

BOARD OF REALTY REGULATION NEWSLETTER

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Medical Marijuana Lease Could Result in Charges

By: Don Harris, Prosecuting Attorney, Montana Board of Realty Regulation

On May 21, 2012, Jonathan Janetski of Whitefish, Montana, was sentenced to federal prison for a year in connection with his plea of guilty to federal charges of maintaining drug-involved premises. Such a conviction would not ordinarily draw the attention of the real estate community or the Board of Realty Regulation; however, Mr. Janetski's case is apparently the first of its kind in the United States and should concern anyone in the business of leasing real property. This article will describe the drug-involved premises offense, the facts that led to Janetski's conviction, and the relevance of the conviction for all real estate licensees.

Governing Law

Under 21 U.S.C. § 856(a), it is unlawful to: "(1) knowingly open, lease, rent, use, or maintain any place, whether permanently or temporarily, for the purpose of manufacturing, distributing, or using any controlled substance; [or] (2) manage or control any place, whether permanently or temporarily, either as an owner, lessee, agent, employee, occupant, or mortgagee, and knowingly and intentionally rent, lease, profit from, or make available for use, with or without compensation, the place for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance." Marijuana is a controlled substance according to federal law. 21 U.S.C. § 812.

Since voters approved an initiative in 2004, Montana law has recognized certain legal medical uses of marijuana (Mont. Code Ann. § 50-46-301) and provided for its use and legal distribution, (Mont. Code Ann. § 50-46-319). Although limited use and distribution of marijuana is permitted under the Montana Medical Marijuana Act (MMA), federal law does not provide an exemption from the Controlled Substances Act for medical uses of marijuana. Therefore, as pointed out in a memorandum sent to all United States Attorneys by the Department of Justice, "[p]ersons who are in the business of cultivating, selling or distributing marijuana, and those who knowingly facilitate such activities, are in violation of the Controlled Substances Act, regardless of state law."

Facts

Molly Priddy in the Flathead Beacon noted that Mr. Janetski is a general contractor and the owner of a commercial building in Kalispell. In September 2010, he rented his building to the owners of a medical marijuana business which provided marijuana to patients with medical marijuana cards under the MMA. According to Priddy, Janetski (Cont. on pg. 3)

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BRR MEMBERS, STAFF & UPDATES

BOARD OF REALTY REGULATION MEMBERS

The Governor, with Senate confirmation, appoints board members. Members serve 4-year terms with a 2-term limit.

C.E. "ABE" ABRAMSON
BOARD CHAIR
RE INDUSTRY MEMBER
MISSOULA, MT
Term Expires: 5/9/2015

CINDY WILLIS
RE INDUSTRY MEMBER
POLSON, MT
Term Expires: 5/9/2013

SHIRLEY MCDERMOTT
PUBLIC MEMBER
LAUREL, MT
Term Expires: 5/9/2015

LARRY MILLESS
RE INDUSTRY MEMBER
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Term Expires: 5/9/2015

CONNIE WARDELL
RE INDUSTRY MEMBER
BILLINGS, MT
Term Expires: 5/9/2015

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RE INDUSTRY MEMBER
GREAT FALLS, MT
Term Expires: 5/9/2012

STEPHEN HESS
PUBLIC MEMBER
Butte, MT
Term Expires: 5/9/2014

CHANGES AHEAD:

The Board of Realty Regulation, along with all other professional licensing boards, is currently undergoing a reorganization. Therefore, your phone call or email may be directed to a staff member that you are not familiar with who is learning the rules and processes associated with realty regulation. Please be patient and understanding as we go through the change.

The Honorable Brian Schweitzer, Governor BOARD ADDRESS & CONTACT INFORMATION

BOARD OF REALTY REGULATION
301 S. PARK, 4TH FLOOR/ PO BOX 200513
HELENA, MT 59620-0513
FAX: 406-841-2323
EMAIL: dlibsdrre@mt.gov
WEBSITE: www.realestate.mt.gov
Grace Berger, Executive Officer

For real estate licensing questions and information, contact:
Professional Licensing 406-841-2300

For information regarding education, contact:
Stacey Fossum, Education Director 406-841-2324

For information regarding audits, contact:
Marilyn Willson, Auditor 406-841-2321

For information regarding complaints, contact:
Teri Smith, Compliance Specialist 406-841-2336

Medical Marijuana Lease Could Result in Charges

(Cont. from pg. 1)

"had no part in the growing or selling of the drug,"; however, he "use[d] his skills as a general contractor to make modifications to the electrical system to fit his tenants' needs." Mr. Matthew Frank of the Missoula Independent noted in an article on March 29, 2012, that Mr. Janetski reportedly believed his tenants "would eventually buy the building."

On March 14, 2011, federal law enforcement agents executed a search warrant at the location where Janetski's tenants ran their operation, and the agents discovered and confiscated approximately 718 marijuana plants.

As a result of the federal investigation, Mr. Janetski was charged with conspiracy to manufacture marijuana, conspiracy to distribute marijuana, possession with intent to distribute marijuana, and maintaining drug-involved premises. In December 2011, he pled guilty to the premises charge, and the United States Attorney agreed to dismiss the remaining charges. Janetski was convicted of maintaining a drug-involved premises for leasing his building to the medical marijuana business in March 2012, and on May 21, 2012, United States District Judge Donald Molloy sentenced him to twelve months and one day in prison, ordered him to pay \$100, and added three years of supervised release to the end of his prison term.

Relevance to Licensees

Mr. Janetski's situation should serve as a cautionary tale to any licensee who would consider leasing a client's property to a medical marijuana business. While the extent of Janetski's involvement in the marijuana business was not clear, his attorney insisted that he was not involved in growing or selling the drug. Thus, his culpability for the premises crime stemmed solely from his activity as a landlord who knowingly leased property to a business that distributed a controlled substance. A real estate licensee should be advised that he or she could be held criminally responsible for maintaining a drug-involved premises if the licensee were to "manage or control any place, whether permanently or

temporarily, either as an owner, lessee, [or] agent. . . and knowingly and intentionally rent, lease, profit from, or make available for use, with or without compensation, the place for the purpose of manufacturing, storing, distributing, or using a controlled substance." 21 U.S.C. § 856(a)(2). The broad scope of this statute would encompass the situation wherein a licensee, acting as an agent for a property owner, knowingly leases a place where marijuana is grown, stored, supplied, or used.

In addition, the license of a broker, salesperson, or property manager who commits the crime of maintaining a drug-involved premises could also be disciplined for unprofessional conduct, including but not limited to being charged with the following violations of statute or rule:

- Montana Code Annotated section 37-1-316(1) – The following is unprofessional conduct for a licensee or license applicant governed by this part: conviction, including conviction following a plea of nolo contendere, of a crime relating to or committed during the course of the person's practice or involving violence, use or sale of drugs, fraud, deceit, or theft, whether or not an appeal is pending.
- Montana Code Annotated section 37-1-316(18) – The following is unprofessional conduct for a licensee or license applicant governed by this part: . . . conduct that does not meet the generally accepted standards of practice.
- Administrative Rule of Montana 24.210.828(3) – In addition to all other provisions contained in the statutes and rules administered by the board, the following are considered unprofessional conduct: . . . (b) violating laws and rules affecting any transaction in which the licensee acts.

Conclusion

A licensee who knowingly leases property to a tenant who uses the space to grow, make, distribute, or use controlled substances in violation of federal law could be disciplined for unprofessional conduct, in addition to being charged with a federal crime. Specifically, a broker, salesperson, or property manager who rents to a medical marijuana business may be in violation of laws regulating real estate professionals, whether or not this activity is ostensibly permitted under Montana's Medical Marijuana Act.

Harvard Study Points to Signs of Housing Recovery, Identifies Remaining Challenges

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Ever since the housing crisis began, countless published studies and reports have attempted to predict the point at which U.S. housing markets will “hit bottom” and begin a likely slow, but inevitable, climb toward revitalization. Among the more recent, and increasingly positive, analyses is a Harvard University report that declares, “After several false starts, there is reason to believe that 2012 will mark the beginning of a true housing market recovery.” Still, the report cautions that significant remaining challenges could hamper recent promising trends. The Harvard University Joint Center for Housing Studies *2012 State of the Nation’s Housing* is the 24th edition of a report that has been published annually since 1988. It notes that during most of 2011 “...house prices in most areas continued to slide, sales were lackluster, and single-family construction hit a record low. But as the year ended, steadier job growth and improving consumer confidence boosted sales of both new and existing homes.” The report points to accumulating signs of a sustained market rebound during the latter part of 2011 and into 2012 that include increased rental demand and decreasing vacancies, which together have led to a jump in both single and multifamily construction starts; increasing new and existing single-family home sales and low inventories in both categories; and potentially stabilizing home prices. With respect to prices, the report concludes that, “While [it is] too soon to tell with confidence, the worst may be over.” In connection with those trends Eric S. Belsky, Managing Director of the Joint Center for Housing Studies added that, “While still in the early innings of a housing recovery, rental markets have turned the corner, home sales are strengthening, and a floor is beginning to form under home prices.” Still, while the report analyzes growing positive signs for the future, there are still numerous challenges that could threaten the incipient recovery, including:

- **Still sliding home ownership rates** as reflected by the less than 700,000 new U.S. households that were created in 2011, well below the 1.2 million or more that are expected annually under more normal economic conditions. “Surveys consistently find that the overwhelming majority of young adults plan to own a home in the future, but many would be buyers have stayed on the sidelines waiting for the job outlook to improve and house prices to stop falling”, said

Belsky. “But as markets tighten, these fence-sitters may begin to take advantage of today’s lower home prices and unusually low mortgage rates.” Belsky also noted that current monthly mortgage costs relative to monthly rents haven’t been this favorable since the 1970’s;

- **The backlog of roughly two million homes in the foreclosure process** which, while “gaining ground”, will keep distressed sales at elevated levels and could keep price increases in check in the areas that have been hardest hit by foreclosures;

- **11 million “underwater” mortgages** (with balances that exceed the value of the home) may continue to mute market growth because the homeowners cannot sell without incurring a loss and have no home equity to borrow against to fund major remodels;

- **The inability of many homeowners to refinance**, together with rising rents and high unemployment, has lifted the number of households spending more than half their income on housing to record heights. According to the report, “Between 2007 and 2010, the number of US households paying more than half of their income for housing rose by an astounding 2.3 million, bringing the total to a record 20.2 million.”; and

- **Lender Reluctance** reflected through higher mortgage loan qualification thresholds, higher Down payment requirements, new regulatory standards and other factors that have led to a difficult mortgage credit environment. The report also concludes that sustained employment growth remains as a key factor and is needed to provide the stimulus for stronger household growth and to bring relief to more distressed homeowners. “What the housing sector needs is a sustained increase in jobs to bring household growth back to its long-term pace and spur demand,” said Chris Herbert, Director of Research at the Joint Center for Housing Studies.

“While still in the early innings of a housing recovery, rental markets have turned the corner, home sales are strengthening, and a floor is beginning to form under home prices.”

Realty Regulation Rule Changes

By: Grace Berger, Executive Officer

The Board of Realty Regulation has finalized a review and rewrite of the rules regulating all licensees licensed by the board. Some of the rule amendments are more general in nature. There are other amendments that will directly affect your daily practice. You can find the rule notice and final adoption in its entirety on the board website at www.realestate.mt.gov under the “Regs” tab under “Rule Notices”.

A number of definitions have been added, and a few have been amended to clarify the meaning of terms used throughout the statute and rules. Trust account rules for both brokers and property managers have been amended and updated. As passed by the 2011 Legislature, the process to temporarily transfer salespersons to a different supervising broker is outlined. The examination passing requirements have been updated and clarifying the expiration and termination of the supervising broker endorsement is spelled out. Adding clarity to the point system used to qualify for a broker license, clarifying who may renew a license, and amending the unprofessional conduct rules are all included in the latest rule amendment package.

While you will need to follow all of the amended laws and rules, there are some that I would like to highlight.

The definition of a “cancelled” license is being added. While the term has existed in statute for many years, it has never been defined. According to statute, a salesperson’s license is cancelled when the license is released from the current supervising broker and is forwarded to the board office. This “cancelled” status will show up on licensee lookup. A salesperson must not conduct licensed activity while their license is cancelled. It is also worth noting that a cancelled salesperson license cannot be renewed. The license must be transferred to a new supervising broker or placed inactive before it can be renewed. The license will expire if not renewed.

A definition of trust funds has been added. While we all know what trust funds are, and we can get to a

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definition by going to a number of different rules, the board determined it would make sense to have a definition that spells out exactly what are trust funds. Essentially, trust funds are monies that belong to someone else that has been accepted by a licensee during the course of conducting licensed activity. If it comes into your possession as a result of your real estate license, and it’s not your money, it is trust funds.

Trust account rules are being updated to more clearly reflect current trends. While the trust account amendments appear to be somewhat benign, the purpose of the amendments are to ensure that the trust funds exist, can be tracked and accounted for, and are not comingled with other trust funds or licensee personal funds. Please carefully review the amendments. You will be held accountable for complying. You have trust fund responsibilities, even if the funds are held by an agreed upon third party like a title company.

Of particular note to supervising brokers, you remain responsible for the action of a salesperson under your supervision until the license and release are received in the board office. While this has always been the case and can be found by a reading of the entire body of law and rules, the board determined actually adding this statement will eliminate confusion on the part of a supervising broker or salesperson.

Supervising brokers and salespeople need to be aware that the board has memorialized the responsibilities of both license types when a supervising broker fails to renew their broker license or maintain their supervising broker endorsement.

The 2011 Legislature gave the board the ability to adopt rules to allow a supervising broker to temporarily transfer their supervised salespeople to another supervising

Realty Regulation Rule Changes (con't)

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broker. This might occur because the broker anticipates being away and inaccessible to his or her sales staff and cannot properly supervise. This might happen if a supervising broker suffers an incapacitating (as defined in 24.210.301) event and is not able to supervise. Finally, this might happen in the death of a supervising broker. Basically, the temporary transfer involves notification to the board. The notification must: 1) be in writing and must also be provided to all temporarily transferred salespeople by the supervising broker of record; 2) include the signature of the supervising broker of record, authorizing the temporary transfer of the listed salespeople; 3) include the signature of the temporary supervising broker, agreeing to supervise the listed salespeople; 4) include a list of all salespeople being temporarily transferred; and (5) include the beginning and ending date of the temporary transfer. A supervising broker may not temporarily transfer the supervision of their salespeople for more than 60 days in any 12-month period. The reason for the limitation is, at some point, the transfer is not really temporary. The notification of the temporary transfer of supervision must be received by the board office at least 3 days prior to the effective date. For the nuances of the temporary transfer of supervision, review the rule in its entirety at ARM 24.210.601(16)-(18).

Supervising brokers, you should know that the board has discussed temporary supervision and who the board would hold responsible for the actions of a salesperson that resulted in a complaint while being temporarily supervised. The board has determined that the answer is "it depends on the facts" of the situation. It may be determined that the supervising broker of record, or the temporary supervising broker, or both, are asked to respond when a complaint is filed against a salesperson.

Supervising brokers, your endorsement may not be put on inactive status. If you do not complete your supervising broker education every year, your endorsement will expire and then terminate. If it terminates after two renewal periods, you will be required to meet the current requirements to obtain the

endorsement.

Salespeople, if you are contemplating applying for your broker license you will want to familiarize yourself with the various ways to meet the experience requirement. If you currently work on a team, be aware that the board limits the amount of credit that can be used by team members to one credit total per side of the transaction.

Brokers and salespeople, when managing property you must comply with all property management requirements except in advertising. You must still comply with advertising requirements as a real estate licensee. These property management requirements would also apply when you have a property listed, are having delays in selling it, and put a renter in the property. Any time you manage property you must comply with property management requirements.

Property managers, carefully review the trust account changes in 24.210.805. As a property manager you are required to maintain a trust account. Review the amendments to ensure compliance.

Many of the rule amendments in broker trust account and continuing education are mirrored for property managers. While the property management profession is licensed and regulated by the board, many of the requirements are unique to each profession. It would behoove you to be familiar with your duties and responsibilities as a licensee.



Unlicensed Practice – Who Are You Hiring?

On behalf of the Montana State Electrical Board and Board of Plumbers, those hiring individuals that are not licensed electricians and plumbers could be subject to Unprofessional Conduct complaints as provided by 37-1-316, MCA.

So what does this mean to you? If you are hiring individuals who are not licensed in the State of Montana as electricians and plumbers to perform electrical and plumbing work, you could be subject to disciplinary action against you or your business.

How do I know? Ask. If you are planning on hiring a handyman to perform electrical or plumbing work around your duplex or apartment complex, you should **always** ask to see their license first. If they hold a Montana electrical or plumbing license, they will also need to hold an electrical contractor or plumber business license or be working for one of the respected contractor or business licenses. These licenses allow them to pull permits and insures they are properly trained and licensed to perform the work.

How do I find out if they are licensed before I hire them? You can visit the board's web site and perform a "licensee lookup" of the individuals or the businesses. For electricians go to www.electrician.mt.gov or for plumbers go to www.plumber.mt.gov You can also download the "Rules and Regulations" to see if any of the work may be exempt. Currently, any electrical work performed on 90 volts or less circuits are exempt from needing licensure in Montana.

Sincerely,

Jason Steffins, Executive Officer
Montana State Electrical Board
Montana Board of Plumbers

New Rule Changes Regarding Trust Account Requirements

Attention!

Make sure you check the Board of Realty Regulation's website for the new rule changes, which include changes to the trust accounting requirements for both property managers and brokers. If you have questions or need a refresher on the trust account rules for property management, sign up for the free "Trust Accounting for Property Management" course taught by Marilyn Willson, Auditor for the Board of Realty Regulation. Registration for the course can be found at www.realestate.mt.gov, select the "Forms" tab, and choose "General Forms". Bookkeepers or other non-licensees are welcome to attend.

D.C. Appeals Court Upholds Recovery Fund Sweep – Could It Happen in Montana?

By: Gene Allison, Board Counsel

Montana real estate licensees are probably aware of the state's 'Recovery Fund' aka "Recovery Account". No doubt, many licensees will recall that this account was created years ago at the urging of the real estate profession itself. Every licensee pays a one-time fee of \$35 when they are first licensed. The money goes into a statutorily appropriated special account. The account is used to provide payment of claims based on unsatisfied judgments against Montana real estate licensees (if the judgment is based on conduct for which a real estate license is required). Montana's Recovery Account is managed by the Montana Board of Realty Regulation (Board). Essentially, every jurisdiction in North America has a similar real estate recovery account.

In Montana, Recovery Account funds are also available for licensee and license applicant educational programs. Many Montana licensees have benefited from those educational programs. For example, the Board has recently been providing 8 free hours of Continuing Education through its "Day with the Board" program. The Board has conducted that program more than 8 times in recent months. Hundreds of licensees have taken the opportunity to attend. Likewise, the Board has assisted local education programs for years through grants of money.

Currently, the Montana Recovery Account balance is over \$400,000. This is your money! By law, the fund must maintain a minimum balance of \$100,000. If the balance falls below \$100,000, every licensee must be assessed a sum in order to bring the balance back over \$100,000. However, something, which hopefully will not be a trend, has been taking place in some other jurisdictions.

In November 2008, the District of Columbia, like many jurisdictions, faced unexpected revenue shortfalls and needed to meet its statutory obligation to present a balanced budget to Congress. Therefore, the District's legislative Council transferred the available balances in 69 designated special funds to the District's General Fund. That action included the transfer of \$3,252,618 from the District's Real Estate recovery fund.

Three REALTOR® associations brought a lawsuit against the District to stop the real estate fund transfer. The Superior Court granted summary judgment in favor of the District, ruling that the Council acted within its legislative authority.

The associations appealed. The Court of Appeals ruled that the Council is not prohibited from transferring monies from a special fund to the General Fund as the need arises. The court said, "The only thing 'special' about special funds is that they are created because of their usefulness in serving particular governmental purposes. If the Council determines that a special fund has outlived its usefulness..., or that other public needs for those monies take precedence, a rebalancing and reallocation of the funds makes sense and is undeniably a 'rightful subject' of legislation."

Of interest to Montana licensees is that a Montana legislative interim committee is currently reviewing all statutorily appropriated accounts in order to determine whether the accounts have too much money or even whether the accounts are necessary at all. Montana's Real Estate Recovery Account is one of the statutorily appropriated accounts which are under review. Licensees may wish to keep watch on this issue. *(Cont. on page 9)*

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In fact, Licensees are urged to keep watch on both the Board and the legislature with regard to any issues that may affect the profession. The Board tries very hard to keep the profession and the public informed of Board activities and the Board welcomes constructive input. But the Board does not provide day-to-day information about the legislature. That task belongs to all citizens – including real estate licensees.

The District of Columbia case is: [Washington, D.C. Association of Realtors, Inc., et al. v. District of Columbia, 2012 D.C. App. LEXIS 271]

It is with much pride we announce that Jason Whitney, the investigator for the Montana Board of Realty Regulation, has won the ARELLO Investigator of the Year Award. Mr. Whitney's investigation report of an alleged unlicensed practice of property management was chosen as the best among real estate investigative reports submitted from both Canada and the United States. The criteria for selection included interview technique, report writing skill, applicability of local statutes, creativity, and supporting documentation.

Before coming to work for the Board of Realty Regulation, Jason, a graduate of the University of Montana, worked as a real estate salesperson in northern Virginia. Eventually, he moved back to Montana and worked as a private investigator for Orion International Corp. in Helena for approximately 8 years. This combination of experience in both the real estate and investigative fields made him a perfect fit for his current position.

For more information about ARELLO (Association of Real Estate License Law Officials), please visit their website at www.arello.org.

Upcoming Changes to the Approved Continuing Education Topics List

The Board has made some significant changes to the Approved Topics List for the 2013 license year (November 1, 2012 to October 31, 2013), which may or may not affect courses you currently are taking.

- The following topics will no longer be approved effective November 1, 2012:*
 - Property Valuation
- The following topics will be approved as elective hours effective November 1, 2012:*
 - Environmental Issues
 - Forms
 - Land Use Planning
 - Title Insurance
- The following topics have been added as approved elective topics effective November 1, 2012:
 - Business Valuation
 - Mobile and Other Manufactured Homes

*All licensees who are currently registered for distance education courses under any of the above topics must complete the course(s) on or before October 31, 2012, or the amount or type of credits you are given will be affected.

BRR CALENDAR: July-September 2012

JULY

- 4th:** State Holiday
- 12-13th:** Rookie Class (Missoula)

AUGUST

- 8th:** Board Review of Core Courses (Open)
- 9th:** Committee Meetings
- Screening Panel (Closed)
 - Education Committee (Open)
- 12th:** Full Board Meeting(Open)

SEPTEMBER

- 3rd:** State Holiday (Board Offices Closed)
- 6th-7th:** Rookie Class (Billings)
- 7th:** Supervising Broker Pre-Endorsement Class (Billings)
- 11th:** Committee Meetings
- Screening Panel (Closed)
 - Education Committee (Open)
- 12th:** Full Board Meeting(Open)
- 18th:** **2013 Core Course Instructor Training**

Upcoming 2013 Core Course Instructor Workshop:

Instructor training for the 2013 Core Courses will be held September 18, 2012, at the Great Northern Hotel in Helena. Registration forms and information can be found online at www.realestate.mt.gov: Educ : Forms. You must register by September 14, 2012 in order to attend. Please call me at 406-841-2324 or email dlibsdrre@mt.gov with questions. This is the only time the instructor training will be offered.

2012 CE Reminder:

Don't forget that this license year, each licensee must take the core course that "best aligns with their daily practice" in addition to 12 hours of regular continuing education (at least 4 of the 12 hours must come from a mandatory topic). Dual licensees must take both core courses. Brokers and salespeople who do both sales and property management are encouraged (but not required) to take both core courses. If you take both core courses, please send the certificates of completion for the core courses to sfossu@mt.gov to ensure proper credit.