

Promotional Incentives

Many Realtors® promote their businesses by offering incentives to Buyers and Sellers. These incentives typically involve doing something that promotes the Realtor's® business in exchange for a chance to win merchandise or cash prizes. This seems like a great way to gain clients and attract business, but these promotional incentives often involve an element of chance, which raises a number of issues under Michigan law.

Michigan, like many other states, prohibits various types of games of chance. Under the Michigan Lottery Statute, a promotion will be deemed illegal if it contains all of the following three elements: “consideration” chance, and a prize. If the promotion is missing the “consideration” element, the activity will not be considered a prohibited Lottery, but instead a Game Promotion. A Game Promotion, unlike a lottery, is a permissible activity under Michigan law unless it is being used to promote the sale of a particular home. So long as that is not the case, it is completely legal for a Realtor® to conduct certain contests and games of chance, so long as the participants are not required to provide any type of “consideration” to enter the contest.

That, of course, leads us to the big daunting legal question: What is consideration? Consideration, for purposes of distinguishing between an Illegal Lottery and a permitted Game Promotion, is defined very broadly. Both the Michigan Supreme Court and the Attorney General have determined that consideration exists when the person or business promoting the contest gains some type of financial benefit from the method of entry. This is difficult because the courts have significant discretion interpreting what is and is not a “financial benefit”. The Michigan Supreme Court has found that consideration exists when an individual is required to buy goods or services in order to enter a drawing, even if they are not required to pay an additional amount for the chance. This example is best illustrated by a Michigan Supreme Court case, in which the

court held that theatre patrons who received a raffle ticket with the purchase of a standard admission ticket, had, in fact, paid consideration. The court ruled that consideration existed because the theatre intended to attract additional business and reaped a financial benefit from patrons who, had it not been for the free raffle ticket, might have purchased an admission to ticket from a competing theatre. This case illustrates how consideration can exist even in simple activities that don't require participants to pay an additional amount beyond the price for the original good or service.

Remember, if consideration is present, the gaming activity is a prohibited Lottery. If the gaming activity lacks consideration, it is a Game Promotion which may be permissible under Michigan law. Even if the activity is a permitted Game Promotion, Realtors® should be familiar with real estate-specific Michigan law that limits the use of Game Promotions in certain situations. Specifically, Realtors® should be aware of MCL 339.2511 which states that a Broker or Real Estate Salesperson may not use a plan or scheme involving lottery, contest, game, prize, or drawing for the sale or promotion of a sale of real estate. In other words, even though Game Promotions are legal gaming activities, Michigan law prohibits Realtors® from using Game Promotions to sell or promote a specific piece of real estate. For example, a Realtor® cannot say “Come to the open house at 123 Elm Street for a chance to win a flat screen TV”. This is a scheme that directly promotes the sale of 123 Elm Street. True Game Promotions may still be used by Realtors®, so long as they are used for a purpose other than directly promoting specific real estate.

In today's age of emerging technology, many professionals utilize social media to promote their businesses and expand their networks. In fact, many professionals rely solely on social media - and the real estate industry is no exception. For this reason, it is very important for

Realtors® to understand how the gaming law affects acceptable online business practices. Some online promotional incentives might technically be prohibited Lotteries, depending on the type of consideration requested by the Realtor® who is conducting the activity.

A common web promotion used in the real estate industry requires an individual to “like” or “share” the Realtor’s® social media page for a chance to be entered into a prize drawing. This activity is, at minimum, a Game Promotion because there is certainly a prize element and a game of chance. If consideration is also present, then the activity becomes a prohibited Lottery.

This brings us back to the recurring question of “what is consideration?” and whether or not “Liking” or “Sharing” on social media amounts to consideration, as defined by the law. There is no Michigan case directly on point, but in the past, courts have taken a very broad interpretation of what actions amount to consideration. In making a determination, the courts look at whether or not the contest’s entry method conferred a financial benefit on the game promoter. One might argue that while simply “liking” a page confers no financial benefit, actually “sharing” a page requires a participant to affirmatively promote the game sponsor’s business and, thus, is more likely to be deemed “consideration.” Realtors® are strongly encouraged to exercise caution when offering promotional incentives through social media platforms.