

ABENDROTH & RUSSELL, P.C.

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Welcome

The third year of our quarterly newsletter begins with the announcement of several new hires.

Joseph F. Wallace has joined the firm as an associate attorney. Joe received his B.A. from the University of Minnesota and is a 2006 graduate of Drake Law School. He provides support in all areas of our practice.

Monica has joined the firm as the legal assistant for Mark Abendroth and David Russell. She has a law degree from Drake University and so is uniquely suited to assisting the managing partners.

Andrea has joined the accounting department. She is also our backup receptionist, so you may hear her voice if you call over the lunch hour.

Finally, Crystal has joined the firm as a telephone collector. She brings several years of experience to our collection department. ♦

MARK U. ABENDROTH
DAVID B. RUSSELL
ROSS F. BARNETT

CHRISTOPHER L. LOW
MATTHEW F. HRUBETZ
JOSEPH F. WALLACE

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SELLERS' DISCLOSURE

Legal Obligations When Selling Real Estate

Most residential real estate sales are accomplished smoothly. However, sometimes the closing of the transaction is just the beginning of problems for the seller. Once buyers move in and become familiar with the house, they often find defects that they didn't notice when they walked through the house.

No house is perfect, but when new buyers find water damage, a cracked foundation, or a leaking basement, their first instinct is often to blame the seller. The leading cause of post-sale disputes and litigation between the parties is alleged non-disclosure of defects by the seller.

Any agreement for the sale of real estate must be in writing. The statute of limitations for suits brought for the breach of a written contract is ten years. This means that the seller has a decade of potential liability for failing to disclose material defects when selling property. Thankfully, most disputes can be avoided if proper disclosures are made.

The leading cause of post-sale disputes and litigation is alleged non-disclosure of defects.

Iowa Code Chapter 558A requires the seller of real estate to complete a written disclosure statement. This is true even if the seller is attempting to sell the property in "as-is" condition or if the seller may not be familiar with the house (such as a sale from an estate).

In Iowa, a seller has an obligation to disclose known material facts about defects or other adverse conditions. A material fact is anything that could affect the sale price or influence a buyer's decision to purchase a home. This is a very subjective standard that is weighted in

Sellers' Disclosure

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favor of the buyer, so err on the side of full disclosure.

The seller has a decade of potential liability for failing to disclose material defects when selling property.

The seller also has an obligation to conduct a reasonable investigation when completing the disclosure statement – you can't just mark "unknown" because you didn't bother to look around the house. In the event of litigation, sellers will be held responsible for defects that they knew about and didn't disclose or which they *should have known about* if they had conducted a reasonable investigation. Take the time to inspect the property.

In addition to state law, Federal law requires sellers of homes built before 1978 to disclose any known lead-based paint unless the property has previously been certified as being lead-based-paint free.

Homebuyers are becoming increasingly concerned about environmental hazards and toxic materials in houses, especially in older homes. Common toxic substances include lead paint, lead pipes, asbestos insulation, asbestos ceilings, formaldehyde insulation and glues, carbon monoxide, and radon gases. More buyers are requesting such tests, and may expect the seller to correct the problem or offer a lower price to cover the cost of removing toxic substances.

Full disclosure of a home's history is always the right thing to do. A fact that is material to one buyer may not concern another. If you are wondering whether something should be disclosed, consult your realtor or a real estate attorney. Ask yourself if you would want to have the information if you were the buyer. If the answer is "yes", then disclose. ♦

HOW LONG SHOULD I KEEP RECORDS?

Spring cleaning should include your documents and records, too. It is important to retain key information for use in the future. Sometimes, there are valid legal reasons to keep instruments. For example, there is a ten-year statute of limitations for suits based on written contracts, so you should keep contracts for ten years. But there are other papers and records which you can dispose of on a regular basis.

Here is a general guideline for retaining records:

1 Year

- Routine business correspondence
- Duplicate deposit slips
- Receipts
- Records of charitable donations

3 Years

- Appointment books
- General business correspondence
- Employee personnel records (after termination)
- Insurance policies (after expiration of term)

5 Years

- Invoices to customers
- Invoices from vendors
- Loan documents
- Purchase orders

7 Years

- Accident reports and claims (settled)
- Accounts payable / accounts receivable schedules
- Bank statements
- Brokerage statements
- Employee expense reports
- Employee payroll records
- Safety records

Title

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Legal Latin

caveat emptor – "Let the buyer beware." Maxim which applies to real estate transactions where the onus is on the purchaser to satisfy himself as to the suitability and condition of the property. The seller is not responsible for the condition of the property and, unless specifically asked, does not generally have an obligation to reveal problems to the purchaser. To a great extent, statutory requirements for disclosure obviate the precept of *caveat emptor*

maxim – principle, doctrine

onus – burden, responsibility

obviate – do away with, preclude

precept – principle, guide



ASK JACK

Jack is a Labrador-Great Dane mix who is happy to answer your questions about legal issues.

Q: What are guardianships and conservatorships?

A: Guardianships and conservatorships are court-established and court-supervised entities that allow somebody else (often a spouse or other family member) to take control of another person's affairs. In general, the person (called the Ward), must be adjudicated to be incompetent.

Q: What is incompetency?

A: The law says that when someone's decision-making ability is so impaired that the person is unable to care for themselves, they are incompetent. This includes inability to make decisions regarding personal safety or to provide themselves with necessities (food, clothing, and shelter). A person who is a minor (under the age of 18) is also considered legally incompetent, since a minor can't legally enter into contracts or manage his or her own financial affairs.

Q: What is the difference between a guardianship and a conservatorship?

In a conservatorship, a conservator is appointed by the court to have control of the **property** of a Ward. In a guardianship, a guardian is appointed by the court to have control over the **person** of the Ward. A conservatorship deals with the person's financial decisions. A guardianship deals with non-financial decisions such as where the Ward lives and what type of medical care the Ward receives.

Q: Why would a guardianship or conservatorship be established?

A: Often, a person's health deteriorates to the point where they need help caring for themselves. It is too common for a person to develop dementia or a similar degenerative disease which impairs the ability to make good decisions about health or finances. If a person has not planned for their incapacity (such as executing a durable power of attorney), a guardianship or conservatorship must be established to legally assist the Ward.

Q: Do both a guardianship and conservatorship have to be established?

A: Not necessarily. It is possible for a Ward to need one, but not the other. For example, a minor who inherits money may live with parents and therefore need a conservatorship but not a guardianship. A person who is incompetent but who has no assets may need a guardianship, but not a conservatorship.

Q: What are the on-going legal duties and responsibilities as guardian?

A: In general, the guardian must know about the Ward's physical and mental status, be familiar with the Ward's needs, and be available to carry out all of the powers granted by the court. In order to carry out these responsibilities, the guardian should be actively involved in planning for services, ensuring that the services that are provided meet the needs of the Ward, and making informed decisions by weighing the risks and benefits to the Ward and acting in the Ward's best interest.

Q: Does the guardian or conservator have to provide services or pay for debts of the Ward out of their own personal funds?

A: A guardian or conservator has no duty or obligation to pay for any services of the Ward from the guardian's or conservator's personal funds. The Ward's funds pay for services and debts of the Ward. Government benefits may also be available to pay for services. The guardian's or conservator's responsibility is to find federal, state, or county benefits and services to which the ward is entitled.

Q: Can co-guardians be appointed? If so, how many can there be?

A: Co-guardians can be appointed. There are no legal restrictions about the number of co-guardians that can be appointed by the court for a single person. Normally just one (and no more than two) should be appointed. This is because with more people it is difficult to get decisions made and come to an agreement. The guardians will have to work together.

Q: When does a conservatorship end?

A: A conservatorship usually ends for one of two reasons. First, the assets of the Ward are exhausted. After the Ward runs out of money, the conservatorship can be closed, even if the Ward is still under a guardianship. Second, the Ward dies. Any assets remaining in the conservatorship will pass to the Ward's estate.

Q: When does a guardianship end?

A: A guardianship also usually ends for one of two reasons. First, a minor reaches the age of majority and no longer needs a legal guardian. Second, the Ward dies. It is also possible, but rare, for a Ward who previously needed assistance to improve to the point where a guardianship is no longer necessary. ♦

Have a question? E-mail it to AskJack@ARPCLaw.com

SECURITY DEPOSITS

Know Your Landlord / Tenant Rights

A landlord cannot demand or receive a security deposit which exceeds two months' rent. All security deposits must be held in an FDIC-insured account in a bank or savings and loan association. Deposits may be held in a common trust account, with separate entries for each tenant. There is no requirement that the bank account bear interest on the security deposits.

If the security deposit is held in an interest-bearing account, any interest earned on a security deposit during the first five years belongs to the landlord; after that, the interest becomes the property of the tenant.

After the tenancy is over, the landlord must send written notice to the tenant disclosing the disposition of the security deposit. This notice must be sent within 30 days of the termination of the tenancy; and receipt of a forwarding address; or receipt of delivery instructions.

The landlord must either return the security deposit or give a detailed itemization of its disposition. The landlord may only withhold the security deposit to pay for back rent owed; restore the rental unit to its condition at the beginning of the tenancy, ordinary wear and tear excepted; and recover expenses incurred in regaining possession.

A landlord who fails to provide a written disposition within the 30-day period forfeits all rights to the security deposit. The bad faith retention of a security deposit can subject the landlord to actual damages, punitive damages, and attorney's fees. ♦



EMPLOYEE SPOTLIGHT



Peggy

Peggy is the office manager for ABENDROTH & RUSSELL, P.C. She was previously a private banker for U.S. Bank. She is the human resources department, the facilities department, the payroll department, the vendor liaison, and general calming influence for the firm.

In her spare time, Peggy and her husband build houses in the Waukee area.

Sales records
Stock and bond certificates (canceled)

10 Years

Contracts and leases (expired)
Property appraisals and records
Tax returns
W-2s, proof of income

Permanently

Adoption papers
Articles of incorporation
Audit reports of accountants
Birth certificates
Bylaws
Capital stock and bond records
Citizenship papers
Contracts and leases (existing)
Copyright, patent, and trademark registration
Death certificates
Divorce decrees
Alimony, and child custody agreements
Military records
Corporate minute books
Union agreements ♦

EMPLOYMENT CORNER

When asked to share the most unusual excuses workers gave for missing work, office managers revealed some of their favorite alibis:

1. One of the walls in the employee's home fell off the night before;
2. Employee was poisoned by his mother-in-law;
3. Employee broke his leg snowboarding off his roof while drunk;
4. Employee's dog swallowed her bus pass (*this is entirely plausible* – Jack);
5. Employee's mother was in jail;
6. Employee's wife said he couldn't come into work because he had chores to do around the house;
7. A skunk got into the employee's house and sprayed all of his uniforms;
8. A buffalo escaped from the game reserve and kept charging the employee every time she tried to go to her car from her house. ♦