedent that NAR and IAR hope will be followed by other courts in other jurisdictions in the future!

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# 2011 Code of Ethics Changes

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## Article 10 revised

REALTORS® shall not deny equal professional services to any person for reasons of race, color, religion, sex, handicap, familial status, national origin, **or sexual orientation**. REALTORS® shall not be parties to any plan or agreement to discriminate against a person or persons on the basis of race, color, religion, sex, handicap, familial status, or national origin, **or sexual orientation**.

REALTORS®, in their real estate employment practices, shall not discriminate against any person or persons on the basis of race, color, religion, sex, handicap, familial status, national origin, **or sexual orientation**.  
(Amended 1/11)

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**Standard of Practice 10-3 revised**

REALTORS® shall not print, display or circulate any statement or advertisement with respect to selling or renting of a property that indicates any preference, limitations or discrimination based on race, color, religion, sex, handicap, familial status, national origin, **or sexual orientation. (Amended 1/11)**

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## Standard of Practice 12-5 revised

REALTORS® shall not advertise nor permit any person employed by or affiliated with them to advertise real estate services or listed property in any medium (e.g., electronically, print, radio, television, etc.) without disclosing the name of that REALTOR®'s firm in a reasonable and readily apparent manner. **This Standard of Practice acknowledges that disclosing the name of the firm may not be practical in electronic displays of limited information (e.g., "thumbnails", text messages, "tweets", etc.). Such displays are exempt from the disclosure requirement established in this Standard of Practice but only when linked to a display that includes all required disclosures. (Amended 1/11)**

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## Standard of Practice 3-10 new

The duty to cooperate established in Article 3 relates to the obligation to share information on listed property, and to make property available to other brokers for showing to prospective purchasers when it is in the best interests of the seller.

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## 2011 IAR Residential Forms Revisions

Please review the 2011 IAR Forms Changes Powerpoint  
[http://www.indianarealtors.com/Uploads/ZipForms/  
2011.Forms.Changes.pdf](http://www.indianarealtors.com/Uploads/ZipForms/2011.Forms.Changes.pdf)

describing the minimum changes made to the Purchase Agreement, Listing Contract, Amendment to Listing Contract, and FSBO/Builder Compensation Agreement forms. Most revisions were clarifications of existing language, and any new language added, other than for consistency or clarification, was merely the acknowledgement of the NAR change in the Code of Ethics which prohibits members from participating in discrimination based on sexual orientation.

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## New IAR Forms

### 1. Licensee's Disclosure of Interest

(to help in disclosing familial relationship with buyer or financial interest in property pursuant to Article 4 of the Code of Ethics and 876 IAC 1-1-37).

### 2. Broker Compensation Agreement

(to establish or alter co-op commission, i.e., when brokers are not members of the same MLS/BLC ).

### 3. Multiple Offer Notification

(to disclose the existence of multiple offers to buyers).

### 4. Shared Listing Agreement

(Addendum to Listing Contract)  
(when 2 brokerages agree to co-list the same property).

{\*These new forms are optional, not mandatory.}

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IAR LEGAL wishes you a  
safe and claim-free year in  
2011!

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