

## Practice Tips

By Garris Neil Yarborough, Legal Counsel to the Board

Very rarely does the NCALB receive complaints about large item auctioneer related transactions. I believe this is due, in part, to everyone involved being more particular about the paperwork and the handling of money. However, a large portion of our complaints come from sellers who believe their 10 pieces of household furniture are antiques and their two boxes of knickknacks are objet d'art (and to them, they may be). Therefore, it is particularly important to the Auctioneer who wants to avoid lawsuits and complaints to the Licensing Board to keep all of the required paperwork and obtain all the appropriate signatures and approvals even in small transactions.

Although this practice tip may not be necessary for many of you, the auctioneer practice I would like to address in this issue relates to habit of some auctioneers that after the day of the sale, but within thirty days, mailing two copies of a settlement statement to a client, along with their check, with a request to review and sign the settlement statement and to mail it back to the auctioneer (sometimes with a self-addressed stamped envelope enclosed). This may be a convenient way of handling your legal obligations under N.C. Gen. Stat. §85B-7.1(a), but it is a risky one.

As you know, N.C. Gen. Stat. §85B-7.1(a) requires all auctioneers to have “all settlement statements . . . signed by the licensee or the licensee’s agent and by the person receiving the disbursement.” This statutory requirement not only protects the public, but it may also protect the auctioneers from “after the fact” complaints about sale prices, commission percentages, additional costs charged, etc. Furthermore, if a complaint is filed against you regarding a dispute on a sale, one of the first items requested by the investigator will be a copy of the signed settlement statement and failure to produce one is a violation in and of itself (regardless of the merit of the original complaint).

As a practical matter, if the seller is going to dispute your services or the money split, you need to know this as soon as possible (before the dispute becomes a legal controversy). Therefore, my suggestion to auctioneers is if you are not going to have a face-to-face exchange of the signed settlement statement and the proceeds check, to write a letter to your seller that goes like this:

“Enclosed you will find two copies of your settlement statements reflecting the accounting for the sale you hired me to conduct and a copy of my escrow account check to you in the amount of \$XYZ.00 which are your net proceeds as reflected in the settlement statement. Please review the settlement statement and if it is correct, sign one of them and mail it back to me in the enclosed self-addressed stamped envelope and I will immediately mail you your check.”

Obviously, me being a lawyer and all, that sounds a little legalistic and you may want to adapt it to your style of communication, but words to that effect, along with this practice, will help prevent a complaint to the NCALB and perhaps a lawsuit by your client against you. To send the actual check with the settlement statement sets

you up for at least two problems: 1) A well-intentioned seller who, after they receive their check, may develop little interest in doing anything further related to the sale to assist you, or 2) A less well-intentioned seller who may take your check, cash it and then complain about the transaction. In either of those two events, if the NCALB learns of your failure to comply with N.C. Gen. Stat. §85B-7.1(a), you may be subject to some form of license discipline. Of course, if litigation arises, having a cancelled check may help you, but it is not as good as having a cancelled check and a signed settlement statement.

In assessing this course of action, you may consider the effect of N.C. Gen. Stat. §85B-8(3) on it. N.C. Gen. Stat. §85B-8(3) requires auctioneers “to account for or to pay over within a reasonable time, not to exceed 30 days, funds belonging to another which have come into the licensee’s possession through an auction sale.” It is my position that sending the settlement statement within that 30 day period complies with the “account for” compliance alternative to that statute. Obviously, the quicker you can begin this process, the smoother it will go.

In the event there is a dispute as to the split of the proceeds, you are authorized, according to Section .0603(f) of the North Carolina Auctioneer Licensing Board Regulations, to hold the money until it can be resolved. Section .0603(f) reads as follows: “In the event of a dispute between the seller and buyer of goods or property or between the licensee and any person in whose name trust or escrow funds are held, the licensee shall retain said monies in his trust or escrow account until he has obtained a written release from the parties consenting to its disposition or until disbursement is ordered by a court of competent jurisdiction.”

Complying with this law in that event would mean you would not disburse to the seller, nor would you disburse your commission to yourself or others involved in the transaction that may be due money. This may seem to be inconvenient, but it is much less awkward than handling a NCALB complaint or chasing down disbursed money after a judgment is entered against you.

Please accept this tip in the manner in which it is provided to you: a tip designed to help you have a more worry-free auctioneer practice.