



Agent Fiduciary Duties
Capitol Report President's Report





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# **New and Returning Events**

As we continue to find innovative ways to strengthen our voice as an association, 2023 will offer a variety of opportunities for members to attend in-person events throughout the year. January concluded with a successful and well attended Achieve leadership conference. 250 Realtor® Leaders and industry affiliates were in attendance for two days of knowledge, networking and Michigan RPAC honors. At the President's Reception, it was a special moment for me to stand alongside the newly elected officers and directors as they recited their oath to serve as your 2023 leadership team.

... **2023** will offer a **variety** of opportunities for members to attend **in-person events** throughout the year.

Throughout the rest of the Achieve conference, we learned best practices for leadership, how to address stress, burnout and most importantly, how to "lean in" and embrace change. Local associations and major investors were recognized for their collective accomplishments during the Michigan RPAC Awards. 2023 NAR Realtor® Party Director, Colin Mullane, was our keynote speaker and stressed the fact that owning a home is the best way to build generational wealth. Look for the full list of our 2022 RPAC major investors in this magazine.

Looking ahead, our next event is the Broker Summit on April 26 at The Westin Book Cadillac Detroit. This is a must-attend event for Brokers and Office Managers and will feature a legal update specific for Brokers. Additionally, we are excited to host the first ever Michigan Realtors® Fair Housing Summit. Located in the same venue the following day, on April 27, the Fair Housing Summit will feature some incredible speakers and have many educational resources available for you. Fair housing is more than a list of dos and don'ts, rights and penalties, and mandatory continuing education. As stewards of the right to own, use and transfer private property, fair housing protects our livelihood and business as Realtors® and depends on a free, open market that embraces equal opportunity. Fair Housing Makes US Stronger.

Lastly, I'm excited to announce the return of our Capital Day, but also that the NAR *Riding with the Brand* bus tour will be making a special stop in Lansing on June 6 during our Capitol Day. NAR has partnered with state Realtor® Associations on Riding with the Brand events across the country to showcase the value of Realtors®, our association and the importance of real estate and Realtors® to local communities. We'll engage local elected officials, community leaders and the media to highlight everything from market condition trends to Realtors® supported programs and policy initiatives.

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With all that said, I am looking forward to seeing you at our upcoming events this year as we all progress in this exciting and rewarding industry. Let's continue our efforts to embrace change and find ways to innovate our processes, both personally and professionally. That's Who We R. •

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# **COMING** EVENTS



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#### April 26, 2023 / April 27, 2023

Broker Summit x Fair Housing Summit

Westin Book Cadillac Detroit

#### June 6, 2023

Capitol Day x Riding With The Brand Bus Tour **Downtown Lansing** 

#### June 20-22, 2023

MRAEC Retreat

The Hotel H, Midland

#### September 20-22, 2023

The Convention

Detroit Marriott at the Renaissance Center

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# Michigan Government: A Focus on Housing

The 2023-2024 Michigan legislative session kicked off this past month with a focus on housing. Overall, this is great news for our membership. Michigan, much like the rest of the country, faces critical challenges to housing availability and affordability -- and Realtors® aren't the only group concerned about the housing industry. It is on the mind of government officials and businesses in every sector as Michigan competes for talent and the workforce seeks housing options near their place of employment. Now, the legislature and Governor Whitmer are making it a top issue for the state of Michigan.

In a legislative first, the Michigan House and Senate have created unique committees charged with housing issues in their respective chambers. The Senate has the Housing and Human Services Committee, while the House created the Subcommittee on Housing under the Economic Development and Small Business Committee. In prior sessions, issues related to housing were spread out among many other committees from Regulatory Reform to Local Government. We are still early in the legislative session to see the extent of the issues charged to each of these committees, but the acknowledgment of the need for impactful housing policy is a step in the right direction.

Encouragingly, the legislature got to work early on the housing front. The first bill signed by the Governor this session was a budget supplemental that allocated \$200 million dollars towards housing in Michigan. \$50 million to Michigan's Missing Middle GAP Program and another \$150 million to Housing Gap Financing and Affordable Housing. It marked one of the earliest bill signings ever in a legislative session. Both funds were established within the Michigan State Housing Development Authority (MSHDA) last year and funded at nearly the same level, with a goal toward rehabbing and building 75,000 new housing units over the next 5 years. This new round of funding continues that commitment, but it also expands the availability of the funds to for-profit developers (last year's funding was only open to nonprofits). Coupled with a recent executive order moving oversight of the Community Development Block Grant program to MSHDA, housing program funding will hopefully be more streamlined.

The legislature also got the ball rolling on Senate Bill 4 and House Bill 4003, to expand the Elliott Larsen Civil

Rights Act to include protections for sexual orientation and gender identity. Realtors® have protected against housing discrimination for sexual orientation and gender identity through the Realtor® Code of Ethics since 2011 and 2014, respectively. This important change has been a long time coming in Michigan and will codify the recent Rouch World, LLC. v. Department of Civil Rights decision by the Michigan Supreme Court extending civil rights protections for the LGBTQ+ community. Not only do these bills provide important housing protections, but they support Michigan employees and business, as we attract and maintain a skilled and diverse workforce, beyond just wages and benefits.

Additionally, this year will mark the start of a new Statewide Housing Commission that will include Realtors®, builders, local governments, community development organizations, and nonprofits among other stakeholders. This commission will be charged with implementing the new Statewide Housing Plan adopted last year. As a reminder, Michigan Realtors® and the National Association of Real Estate Brokers (NAREB) both played a key role in developing Michigan's first ever statewide housing plan. We expect Governor Whitmer to name those appointees in late February or March. The housing plan aims to tackle issues of safe and affordable housing through a collaborative and data driven approach. More information on the Statewide Housing Plan can be found on MSHDA's website, Michigan.gov/MSHDA.

Michigan Realtors® will once again be working with the Housing Michigan Coalition to identify and pass legislation to find common ground between the public and private sector in the development of more housing. Last legislative session, the coalition worked to help pass legislation aimed at the creation of flexible and locally driven incentives for development: creation of Housing Facilities Tax Exemptions, extending Neighborhood Enterprise Zones to all local governments and allowing for local payment in lieu of taxes programs for workforce housing without requiring state or federal subsidies or programs. This year the coalition will turn its attention to amendments to the Michigan Brownfield Act, employer assisted housing tax credits, and incentivizing local zoning changes, among others.

The policies discussed above present real opportunities to make a positive impact to increase the supply of

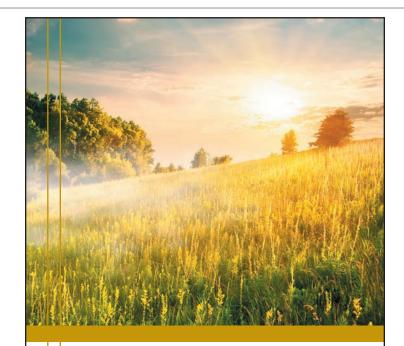
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safe and affordable housing in Michigan, but there will be challenges to this goal in the year ahead. In January, the Detroit City Council passed a resolution urging the legislature to repeal the current statewide prohibition on rent control. Michigan Realtors® Statement of Public Policy includes opposition to all forms of rent control -- A policy that while well intentioned, reduces housing supply, impacts affordability and has proven to harm the very renters it seeks to protect.

Rent control remains the narrow exception, rather than the rule across the country. Michigan is one of 26 states that has an explicit prohibition on local rent control ordinances, having passed the measure in 1988. In communities that have tried it, rent control has backfired. In place like San Francisco, New York, and St. Paul, rent control polices have led to a sharp decline in affordable rental units, decreased rental supply through conversion to condos, and degraded the condition of existing rental units. At a time where Michigan is suffering from a lack of affordable housing, increasing housing supply is the answer, not rent control policies. Michigan Realtors® will continue to advocate for production of new affordable rental housing and the preservation of current rental housing stock through renovation and redevelopment. Housing demand cannot be met if government disincentivizes the financing, production and improvement of rental housing.

The year is off to a quick start on housing policy and the expertise and engagement of the Michigan Realtors® membership will be imperative in shaping these policies moving forward. The association's Public Policy Committee and Board of Directors will be constantly advocating for and monitoring legislation every step of the way.

Please follow along for breaking news through our social media and E-news publications. Additionally, be the first to receive legislative Call for Action alerts on your mobile device by texting the word "REALTOR" to 30644.



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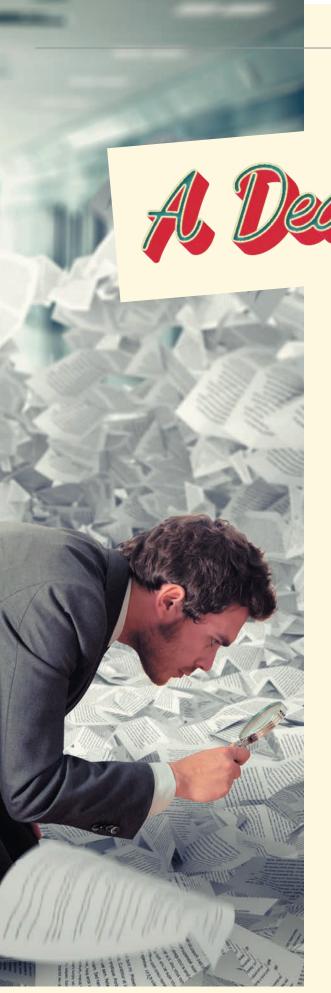
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Residential purchase agreements typically contain standard clauses designed to discourage parties from claiming that there were agreements or representations made outside of the written documents themselves. This article will discuss several of those clauses in

GAIL A. ANDERSON, ESQ.

#### Integration (Merger) Clauses

In the first case, the Buyer had initially put in a \$540,000 offer on a home which was contingent upon a \$340,000 mortgage. Along with that offer, the Buyer submitted a mortgage preapproval letter for \$340,000. After the Sellers rejected her initial offer, the Buyer submitted a second offer at \$560,000, which was contingent upon a \$448,000 mortgage. The Sellers accepted the Buyer's second offer.

the context of cases decided by the Michigan Court of Appeals in the last year.

The Buyer was unable to get a \$448,000 mortgage and terminated the purchase agreement. The Sellers ended up selling their home for \$525,000, which was considerably less than the Buyer's second offer. The Sellers sued Buyer for fraud, alleging that the Buyer had told the Sellers' listing agent that the Buyer had substantial retirement funds available that the Buyer could use to complete the sale. The Sellers' lawsuit was thrown out before trial because the purchase contract contained the following language:

Entire Agreement: The parties agree that this Agreement contains the entire agreement between Seller and Purchaser and there are no agreements, representations, statements or understandings which have been relied upon by the parties which are not stated in this Agreement.

The trial court found, and the Court of Appeals agreed, that because of this clause, it must find in favor of the Buyer. The purchase agreement had a mortgage contingency. The purchase agreement also had a merger clause that stated that there were no side agreements and that all agreed upon terms were included in the written purchase agreement. As a matter of law, whether or not the Buyer had mentioned her retirement account as an alternative source of funding was irrelevant.

#### "As Is" Clauses

In the second case, after the closing on their purchase of a vacation home, the Buyers discovered that the garage, fence and part of their patio were located on their neighbor's property. The Seller had answered "unknown" to the question about encroachments on his seller's disclosure form. The Buyers sued the Seller for fraud.

It turned out that the Seller had owned this vacation home for ten years. At some point during those ten years, Seller's neighbor had duct-taped a note to the Seller's door and followed up with a heated discussion demanding that the Seller "get their stuff off" the neighbor's property. Although the neighbor had a survey, he did not show it to the Seller either during that conversation or at any time later. According to the neighbor, this had been the only discussion about the encroachments, and there had been no follow-up by either party.

The Seller's first response was that not only had the Seller disclosed that he did not know whether there were any encroachments, but he had also disclosed that there had been improvements made to the property without permits. The Seller argued that these disclosures were sufficient to put the Buyers on notice

that they should have the property surveyed. The Seller correctly noted that under Michigan law, if there is an "as is" clause, the Seller is not responsible for defects that could have reasonably been discovered upon inspection.

The Court rejected this argument, stating that while it would have been prudent for the Buyers to have the property surveyed, it was not required. The Court held that an "as is" clause does not protect the Seller merely because the Buyers could have discovered the truth. For the Seller to be protected, the Buyers must also have a duty to investigate. In other words, the question as the Court saw it was whether the Buyers were presented with some indication that further investigation was necessary. In this case, the Court found that the information disclosed by the Seller had not been sufficient to put the Buyers on notice that a survey was required.

The Seller's second argument was that the Buyer had agreed to accept the property "as is" and, therefore, as a matter of law, the Seller was not responsible for what had been an innocent misrepresentation. The factual determination to be made by the Court was whether the Seller's statement that he did not know of any encroachment was false. Interestingly, the Court concluded that it was not. The Court pointed out that there had been only one mention of an encroachment over a ten-year period, that this conversation had been "out of the blue," that the neighbor had provided no survey or other verification of the encroachment to the Seller and that there had been no follow-up by anyone. Given these facts, the Court found that it was entirely reasonable for the Seller to dismiss this single interaction as insignificant. Since the Seller's statement about encroachments was found to be innocent, the "as is" clause shielded the Seller from liability. The Court therefore threw out the case before trial. Had the Court concluded that the Seller's single interaction with the neighbor was sufficient to put the Seller on notice, then the "as is" clause would not have protected the Seller from liability.

#### Release Clauses

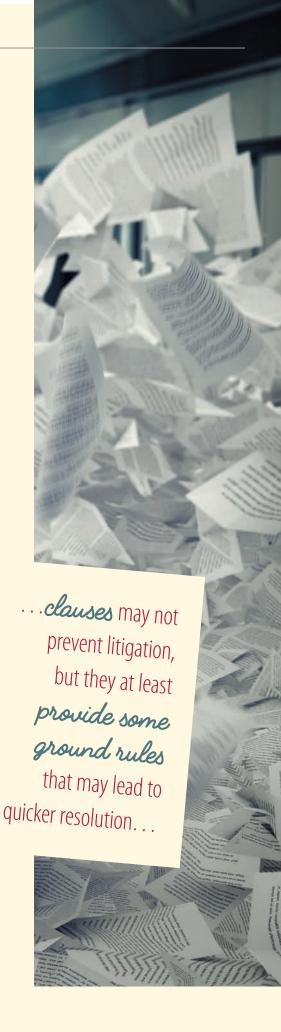
The last case involved Buyers who had been told that the home they were purchasing contained 800 more square feet than it actually did. The Buyers sued the Sellers and their Listing Broker, claiming that they had committed fraud. The Buyers claimed that their decision to buy the home was based in part by the home's relatively low price per square foot compared to other homes in the area. The Sellers and their Listing Broker argued that the Buyers' claims were barred by the following clause in the purchase agreement:

Buyer agrees that Buyer is not relying on any representation or statement made by Seller or any real estate salesperson (whether intentionally or negligently) regarding any aspect of the Property of this sale transaction, except as may be expressly set forth in this Agreement, a written amendment to this Agreement, or a disclosure statement separately signed by the Seller.

The trial court agreed and threw out the case before trial. The trial court held that by signing the purchase agreement containing the release clause, the Buyers had agreed that they were not relying on any statements made outside of the purchase agreement or the seller's disclosure statement. Having previously disclaimed such reliance, the Buyers could not now take a contrary position.

#### Final Word

The purpose of an integration clause is to prevent either party from claiming that there were additional terms beyond what is contained in the written contract. The purpose of a release clause is to prevent a buyer from claiming that there were additional representations about the condition of the property beyond what was in the seller's disclosure or elsewhere in writing. With an "as is" clause, the buyer is assuming the risk of a defect unless the seller makes a knowingly false statement. These clauses may not prevent litigation, but they at least provide some ground rules that may lead to quicker resolution of the lawsuits that are filed.





# An Overview of Agency Part II — Fiduciary Duties

In the last edition of this publication, we discussed the ins and outs of agency law – specifically, how to create and terminate agency relationships with buyer and seller clients. This article will explore the fiduciary duties that stem from the creation of those agency relationships.

Let's start by reviewing the basics of agency law. In an agency relationship, an agent acts as a "fiduciary" to the principal (client) which means that the agent must at, at all times, act in the principal's best interest. This obligation stems from the set of duties (known as "fiduciary duties") that are created as a result of this relationship.

Typically, a fiduciary relationship is created when the parties enter into a service provision agreement (such as a listing agreement or buyer's agency contract). Understand, however, that a written agreement is *not required* to create an agency relationship. The parties' words and actions can also be used to establish an agency relationship and impart the fiduciary duties that flow from that relationship. It's not necessary that the parties *intend* to establish the agency relationship – only that their conduct does, in fact, create such a relationship.

#### **FIDUCIARY DUTIES**

What fiduciary duties are real estate licensees obligated to provide to their clients?

The Michigan Occupational Code provides that when the licensee enters into a service provision agreement with either a buyer or seller, the licensee owes, at minimum, the following duties to his or her client: 1) reasonable care and skill, 2) loyalty, 3) compliance, 4) accounting and 5) confidentiality. The following sections will discuss these fiduciary duties in depth.

#### **REASONABLE CARE AND SKILL**

An agent owes, to their client, the duty to exercise reasonable care and skill in representing the client and carrying out the responsibilities of the agency relationship.

An agent is not expected to have skills and knowledge beyond that of an ordinary real estate salesperson or broker. In fact, the Code obligates a real estate licensee to refer their client to other licensed professionals for expert advice related to material matters that are not within the expertise of that licensee. For example, attorneys, tax professionals, land surveyors, appraisers, home inspectors, builders, engineers etc. all have a special subset of knowledge beyond that of the average real estate salesperson or broker. The law requires agents to refer their clients to these professionals when it's appropriate.

Say, for example, that a buyer's agent is representing a buyer who wishes to purchase a property that will be used to cultivate and manufacture marijuana products. This is a complex transaction in which the buyer-client will likely have a number of legal questions that the real estate license cannot not (and should not) answer. In this scenario, the buyer's agent should encourage the buyer to seek legal counsel from a real estate attorney who has experience with marijuana-related transactions. There are liability concerns if the buyer's agent attempts to answer questions related to the

legal implications of the sale (e.g. questions about the conflict between state and federal marijuana laws).

#### LOYALTY

The Duty of Loyalty requires an agent to, at all times, act solely in the best interests of his or her client. Agents are prohibited from taking advantage of their agency position for their own benefit. The law calls this "usurping opportunity," which is a breach of fiduciary duty.

For example, let's say that an agent lists their seller-client's home for sale and then purchases the property for themself. The agent then immediately re-lists the home and sells it for a profit. This agent is engaging in self-dealing and has breached their duty of loyalty to their seller-client.

#### **COMPLIANCE**

The Code obligates an agent to comply with the laws, rules, and regulations of this state and any applicable federal statutes or regulations. In other words, don't break the law.

#### **ACCOUNTING**

An agent must account for, in a timely manner, all money and property received by the broker in which the client has or may have an interest. This duty compels the agent to safeguard any money, deeds, important documents or other personal property provided by the client and in the agent's control.



#### CONFIDENTIALITY

An agent has an obligation to not disclose their client's confidential information. The tricky part here is discerning what is and what is not considered "confidential information." Realtors® must understand that not everything they learn about their client or their client's property will be considered "confidential information." As a general rule, information about the client and/or their property is not considered "confidential" if that information is learned from (or even simply available from) an outside source. This would include, for example, information that is available to the public (like court records), or information that is learned from the other side of a transaction. For instance, the details of an inspection report that was paid for and provided by a buyer would not be considered "confidential information" to a seller.

Agents often ask whether or not information about the condition of a property is considered "confidential information" to the seller of that property. This question stems from the concern that the listing agent would be prohibited

from sharing certain information about the condition of the seller's property should that information be considered "confidential." What Realtors® must remember here is that, regardless of whether information about a property condition is considered "confidential," the Duty of Confidentiality will not obligate a listing agent to misrepresent the condition of the property to the other side of the transaction. In fact, agents are very much cautioned against partaking in the misrepresentation of the condition of the property as such involvement could result in liability.

#### **SERVICES OWED**

There are also a handful of services that a real estate licensee is obligated to provide to their clients after entering into a service provision agreement. Per the Michigan Occupational Code, those services are as follows:

- If the real estate licensee is representing a seller, they must market the seller-client's property in the manner agreed on in the service provision agreement.
- 2. Acceptance of delivery and presentation of offers and counteroffers

- to buy, sell, or lease the client's property or the property the client seeks to purchase or lease.
- A real estate license must assist in developing, communicating, negotiating, and presenting offers, counteroffers and related documents or notices until a purchase agreement is executed by all parties and all contingencies are satisfied or waived. Note, that while the Michigan Occupational Code requires real estate licensees to present offers to their seller-clients only up until there is a signed purchase agreement in place – the Realtor® Code of Ethics obligates listing Realtors® to continue presenting offers up until the transaction has closed. Listing brokers should include language in their listing agreements that allows the seller to expressly waive this obligation if there is no expectation that offers will be presented after a binding purchase agreement is in place.
- After execution of a purchase agreement by all parties, the real estate licensee will assist, as necessary, to complete the transaction pursuant to the terms specified in



the purchase agreement. A licensee shall not close a transaction on any terms or conditions that are contrary to the terms or conditions of an executed purchase agreement unless given written approval from the buyer or seller.

5. A real estate broker who is involved at a closing must provide, to the buyer and seller, a closing statement signed by the broker (or associate broker) showing to each party all receipts and disbursements affecting that party. This rule does not apply if the closing is conducted by a title company.

#### WHEN DO FIDUCIARY DUTIES END?

In general, an agent will stop owing services and fiduciary duties to a client whenever the agency relationship with that client ends. An agency relationship will typically terminate whenever the listing agreement or buyer's agency contract says that it terminates. These agreements are

required, by Michigan law, to have an expiration date. That expiration date is, typically, when the agency relationship will terminate and thus, when the agent will cease to owe fiduciary duties to that client.

Understand, however, that not all fiduciary duties end when the agency relationship ends. The Duty of Confidentiality, for example, is somewhat special in that it survives the termination of the agency relationship, while the other duties do not. This means that the Duty of Confidentiality does not end when the agency relationship ends. Instead, it continues on, even after the agency relationship has been terminated. The other fiduciary duties (such as the Duty of Loyalty, Duty of Reasonable Care, etc.) operate differently and end when the agency relationship ends.

This is why it's so important that real estate licensees are able to differentiate between what is and what is not considered "confidential" information. This distinction is important because it will determine when, if ever, the agent is permitted to disclose certain information about their client. If the information is considered "confidential" then, of course, the agent's duty of confidentiality applies, and the agent must keep that information confidential even after the agency relationship has ended. If the information is not "confidential," then the agent is free to disclose that information after the termination of the agency relationship.

Fully understanding these fiduciary duties (and their implications on agency relationships) is a must for Realtors® who wish to avoid liability and keep in lockstep with the legal requirements of the Michigan Occupational Code. Undertaking these obligations correctly and remaining cognizant of the responsibilities that come with taking on an agency role is a crucial step in "doing agency the right way." •



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# 2022 Michigan RPAC Major Investors

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### **PLATINUM R**





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