

NAREAL

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Opening Arguments

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NAREAL President



I grew up in the suburbs of Omaha, Nebraska where the tallest structure visible from my backyard was a neighbor's two story house. In my early teens my family and I moved to a small town in Utah County, Utah where I think the tallest structure was a gym in our local high school. Through my early years I had never lived or visited anywhere with mass transit systems or high-rise buildings.

In my late teens I had the opportunity to live in Santiago, Chile for several years. I quickly fell in love with the city and its warm people. Santiago is a very large city with a superb mass transit system and high-rise buildings. They even have a skyscraper that is the replica of a giant cell phone. It's there that my love of buildings started.

On my way home from Santiago, Chile I viewed New York City for the first time. I can still vividly remember buzzing by Manhattan on our way into La Guardia airport.

The plane offered a fantastic view of the city's skyline. The sheer number of buildings blew my mind! I couldn't believe what I was seeing. There were literally thousands and thousands of high-rise buildings packed into a little area. Because I had only a brief layover I didn't get a chance to go into the city on that day. However, I was hooked; I had to see this city with so many buildings and lights. Since my first view of the city I've been back many times and have only fallen more in love with the history and architecture of place.

Until recently I've never really understood why I love buildings and dense urban areas so much. But it dawned on me one day that the Super Skyscrapers of today are similar to ancient structures we marvel at—whether it's the Egyptian pyramids, the Sistine chapel, the leaning tower of Piazza, the Taj Mahal, or Great Wall of China. Those structures stand as monuments to the ingenuity and daring, of those who have gone on before us. The men who designed and built those structures have all long since passed but what they built still stands today. People from all over the world visit those ancient sites and think, "With the limited resources and technology of their day, how did they build that?"

Today we have the Burj Dubai, Taipei 101, Gran Torre, and 432 Park Avenue as examples of our hard work, imagination, and ingenuity. These super structures of our day will stand as our monuments. Some-day hundreds of years from now people from all over the world will visit these sites and think, "With the limited resources and technology of their day, how did they build that?"

Clint Dunaway, Esq. received a Bachelor of Arts in Political Science from Brigham Young University. He then earned a Juris Doctorate from the University Of Dayton School Of Law. During law school Mr. Dunaway was an active member of the J. Reuben Clark Law Society and served on its national Student Chapter Board's Membership, Technology, and Finance committee.

Mr. Dunaway is currently a real estate attorney in Phoenix, AZ.

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Is an Oil and Gas Lease a Conveyance of Real Property or a Grant of a Use Right?

Blake A. Watson, University of Dayton School of Law

With the recent development of hydraulic fracturing and horizontal drilling, many areas of the country are being introduced to the legal issues that often accompany the extraction of valuable minerals. One such issue is the status of an oil and gas lease. Is the mineral lessee the recipient of a property interest, such as a fee simple absolute or a fee simple determinable? Or did the lessor merely grant a “use” right, such as a license, profit, or easement? A related issue concerns ownership rights prior to extraction. Some states, under the “ownership-in-place” theory, hold that a landowner owns the oil and gas underneath the surface, but subject to divestment by lawful capture by adjacent owners. Other states favor the “non-ownership theory” and hold that ownership does not occur until capture.

It has been suggested that “[t]he theory of ownership embraced by a particular state is likely to be more important to law professors than to mineral owners.” John Lowe, *OIL AND GAS LAW IN A NUTSHELL* 40 (6th ed. 2014). However, the characterization of oil and gas interests and leases can affect the rights of the lessor and lessee, as well as other interested parties such as creditors, spouses, land agents, and real estate brokers. This article will examine recent and pending cases in Ohio that have disagreed on the appropriate characterization of rights transferred in an oil and gas lease. Although the article focuses on Ohio cases and statutes, the uncertain status of oil and gas rights and leases is a topical issue in many other states.

Conveyance or License? -- The Ohio Supreme Court in 1897 stated that an oil and gas lease transfers a “vested, though limited, *estate* in the lands for the purposes named in the lease.” *Harris v. Ohio Oil Co.*, 48 N.E. 502, 506 (Ohio 1897) (emphasis added); see also *Pure Oil Co. v. Kindall*, 156 N.E. 119, 123 (Ohio 1927) (“oil and gas in place are the same as any part of the realty, and capable of separate reservation or conveyance”). On the other hand, in 1953 the same court characterized an oil and gas lease as a license. *Back v. The Ohio Fuel Gas Co.*, 113 N.E.2d 865, 867 (Ohio 1953) (“Possession of oil and gas, having as they do a migratory character, can be acquired only by severing them from the land under which they lie, and in effect the instrument of conveyance ... is no more than a license to effect such a severance.”). The *Back* decision makes no mention of the *Harris* and *Pure Oil* cases, and the split in authority has remained unresolved by the Ohio Supreme Court. In the last three years, however, the issue has resurfaced in several different situations.



Rights of creditors – In 2012, a bankruptcy judge resolved the split in Ohio regarding the treatment of oil and gas rights by holding that “the non-ownership theory is the more sensible approach to the ownership of oil and gas rights for purposes of valuation in bankruptcy.” *In re Loveday*, 2012 WL 1565479 (N.D. Ohio 2012). In support of its conclusion that “oil and gas belong to no one until it is reduced to actual possession,” the court agreed with the *Back* decision that the right to oil and gas in place is “no more than a license to effect ... a severance.” *Id.* at *3. In light of fluctuating prices, uncertain production costs, and the possibility of depletion

caused by lawful drainage, the court concluded that – for purposes of valuation in bankruptcy – “it is sensible that oil and gas are not valued until they are extracted from the real property.” *Id.*

Rights of spouses – Ohio recognizes a dower right “for life in one third of the *real property* of which the consort was seized as an estate of inheritance at any time during the marriage.” Ohio Revised Code 2103.02 (emphasis added). In *Egnot v. Triad Hunter LLC*, 2013 WL 5487059 (S.D. Ohio 2013), the lessor’s spouse sought to invalidate an oil and gas lease on several grounds, including the failure to secure the release of his dower rights. Citing the *Back* decision, the United States District Court for the Southern District of Ohio held that an oil and gas lease “is a license rather than a deed of conveyance,” and concluded that the lease was not a transfer of “real property” for purposes of Ohio’s dower statute. *Id.* at *3-*4.

Rights of Land Agents and Real Estate Brokers – Courts have also addressed the status of an oil and gas lease in the context of the right to compensation for individuals who facilitate the acquisition of oil and gas lease rights. In Ohio, individuals who negotiate the sale of “real estate” for a commission must be licensed real estate brokers. See Ohio Revised Code 4735.01, 4735.02, and 4735.21. In two recent decisions, federal district courts in Ohio have disagreed on the applicability of such licensing requirements to individuals who assist developers in obtaining oil and gas leases. In *Binder v. Trinity OG Land Development and Exploration, LLC*, 2012 WL 1970239 (N.D. Ohio 2012), the court determined that oil and gas leases concern “real estate” and consequently held that individuals who are paid to procure such leases must be licensed real estate brokers. However, in *Wellington Resource Group LLC v. Beck Energy Corp.*, 975 F.Supp.2d 833 (S.D. Ohio 2013), the court cited the *Back* decision and held that an oil and gas leases is not a grant of real property.

Rights of Owners of Severed Minerals – Most important of all, the characterization of oil and gas leases may affect the rights of individuals to profit from the resurgence of production in eastern Ohio. Under the state’s Dormant Mineral Act, minerals that are owned separately from the surface estate may be forfeited to the surface owner unless certain actions are taken. Ohio Revised Code 5301.56. However, the statutory dormancy period of twenty years is interrupted if a “savings event” takes place, including the recording of a mineral interest that “has been the subject of a title transaction.” *Id.* at 5301.56(B)(1). With tremendous fortunes at stake, surface owners have strenuously argued that an oil and gas lease is not a “title transaction” for purposes of the Ohio Dormant Mineral Act. The results to date have been mixed, and the issue is currently pending before the Ohio Supreme Court. See *Chesapeake Exploration, LLC v. Buell*, No. 2014-0067 (Ohio Sup. Ct., Mar. 26, 2014) (agreeing to address whether a recorded lease of a severed subsurface mineral estate is a title transaction under the ODMA). The court should finally resolve the split of authority that has existed in Ohio for six decades. To further complicate matters – or perhaps simplify the issue – the Ohio General Assembly in December 2014 amended the oil and gas lease recording statute and included an express “recognition that such leases and licenses create an interest in real estate” Ohio Revised Code § 5301.09.



Before beginning his teaching career with the University of Dayton School of Law in 1992, Blake Watson clerked for Judge Bailey Brown of the U.S. Court of Appeals for the Sixth Circuit and then worked in Washington, D.C., for the Department of Justice. As a lawyer in the Environment and Natural Resources Division, he represented the United States before federal courts of appeal and state supreme courts in cases relating to environmental, natural resources, wildlife, and Indian law. Professor Watson also assisted on a few cases that went to the Supreme Court. He received a Special Achievement Award in 1988 for outstanding work.

Follow up

Richard James

Think back to your formative years. If it's been more than a few years since you walked the hallowed halls of high school, it was likely back in the "old days" when the closest thing you had to receiving a text message was getting a note passed to you in the halls between classes. If you are an attorney just entering the world of law today, well, then you probably had the benefit of the text message as a communication tool in school. Regardless of how you got the information, when a lead for a great prom date was communicated to you, it's likely you didn't waste time following up. Right? Heck, you probably raced home to call to get the asking done so that you could close the deal and celebrate your amazing dating prowess.

It takes an average of twelve phone calls to move a prospect from the very first point of contact phone call to the point of being a client. True, a prom date can sometimes take some cajoling too, but in business, finding ways to "touch" a prospect in multiple ways (and often in multiple forms or as I call them "senses" of communication) is critical in improving your conversion rate.

The more I work with attorneys, the more I realize it doesn't seem to matter which practice area they have established. I continue to find most firms never call back prospects who failed to set an appointment when they call the office or who hadn't shown up for a scheduled consultation.

When attorneys hire me for coaching, this is one of the very first trouble areas I can help them "fix" to bring immediate improvement and value. My mantra? Follow up with every prospect until they BUY, DIE or UNSUBSCRIBE.

You may ask, "But Rich, how am I supposed to do that? And what exactly does that mean?"



Here's the truth: when you have a system to follow up with the leads you acquire and you manage to turn them into prospects, communicating with and EDUCATING that prospect is one more step of the sales process. This means using any means to deliver information that will help them begin to know you and trust you, your firm and your services are necessary. The suggestion that is my follow-up directive is that every firm communicates using what I call The FIVE SENSES of communication: email; direct mail; text message; phone conversations and outbound calling to reach their unconverted leads.

Our world is one of instant information. Yet, depending on our audience, people have different preferences of how they like to receive their information. When your firm's intake staff fields a call from a prospect, it's smart to find out their preferred means of communication. This way, they are actually letting you know how to reach them more often, and you can be sure to optimize your message to them by reaching them in their preferred manner.

When a prospect contacts your office for more information yet doesn't agree to a scheduled consultation, this prospect isn't saying "No", this prospect is saying, "Not yet". What is needed is for your firm to arrange a system that offers the prospect helpful information about the problem that led them to your

office in the first place. Your possibility of converting a prospect to a client increases with each “touch” you make, and if 12 is the magic number, you now have more tools in your arsenal. Let’s say for example, that a prospect indicated that text messages are the best means to reach him, then arranging to communicate with them via text message bears more chance of them actually **READING** your communication and thus, more of a chance of taking action or another step toward becoming your client.

You may be thinking: “But Rich, I can’t afford staff to handle ALL of these different steps to convert these prospects!”

My answer to that is: “**YOU CAN’T AFFORD NOT TO!**” All of the marketing dollars you are investing to attract leads are not yielding full value if you are not following up properly. Can your staff be trained to handle this follow up? **SURE!** Spreadsheets are one way to keep track of unconverted leads.

Another extremely efficient method is to automate the entire process using a CRM (client relationships management) software. A solution that is used widely today by law firms and other professional service providers as well as my own company is Infusionsoft. Since I’m a systems guy who helps attorneys put systems in place, for my money, Infusionsoft is an ideal answer to the challenge of using a communication path of all five senses.

How does **YOUR** law firm measure up? Take my law firm analysis to gauge your firm’s performance today. It’s free. Check it out here at www.therichardjames.com/analysis/.



Richard James is a successful business consultant, who believes that your law practice should support your lifestyle rather than undermining it. He has grown companies by as much as 500% in under 3 years. He also started his own law firm which grew into a multi-million dollar enterprise. He has consulted in all different kinds of industries.

What every attorney should know about improving SEO & Search Rankings

Gregg Gossett, CEO of Kick 'Em Out Quick

I am often asked by Attorneys across the country if I will take quick look at their websites and give them some basic recommendations on what they can do to quickly & easily improve their (SEO) Search Engine Optimization & Search Ranking without having to hire an expensive SEO consultant.

What I see too often is that their web page titles & web page descriptions do not include some very basic specific information that would have an immediate and positive impact on search rankings.

I have listed below my best practice suggestions in regards to properly writing the title & description for each web page on your firm's site.

Web Page Title

Web page titles, in my opinion, are the most important section of each web page in regards to SEO & Search Rank Position.

If you are browsing books at a book store the title is the first thing that a potential buyer will glance at to see if they have an interest in the contents.

I often see law firms putting the name of their firm first in the title and then the state that they are located in without defining what city they are located in and the areas of law that they practice.



Example:

Jones Law Firm – Attorneys at Law – Arizona

Having the name of your firm first is great if a prospective client is searching specifically for your firm.

In most cases, however, a prospective client is searching online because they don't already have a relationship with an attorney. All they know to search for is what city they are located in and the specific area of law they need assistance with.

Of course you are going to want to include the name of your firm in the title but placing your city and the type of law that you practice first is of much greater importance if you want to improve your search ranking.

Try and write the title of each of your web pages the same way a potential client would type a search query into Google.

Subject / City / Firm Name

Example: Eviction Attorney in Phoenix | Kick'em Out Quick®

(Or Alternatively)

City/ Subject / Firm Name

Example: Phoenix Eviction Attorney | Kick'em Out Quick®

Keep in mind that Google typically displays between 50-60 characters of a web page title. If you keep your title under 55 characters you will have a 95% chance of your entire title being displayed without being cut off or shortened.

Web Page Description

The web page description is, in my opinion, the second most important section of each web page in regards to SEO & Search Rank Position.

After you see a title that interests you at a book store the next thing a potential buyer will do is turn over the book and read a more detailed explanation of what the book is about. A description of each specific web page serves the same purpose.

I like to duplicate the subject and location that I have used in my web page title as the first part of my description. I then try and weave in the location again a second time with additional verbiage and synonym keywords that expand upon what my firm does and a finally a call to action.

One important thing to keep in mind is that research shows that consumers search for the keyword "Attorney" twice as much as they do for the keyword "Lawyer."

You should use both words in your title and description but "Attorney" should be the dominant term.

Example:

Phoenix Eviction Attorney - Contact your local Phoenix, AZ Kick'em Out Quick® Eviction Attorney & Landlord Tenant Lawyer for a Free Initial Consultation.

Keep in mind that Google typically displays between 150-160 characters in a web page description.

Conclusion

I have seen rankings improve from the 5th page to the first page just by implementing these simple suggestions.

Just keep in mind that for best results you should write a title & description that is specific and tailor made for each any every web page on your site.

If you have any questions or need further clarification please feel free to contact Gregg.

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Why Law Firms Need Cyber Liability Insurance

By Libby Tieman

With the increasing capacity of technology, most law firms today store valuable information on computer software. Lawyers often expect their privacy to be protected; however, they often do not have the correct security systems in place. Cyber-attacks have increased by almost 45% in the last year and are becoming more common. Daniel Garrie, founding editor of the Journal of Law & Cyber Warfare, stated that law firms are the “easiest and richest target to go after”. It is imperative that law firms implement cyber security plans and insurance so they are protected from these types of attacks.

Marsh, a global leader insurance brokerage, conducted the 2014 Global Law Firm Cyber Survey, and found that most law firms address cyber threats in their overall risk management strategy, yet most are not

prepared to handle a significant attack. Law firms often do not have the same cyber security standards as large companies because they don't have the same resources. Stolen legal data is on the rise, as information is ending up for sale on black market websites. Hackers that target law firms often work for foreign governments and target intellectual property data and trade secrets. Cyber breaches can occur from infiltration through a third party vendor, poor passwords, opening a spam email, or even a lost or stolen laptop.

Recent studies by the specialty insurer, Beazley, has found that the most common source of breaches come from unintended disclosure, or human error. These include misdirected emails and faxes and lost paper records. The cost of malware computer breaches, however, tend to be four times as much as unintended disclosure, which can be attributed to the expensive process of finding out how the breach occurred.

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Attorneys are often silent when it comes to cyber breaches; they rarely discuss if a breach occurred because they have no obligation to tell the public. Each bar association has different guidelines for what lawyers can do with client data, as opposed to the health care industry which has strict privacy rules. Even though law firms may not be required to inform their clients of a data breach, they absolutely should notify them if their information has been compromised.

Some firms have taken security measures. Many firms have internal controls in place to identify non-compliance with privacy policies. Even more have offsite data vaults and servers. Still, firms use third-party suppliers and vendors, which have proven to be a weak spot in a business' cyber defense plan.

Protecting your client's and the firm's confidential data is imperative. A leak of information from an important case could be detrimental to your reputation, your business relationships, and your job. Once your system is infiltrated, opposing counsel, business competitors, or foreign government could obtain sensitive information. These outcomes, on top of the expenses involved following a data breach, such as first-party and third-party notification costs, could land your firm out of business. When you represent clients who place their trust in you, ensuring you have the best security and resources to protect their information should be a top priority. One of the best ways to do that is to invest in cyber liability insurance.

Cyber liability insurance covers a variety of exposures related to data storage. A cyber policy goes beyond what a professional liability policy may provide in the event of a breach. Here is an example of an instance where your cyber liability coverage would be imperative:

- Your firm suffers a data breach of current and former employees' personal data, which was held by a vendor. The documents included tax information, Social Security numbers, passport information and other personally identifiable information. You need to hire forensic analysts to see how your system was breached, to hire a public relations firm to handle media attention, and to spend additional sums to notify everyone whose information may have been stolen. All of these costs are covered by your cyber liability policy.

Because technology is rapidly changing, policies are evolving to cover more cyber liability exposures in one package. You can receive cyber insurance coverage for the following:

- System Damage, Cyber Crimes, Errors and omissions through technology, Crisis communication, Breach of privacy and ensuing liability, investigations, harming of reputation.

Be sure to talk to your clients about how your law firm stores its information and notify your clients in the event that their information was compromised to avoid further damage. When you're not protected, your firm could pay the price.

All law firms are at risk. Be prepared for a data breach and protect your firm. For an industry built on trust, cyber liability insurance is a must.

Lawyer Cover specializes in professional liability insurance for law firms around the country. We have one of the most comprehensive cyber liability policies, which include coverage for cyber, privacy, and media risk liability at an affordable price. We offer cyber coverage within your professional liability policy or as a standalone policy. Deductibles start as low as zero with a one million dollar limit. Protect your firm from unpreventable cyber-attacks and data breaches with cyber liability insurance. Contact Lawyer Cover by phone at 800-945-1810 or email at applications@lawyercover.com to see which policy is right for you.

Interview Process and Making the Right Hire

By Jacqueline McAferty

You may have heard the story of the two brickmakers who were busy with their trade. Someone came by and asked, "What do you do for a living?" One brickmaker responded, "I make bricks." The second brickmaker replied, "I build cathedrals!" We all want to hire the cathedral builders, not the brick makers. How do you find the perfect applicant in the limited time you have to interview someone? You put a significant amount of time and resources into training new employees, so you want to make sure you make a good hiring choice so that investment is not wasted.

Over the years, I've found some things that help me in the hiring process. Our firm has gone from a small firm of five attorneys and seven staff to approximately 68 attorneys and 62 staff in the last 12 years. There have been a lot of interviews in that 12 year period! The process described below can help you in whatever size of firm you have.

Method: We use a four step interview process for interviewing applicants. Once we've reviewed the resumes and chosen the likely candidates: 1) Conduct a telephone pre-qualification interview; 2) Baseline testing administered (varies by position being filled); 3) In person interview with hiring manager; 4) In person interview with the person or team that the applicant will work with if hired.

Step 1. Telephone interview and 'pre-qualification' of candidates. This step includes verifying experience listed on resume, reviewing the job description to see if it is a good fit and ascertaining the salary level is appropriate.

Step 2. Basic testing. Have you thought about reviewing the job description and selecting some basic skills that can be tested so you can have an objective measure of skill for applicants? For a staff position, you may use a grammar/editing test, along with testing in the programs the firm uses (example: Microsoft Outlook). If grammar/editing is important, it is something that is easily measured and can be a critical component in a hiring decision.

If you are hiring a marketing manager you may ask that applicants write a press release with facts presented, edit a website (test site), and/or edit a video. Look at your job description and decided what skills you can test for that relate to actual job duties.

3) When you have multiple people interviewing the same candidate, have you thought about using a scorecard? This allows each person participating in the interviewing process to score each area that is important to you (examples include experience, appearance, presentation, goals, attitude, preparedness). Take time to lay out the philosophy of the firm and give a couple of stories that demonstrate the culture. Once that foundation is laid, you can ask the questions that relate to each scoring area. Examples of questions are given below. Questions should be related to the competencies that the ideal candidate must possess in order to perform at the level a particular position requires.

Experience: For a litigation legal assistant, you may ask a specific question that relates to the work they do. "Walk me through how you would go about setting a deposition of an opposing party represented by counsel." Or, "Tell me what dates you would docket if a client brought in a complaint they had been served with." If you were hiring for an HR person, the question may be "What steps would you take if an employee

was tardy three times in a two week period?” Or a ‘what if’ question of a recent HR issue you faced. The answers will give you an idea of how well they know their position.

Attitude: One of my neighbors told the story of a new person moving in to the neighborhood. The new person asked, “Is this a good neighborhood?” The neighbor responded, “How was your old neighborhood? The new person replied, “It was great! I had such good neighbors.” The neighbor said, “You are going to like this neighborhood too.” That principle applies to work as well – satisfaction in any situation relates in great part to the person’s attitude. A good question to ask may be “What are three things you liked and three things you disliked about your last/current position?” I watch for signs of ‘sour grapes’ about former employers or co-workers. The answers also give you insight as to what the applicant values in a work experience which can help determine if they are a good fit with your firm culture as well as the position.

Goals: A sample question could be “What would you like to be doing five years from now?” or “Describe your perfect job.” The answers can help you know if their goals are in line with the organization and if they will be a good fit for the position. If they don’t have a goal, that also tells you something about the applicant.

Preparedness: My dad used to say there are three kinds of people: those who let things happen, those who make things happen and those who wonder what happened. A critical question can be “Do you have questions for me about the firm or the position?” Their questions are an indicator of how prepared they are. You want someone who asks good questions – it shows they have thought about the position and researched the firm. You want employees who ‘bring their brain to work’ and will question processes and procedures in place. Great insights can be gained by having a fresh set of eyes on what you are doing so you can make a change if there is a better way to do things.

End the interview by letting the applicant know what to expect next and when they can expect to hear from you. At the end of this round of interviews, you should be in a position to identify the top two or three applicants to go on to the final interview.

4) Have the applicants meet with the attorney or team that they will be working with directly if hired. The objective of this interview is to make sure there is a good fit with personalities and the team culture. The questions you want to see answered in this interview relate to expectations. The applicant can be asked what they consider to be important in their employment experience and why they think they should be hired for the position. They can be asked what their idea of ‘a good job’ is. The attorney/team members communicate what they consider to be ‘a good job’ for the position that is being interviewed for and what is important to them in the person that would fill that position. The attorney and/or team members that participate in the interview use the scorecard so that you can have a pretty objective scoring for each candidate interviewed.

Once all the steps above are complete, the scorecards and the test results can be tabulated and the team makes the final decision on hiring. A benefit of using the process above is that generally there can be a consensus as to the hiring decision. Another benefit is that all participants in the hiring decision work to make onboarding a success in part because they have been engaged in the process. Your team can get on with building cathedrals and not just making bricks!



Jacqueline McAferty is the Chief Operating Officer at Davis Miles Mcguire Gardner. With 10+ years of experience in law firm management and 20+ years in the legal field, she excels at improving operational excellence, leveraging the use of technology-based innovations for marketing, and system and process documentation. She received her M.B. from Grand Canyon University.

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UPCOMING EVENTS

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OCTOBER NAREAL CONFERENCE

In October we will be holding our first ever NAREAL Conference. This will be an opportunity for real estate professionals of all kinds to come together, network, learn, and hopefully have some fun. More info to come soon.

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If you are interested in publishing an article in future NAREAL newsletters, email us at admin@nareal.org with your proposal and we will work with you to publish it in a future newsletter.

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