

**OREGON ASSOCIATION OF REALTORS®  
2006 LEGISLATIVE CONFERENCE  
RESEARCH PAPER**

**PRECLUSION OF EVIDENCE AND CIVIL PENALTIES**

During the last legislative session, the Portland Metropolitan Association of REALTORS® (PMAR) proposed legislation to the Oregon Association (OAR) with two components entitled Preclusion of Evidence and Civil Penalties. OAR declined to move this legislation forward because OAR's legislative policies precluded such action. The issues, however, are substantive and need to be addressed. A copy of PMAR's proposed legislation is attached.

**Analysis of the Legislation as Proposed**

**A. Preclusion of Evidence**

The preclusion of evidence provision of the PMAR legislative proposal applies to the “decisions, reports, fines, findings, conclusions, opinions, final orders and judgments that arise out of investigations conducted by the Real Estate Commissioner for any violation of ORS 696.007 to 696.015, ORS 696.022 to 696.495, and ORS 696.800 to 696.880.”<sup>1</sup> The operative provisions of the PMAR evidence preclusion proposal then state that the decisions, reports and so on of the Commissioner (1) “Are not admissible as evidence in any other [sic] civil action, proceeding, or arbitration except as may arise under ORS 183.413 to 183.470;” and (2) “May not be used for the purpose of claim preclusion or issue preclusion in any other [sic] civil action proceeding or arbitration except as may arise under ORS 183.413 to 183.470.”<sup>2</sup>

The PMAR evidence preclusion proposal is clearly aimed at limiting the use of otherwise admissible evidence in civil proceedings, including arbitration.<sup>3</sup> In Oregon, as in all states, what is or isn't admissible in a civil action or proceeding is controlled by the state's evidence code. With limited exceptions not relevant here, the evidence code applies to all Oregon courts. ORS 40.015(1). The evidence code does not, however, apply to private arbitration. ORS 36.665(1).

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<sup>1</sup> The Commissioner has the power to discipline (reprimand, suspend or revoke) only on the statutory grounds set out in ORS 696.301. The grounds for discipline include that a licensee “disregarded or violated” one or more of the statutory provisions cited in the PMAR legislation. It is uncertain how a court would respond to an investigation based on grounds for discipline other than that the licensee disregarded or violated one of the statutes cited in the legislation.

<sup>2</sup> Both provisions speak in terms of “any *other* civil action, proceeding or arbitration.” The precluded evidence, however, applies only to evidence gathered in administrative actions. There are, therefore, no “other” civil actions, proceedings or arbitrations involved. Use of the word “other” is likely to cause confusion about what exactly is being precluded and from what exactly it is precluded.

<sup>3</sup> The provision must be aimed at otherwise admissible evidence because if the evidence at issue were not admissible (*e.g.*, hearsay, more prejudicial than probative, irrelevant, evidence of character, etc.), there would be no need to have a separate statute precluding it.

As a general rule of civil court procedure, all relevant evidence (evidence having any tendency to prove or disprove a material fact) is admissible unless otherwise excluded by statutory (the evidence code) or decisional (typically, constitutional) law. The broad admissibility principle is a statement of public policy based on the fundamental jurisprudential notion that decision makers are more likely to make a fair and just decision if they hear everything that may be relevant to their decisions than if the evidence they hear is limited. A legislative policy limiting use of evidence rejects fundamental public policy by saying no one in a civil action, plaintiff and licensee alike, can use any information gathered in the course of a Real Estate Agency investigation.<sup>4</sup>

Exceptions to the policy in favor of admissibility do exist. These exceptions are typically based on public policy concerns involving fairness. For instance, in a civil matter before a jury, otherwise relevant evidence may be excluded if the evidence is in a form that may make it hard for the jury to weigh (*e.g.*, hearsay) or is likely to be so prejudicial that its admission is more likely to harm rather than enhance the search for truth (more prejudicial than probative). If a legislative policy is adopted precluding evidence, it must contain a rationale favoring public policy.

There are no special statutory limitations in existing Oregon law on the admissibility of information gathered in administrative actions. Because the preclusion of evidence provided for in the PMAR proposal is unique in Oregon law, it should be anticipated the Oregon State Bar will take interest in the legislation. At a minimum, a defensible public policy reason for the exception to the evidence code being proposed is a paramount consideration.<sup>5</sup> This is particularly true, given that the PMAR proposal also contains a limitation on the preclusive effect of orders and judgments arising out of an investigation by the Commissioner.

Issue and claim preclusion are extremely technical areas of civil procedure. The public policies underlying issue and claim preclusion (often lumped together in the outmoded common law concept of “*res judicata*”) are fairness and judicial efficiency. Basically, the rules are intended to prevent the re-litigation of legal issues and claims already conclusively determined in a prior judicial proceeding. Because preclusion involves the weighing of fairness against judicial efficiency, the case law involving preclusion is very complex.

The preclusive effect of an administrative action is always an open question of law. At a minimum, however, a fully contested hearing of some kind is required before issues or claims will be precluded in subsequent proceedings. That means that the vast majority of Real Estate Agency actions have no preclusive effect whatever because there is no hearing. Issue and claim preclusion, in a legal sense, do not apply at all in private arbitration. Hence, it is not clear what exactly the issue and claim preclusion provision of the legislative proposal

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<sup>4</sup> Under the proposal, information will be kept out of civil cases even if the information exonerates the licensee. It is easy to forget that preclusion of evidence cuts both ways and an Agency finding of no violation is just as precluded as one finding a violation.

<sup>5</sup> A “defensible” provision is the minimum necessary because of the clear public policy involved in the admission of relevant evidence in civil proceedings. To actually pass legislation in the face of credible opposition will require not just a defensible public policy rationale, but a compelling one. Oregon has a law favoring the admissibility of relevant evidence in civil proceedings and overturning that law will require an explanation of the countervailing public (not private) benefits.

is intended to accomplish. Without such an explanation, opposition to the proposal from the State Bar, the Oregon Attorney General, the state courts, administrative law judges and private arbitration services should be anticipated.<sup>6</sup>

Finally, it should be noted that the Commissioner has no discretion with regard to the use of public information or the publication of his administrative decisions. ORS 696.430; ORS 696.445(3) That means that whatever the evidentiary or preclusive effect of the Agency's decisions, fines, findings and so on, anyone, including a plaintiff's attorney, can obtain copies of any and all documents generated by the Agency in a discipline matter. It would be a poor attorney who could not turn an Agency investigation file to their advantage. The investigator could be deposed, asked to give an affidavit or called as a witness to testify against the licensee. The investigator's report, findings, conclusions and everything else in the Agency file could be used to guide the deposition, affidavit or testimony.<sup>7</sup>

## **B. Civil Penalties**

The Real Estate Agency has long sought to be able to levy civil penalties in license discipline cases.<sup>8</sup> The Real Estate Agency's rationale for seeking this authority varies with the circumstances. It can be as simple as wishing to have a power other state agencies already have, or as complicated as trying to split the political power of the industry to prevent legislation the Agency does not want but worries it cannot stop. Typically, administrative fines are proposed as an efficient way to resolve discipline cases to the benefit of all concerned. That appears the facial motivation for the Agency's reported acquiescence in the past to proposed legislation.

The advantage to the Real Estate Agency would be that investigations could possibly be closed much faster than is presently the case." The advantage to licensees, in addition to the preclusive effect discussed above, is that there are many types of violations resulting in reprimands and occasionally suspensions which could likely be resolved more quickly with a fine. The rationale is that the Agency will not push for reprimands or suspensions if the licensee will agree to a fine. That is indeed, in the individual case, a potential advantage to licensee and Agency alike.

In this case, because the legislative proposal expressly states that civil penalties "shall be in lieu of any other sanction or enforcement actions," civil penalties cannot be levied unless

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<sup>6</sup> The new state administrative law judge bureaucracy is politically well connected. Concerns by this group will likely bring in the Attorney General's office because the AG appoints two members to the oversight committee that monitors administration law. A proposal may also attract the interest of members of the alternative dispute resolution community, including law professors, because it would represent a rejection the basic of arbitration principle that issues and evidence are within the discretion of the arbitrator alone.

<sup>7</sup> No small part of the motivation for the preclusion is an attempt to keep the opinions and comments of overzealous investigators out of arbitration. Laudable as that goal may be, one must ask what is actually gained if the investigator can show up and make the same comments or, using hindsight and personal distaste for the suppression of their report, even more damaging comments.

<sup>8</sup> The Association has rejected civil fine powers for the Commissioner several times over the years when the Agency has made the proposal. The present proposal differs from past proposals only in the *quid pro quo* preclusion provisions and attempts (discussed shortly) to limit the size of the fines that can be levied by the Commissioner.

there is an “other sanction or enforcement action”<sup>9</sup> As a practical matter, demanding that fines be “in lieu of” other sanctions invites comparison between the size of the fine and the severity of the “other sanctions.” Consumers, lawyers, and legislators can, and will, ask the Commissioner how much it costs to buy a suspension.

Whatever the defensible answer to the question of what it costs to buy a suspension, the main concern should be limits on the size of the fines the Commissioner can levy. The proposed legislation contains two provisions that grant the Commissioner the power to levy fines in discipline cases. In the first of these provisions, the Commissioner’s authority is limited to a fine of “not more than \$500 for each offense.” The proposal goes on, however, to say that “[e]ach violation may be deemed a separate offense regardless of whether it arises from the same transaction, so long as each offense arises from separate operative facts.”<sup>10</sup> These fines are to be paid to the state general fund. “Separate operative facts” is not defined in the proposal.<sup>11</sup>

The second provision of the proposal grants the Commissioner the power to levy fines in discipline cases that makes the first provision completely irrelevant in those cases where the enforcement actions involve a transaction that closed. That is the case because the second provision allows fines “not to exceed the amount by which such person profited in money or other actual consideration in the transaction.” Under that provision, the Commissioner will have the authority to demand the forfeiture of any commission earned by a licensee in any transaction in which a violation of real estate license law is charged.<sup>12</sup> The Commissioner enjoys a similar power under existing license law when fining licensees who do not renew their license on time and, thus, engage in professional real estate activity without a license. Under the forfeiture of profit provision, the Agency has recently proposed a fine of \$3600 and is rumored to have proposed another of \$6000.

## **Conclusion**

The issue of preclusion of evidence, while tempting, needs to be carefully weighed against the difficulty of providing a public benefit rationale. Without a compelling public benefit, this issue could easily turn into a public image crisis for Oregon REALTORS®.

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<sup>9</sup> In other states and in other government agencies, the authority to fine is not in lieu of but in addition to other sanctions. The Commissioner’s existing authority to fine is in addition to other sanctions. ORS 696.990-995. It is clear the authors of the PMAR proposal wished to avoid giving the Commissioner any more power than necessary to gain the preclusion of evidence they sought. In doing so, however, they linked the fine to “other sanctions.”

<sup>10</sup> Last year, the Commissioner proposed a fine of \$10,100 against a licensee who, for the first time in twenty years, forgot to renew his license on time. The Commissioner considered every instance of professional real estate activity, during the period of lapsed renewal, a “separate offense” in coming up with the proposed fine. The fine was subsequently reduced to \$1400 and gladly paid by the licensee.

<sup>11</sup> “Separate operative facts” is a term of legal art applicable in issue and claim preclusion cases. Its application in the context of administrative fines is untested and unknown. Certainly, some limitation is intended, but what eventually a court might rule that limitation to be is unknown.

<sup>12</sup> Because most civil suits seeking damages are brought by buyers disappointed with their purchase, most discipline cases where civil litigation is an issue will involve a closed transaction in which the licensees received a commission.

This issue of civil penalties has been addressed and rejected by Oregon REALTORS® in the past. The issue, however, has been again raised and needs to be decided and resolved under the current climate. The potential benefits of a quick and efficient resolution need to be carefully weighed against the danger of granting the Agency such broad authority.