

A publication of Michigan Realtors®

MICHIGAN REALTOR®

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MAY 2019

PUTTING YOUR
relationships
TO WORK

PLUS

Buyers' Agent Issues
President's Report

Capital Report
Website Lawsuits



Understanding the PRE

Volume 18 | Number 3



MICHIGAN REALTORS®

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{ MAY | TWO THOUSAND & NINETEEN | VOLUME EIGHTEEN | NUMBER THREE }



A Lot of Great Stuff Coming Down the Pike

This May issue of Michigan Realtor® Magazine is before you right now and is the third of six scheduled to publish this year. That means we are halfway through 2019 already! Individually and collectively, we've seen some great things happen so far in Michigan's real estate industry, and no doubt there is much more to follow.

First off, it's important to note a key opportunity is coming up quickly for you. Applications for the 2020 Michigan Realtors® District Director Elections are due no later than Friday, July 19, 2019, and online voting will open on Tuesday, September 3, 2019. Are you up to filling one of these important and engaging seats? Consider being a part of something significant in the real estate community and review the qualifications by visiting www.mirealtors.com. Serving as a volunteer helps to shape the association for you and your colleagues, develop your leadership skills and build your professional network.

Next, let's take a quick look back on the success of the Broker Summit held in April at The Detroit Metropolitan Airport. If you were there, you know what I mean! This is always an exceptional event, but this year's nationally-recognized speakers kicked it up a notch and made it a high-profile experience for all in attendance. Their unique backgrounds and moving presentations made a lasting impression. I know that the knowledge and motivation they shared will guide me for quite a long time.

After all, there is a special sense of pride in being a Realtor®, as we all know, and understanding that we deliver something that no one else can is very rewarding. Learn more about this initiative and share YOUR story at <https://www.nar.realtor/thats-who-we-r>.

There are more impressive events coming up this year to help you continue to your professional development as well as build your network. Mark your calendar now and make sure you don't miss a single thing!

REALTORS® LEGISLATIVE MEETINGS & TRADE EXPO

May 13-18, 2019

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Visit www.mirealtors.com for details, applications, and registration.

I look forward to seeing many familiar faces at the Realtor® Hill Visits in D.C. in May, meeting new colleagues and making some friends too. Our members always have a strong presence and powerful voice in our nation's capital when meeting with their elected officials, and this year will surely be no different. While you continue to reach out to your pipeline, network, and community throughout the next half of 2019, be open to sharing tips and tricks while receiving some, too. ●



Realtors® are real people making a difference everywhere, from neighborhoods to our nation's capital. Earlier this year, NAR launched a new consumer ad campaign directed at NAR members: "That's Who We R®."

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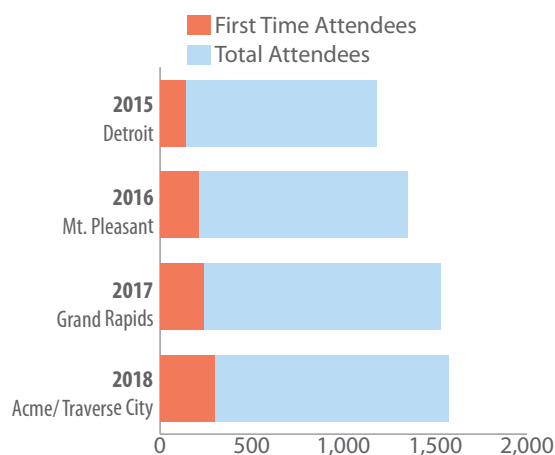
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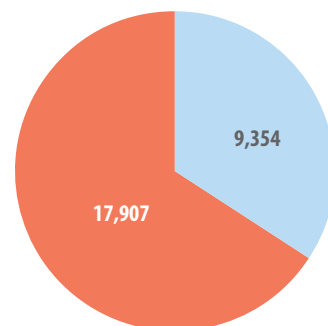


The Convention Attendees 2015-2018



CE Marketplace Registered Users Realtor® Members vs. Non-Members

Non-Members Registered
Realtor® members Registered





Spring (and the State Budget) Has Sprung

It took only a couple of months for the honeymoon between Governor Gretchen Whitmer and the Republican legislature to end. I'm not saying that it has devolved into the nasty politics that we've seen elsewhere throughout the country, but some deep philosophical divides are being exposed in the time since the Governor presented her budget.

In particular, the legislature is taking exception to two key pieces of the Governor's budget: the \$0.45/gallon gas tax increase and a 40% tax increase on pass-through business (S-Corporations and LLCs). While these are two very different issues, the Governor has stated that she believes that this funding must be part of the budget.

It is interesting to see how each of these tax increases operate within her budget proposal—raising money over here, frees up money over there. By raising taxes on LLCs and S-Corps, she proposes eliminating the income tax on public sector pensions. By raising the gas tax, it frees up money for higher-education, which in-turn frees up money for K-12 education. In her presentation to the legislature she acknowledged that she is asking them to take a tough vote, and that is why she is asking for these proposals to be rolled into one. Only one difficult push of a button for a legislator.

It wasn't a secret that the Governor was going to push for increased money for roads. Her campaign heavily used the catch phrase of "fix the damn roads." The proposed \$0.45 prompted a hard "no" from Republican leadership in both the House and the Senate. In fact, there are many Democrats that remain silent and are not coming out to embrace the proposal. The Governor says she is willing to talk, but she wants any proposal to raise at least \$2.5 billion to tackle the state's roads.

You will remember that there are still several legislators currently serving that voted on a roads plan in 2015, set to be fully phased in by 2021. In 2015, the Republican lead legislature voted to increase the gas tax by 7.3 cents and raise registration fees, for a total of \$600 million. Along with a shift in general fund dollars of another \$600 million by 2021, the total 2015 plan raises \$1.2 billion for roads. If I were to predict a Republican starting point on road funding, I would say it starts with letting the 2015 plan fully phase-in and build from there. Thus far, the Governor's approach seems to ignore the 2015 roads plan entirely.

The other part of this budget proposal caught many by surprise. The tax increase on S-Corps and LLCs squarely effects small and medium sized business, and

more pointedly, will result in a tax increase for many Realtors®. Michigan Realtors® supported the previous elimination of the double taxation on pass-through entities when S-Corps and LLCs were exempted from the Michigan Corporate Income Tax. The principals in those entities are taxed at the individual income tax rate of 4.5%, not twice. This proposal increases that rate to 6% and raises \$280 million that could be used by those small businesses to grow Michigan jobs and investment.

Overall, the proposal increases the tax rate on LLCs and S-Corporations to 6%, from the current 4.25% income tax rate that owners are paying. It then exempts owners from the state personal income tax and exempts the first \$50,000 in income to the business entity. If there is plus side to be found, this new business tax of 6% would now be deductible at the federal level.

This is bad news for a lot of Realtors® because most real estate brokers and many individual associate brokers are organized as pass-through entities (I don't know that I've ever seen a brokerage organized as C-Corporation). Under state law, only a broker license can be in the name of a corporation, and there are benefits beyond taxation that make it an attractive business model. The exemption for the first \$50,000 in entity income will apply to small brokers and investors, but many brokers will exceed that amount. Additionally, real estate LLCs and S-Corps are unique, there are a lot of individuals organized as LLCs and S-Corps that don't have employees, personal property, or real property, and cannot take advantage of other tax treatment.

The Michigan Realtors® Public Policy Committee is going to be taking a close look at the pass-through tax increase and the negative impacts on our brokerages and individual members organized as S-Corps and LLCs.

This tax increase has been met with equal opposition from legislative leadership and the business community. As budget discussions progress, it may be that the Governor is willing to negotiate on pass-through tax if the business community is willing to come to the table on her gas tax increase. However, with the legislature dug in on their opposition to both tax increase proposals, I don't see either side willing to move at this point.

In the past several years under one party control, the budget was reliably finished before July. Under the new divided government, the chances of a July timeframe are looking to be rather slim. Constitutionally, Michigan

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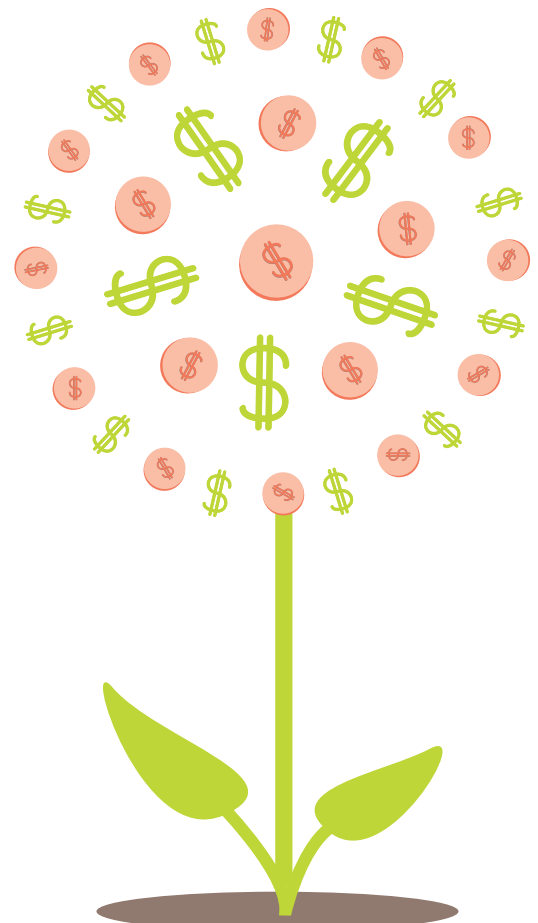
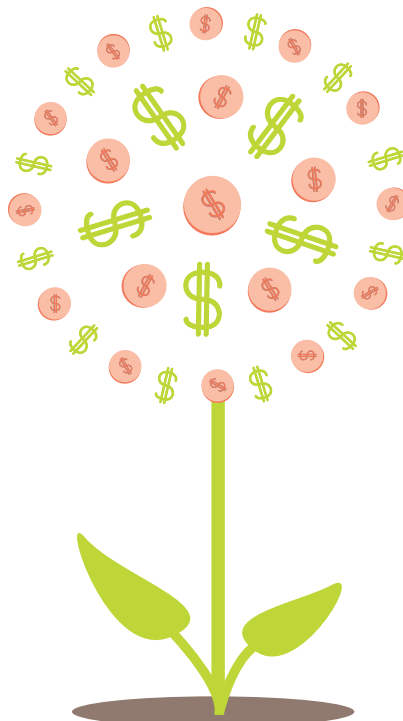
needs to pass a balanced budget before October 1st. One just hopes that we don't find ourselves back in the days where the government fails to reach a compromise and shuts down. Legislative leadership has said that they are interested in working on the budget separate from the tax proposals to provide a balanced budget in advance of October, allowing schools and local governments to plan their own budgets with some amount of certainty. As I stated before, the Governor's goal is to have the budget, the gas tax, and the pass-through tax, all rolled up into one.

The one thing that is certain—this should be an interesting spring in Lansing.

Please be sure to stay up to date on all the latest goings on with Michigan Realtors® Public Policy by visiting <http://www.mirealtors.com/Advocacy-Initiatives>, or subscribing to and liking our YouTube channel <https://www.youtube.com/MICHREALTORS>. ●



the legislature is taking exception to **TWO KEY
PIECES OF THE GOVERNOR'S BUDGET...**



Buyers' Agent Held Liable for Negligent Representation

BY GAIL A. ANDERSON, ESQ. MCCLELLAND & ANDERSON, LLP

In general, buyers' agents owe a duty to disclose all information that they know about a property to their buyer-client. Buyers' agents understand they will be liable if they do not accurately disclose what they know to their buyer-clients. Buyers' agents should understand that under certain circumstances, they may also be liable for something that they did not know. This can happen if a court determines that the information was something that the agent should have known. This can also happen if the buyers' agent volunteers information that turns out to be incorrect.

Real estate agents are not and cannot be experts in all fields. Most buyers' agency contracts attempt to address this concern by including a disclaimer similar to the following:

Buyer acknowledges that Broker is not acting as attorney, tax advisor, surveyor, appraiser, environmental expert or structural or mechanical engineer, and that Buyer should contact professionals on these matters.

While Realtors® are encouraged to include such a disclaimer in their buyers' agency contracts, they should keep in mind that this disclaimer may not protect an agent in those instances where the buyers' agent voluntarily assumes any of these disclaimed responsibilities.

If, for example, a buyer's agency contract disclaims any construction expertise, but the buyer's agent takes it upon himself to opine as to the condition of the roof, a court is not likely to allow the agent to

rely on the boilerplate disclaimer in his contract. It is easy to see how a buyer's agent can inadvertently assume responsibility for a matter not generally within his expertise. When a Realtor® recommends consultation with an expert, buyer-clients are often reluctant to incur the time and expense of hiring an expert and instead look to the agent for his "quick take." Often by virtue of his years of real estate experience, the agent has some knowledge as to the issue at hand which he shares with his client in an effort to be helpful. If that information turns out to be incorrect, the buyers' agent may be held responsible.

A case decided last year by the Michigan Court of Appeals provides a good illustration as to how a buyer's agent can inadvertently assume responsibility that he would not otherwise have. In this case, a couple, Mr. and Mrs. Briggs, were looking for a second home in the Petoskey area. The Briggs' buyers' agent was Kyle Lieberman of Kidd & Leavy Real Estate. The Briggs became interested in a home owned by Mr. and Mrs. Sydlowski. The home was listed in June of 2014 and initially included three lots – Lots 5, 6 and 7. At some point after the initial listing, the Sydlowskis had sold Lot 7 to their neighbors. By the time the Briggs looked at the Sydlowskis' property in the fall of 2015, it did not include all of the property described in the original listing, but neither the Briggs nor their buyers' agent were aware of that.

According to the Briggs' later testimony, when they first looked at the home, one of the things that they

really loved about the Sydlowskis' home was its beautiful garden. The listing had included a number of photographs of the garden and mentioned that the property for sale included landscaping that had won a Chicago Tribune garden award. According to the testimony at trial, "Mrs. Briggs and her mother were immediately drawn to the garden, both being avid gardeners."

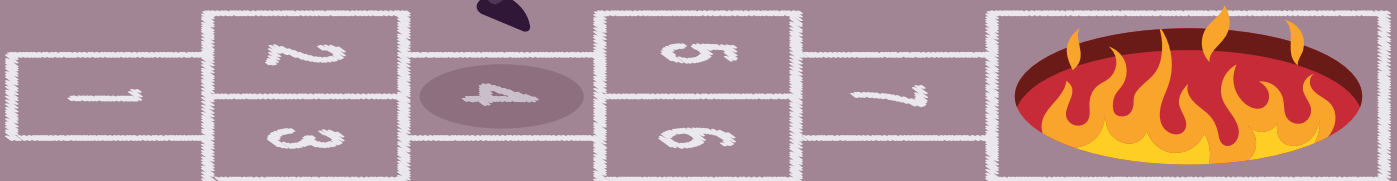
The Briggs purchased the Sydlowskis' home in October of 2015. Just hours after closing, the Briggs discovered that the garden they had so admired was not included in the sale. The Briggs sued the sellers, the listing broker, as well as their buyers' agent, Lieberman, and the company that he worked for, Kidd & Leavy. The case against the listing office was thrown out, the sellers settled and the case proceeded to trial against the buyers' agent and his company.


The Briggs' purchase agreement and their deed for the home both referred only to Lots 5 and 6. The Briggs believed that the home was located on Lot 5 and that the garden was located on Lot 6. In actuality, the home was built over both Lots 5 and 6, and the garden was located on Lot 7 – the lot that the Sydlowskis had previously sold to their neighbors. In defense of the lawsuit, the buyers' agent argued that the Briggs had no right to complain because they ended up with title to exactly what was included in the purchase agreement – Lots 5 and 6. The buyers' agent asked the court to throw out the case against him arguing that as general rule of law, buyers' agents owe no duty to determine

“

Buyers' agents should understand that under certain circumstances, they may also be **LIABLE FOR SOMETHING THAT THEY DID NOT KNOW.**

”





the boundary lines of the property that their clients are purchasing.

The trial court's position was that the issue of whether buyers' agents ordinarily have a duty to determine boundary lines was not the issue in the case. According to the trial court, the actual issue in the case was whether this particular buyers' agent had expressly assumed such a duty. Along those lines, it had been established that prior to closing, Mr. Briggs had looked at the title work and noticed that while the Sydlofskis had acquired three lots, they were only selling two lots to the Briggs. According to the Briggs, when they raised this question with Lieberman, he had responded via email:

The sellers apparently split off lot 7 to the east a ways back. That is the house past the cedar hedges and accounts for the difference in what is being conveyed now.

It turned out that this statement was factually incorrect. The "house past the cedar hedges" was located on Lot 8. The garden was located on Lot 7 between the "house past the cedar hedges" and the property that the Briggs were purchasing. When the sellers "split off" Lot 7, they split off the garden lot.

The trial court concluded that even if the buyers' agent had no general duty to determine property lines, where, as here, the buyers inquired

and the buyers' agent responded, the buyers' agent had a duty to do so accurately. In other words, a duty to disclose may arise solely because the buyers expressed a particular concern. The trial court found, and the Court of Appeals agreed, that the Briggs justifiably relied upon Lieberman's false statement. It did not matter that Lieberman had not known that his statement was false. Lieberman had voluntarily assumed a duty and was therefore responsible for his negligent misrepresentation.

The buyers' agent in this case had not used a buyers' agency contract. The only document signed by the buyers was an agency disclosure form. We do not know whether a disclaimer in a signed buyers' agency contract whereby the buyers acknowledged that their agent was "not an expert" would have changed the outcome of this case. It is certainly possible that even with such a disclaimer, the Court would have concluded that by addressing the buyers' questions, the buyers' agent assumed duties that he had previously disclaimed. Nonetheless, it is certainly true that the buyers' agent in this case would have been in a better legal position had the buyers signed a buyers' agency contract with appropriate disclaimers.

It should also be pointed out that the facts in this case were disputed and that the buyers' agent insisted throughout that he had relied on

the listing agent for the boundary information. It is also true that the listing information, which continued to include photographs of the garden lot even after it was sold, was misleading. That being said and hindsight being 20/20, there are several lessons to be learned from this case. First, a buyer's agent should never use an agency disclosure form as a substitute for a buyer's agency contract. Buyer's agency contracts contain language such as the "expert disclaimer" designed specifically to protect buyer's agents. Second, a buyers' agent should strongly resist any client's efforts to cause him to assume responsibilities outside of his or her expertise. Clients should be persuaded to address their questions to the appropriate expert such as a surveyor, contractor, or attorney. Third and finally, whenever a buyer's agent is passing on information from an expert or anyone else, he or she should carefully identify the source of the information. ●



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MICHIGAN SCHOOLS & GOVERNMENT CREDIT UNION



The background of the page features a blurred image of two hands shaking in a firm grip, symbolizing a deal or agreement. On the left side, there are several thin, diagonal lines in shades of blue and red that extend from the top left towards the center, adding a dynamic, modern feel to the design.

MAXIMIZE YOUR REFERRALS

It's still all about the

relationship

BY LARRY KENDALL

Why do sales associates spend billions of dollars buying leads and chasing strangers? The research is clear. Buyers and sellers prefer to work with someone they know, like and trust. That's why, according to REAL Trends 2018 Consumer Study, some 92 percent of consumers say they look for a referral from a friend when selecting a real estate professional.



Thought-leader Simon Sinek was asked what he thought about our industry's obsession with technology, disruption, internet leads, and e-transactions. Here's his response: "Human beings are social animals and relationships will always win. There is a small percentage of people who want a transaction. Most want a relationship. Invest in your relationships. They are your most valuable assets."

So, back to our original question, "Why do real estate professionals spend so much time and money chasing strangers when consumers prefer a relationship?" Two reasons:

“Buyers and sellers prefer to work with someone they **KNOW, LIKE** and **TRUST.**”

- 1. Because it works!** Their real estate professional abandons most consumers shortly after closing. The Zillow Consumer Housing Trends Report of 13,249 consumers found that 74 percent of them never heard from their real estate professional again after closing! It's clear most agents have a transaction focus instead of a relationship focus. Because consumers are abandoned, they are ripe for internet lead generation, capture, and conversion. Even though consumers would prefer to work with someone they know or a referral, they end up working with strangers by default.
- 2. Most agents are committed to providing the five keys to maximizing referrals.** Those who are committed build both a large and smart business. A smart company is a business that is sustainable in all market cycles and has a high net income per hour. In contrast, most lead generation models have a low net income per hour due to the cost of buying leads.

FIVE KEYS TO MAXIMIZING YOUR REFERRALS

- 1. Relationship & Referral Mindset.** Every person in the United States knows at least four people who will move this year. Our mission is to access and earn those referrals. You do this by building relationships instead of chasing transactions. You build relationships through the frequency of interaction.
- 2. Your Appearance.** People will refer you if you make them look good. How you dress reflects on the person who referred you. Studies indicate that your appearance affects your income by at least 20 percent, and some studies say as much as 100 percent. Sloppily dressed agents may get the business, but they don't get the referrals. A survey of sellers found their two biggest complaints were that the agent was late for the appointment, and the agent didn't dress for the interview.

3. Fabled Service. Can you deliver "Wow!" Is your service memorable? Does your customer feel they are exceptional—or do they feel like they are just a transaction? They are not transactions; they are people.

4. Consistency. Do you deliver the wow consistently? Or is it by accident? Do all your customers receive the wow? Or, are you selective and only provide that level of service to high-end clients? Agents are notorious for this, and it's not seen in any other industry.

When you check into a luxury hotel, rooms may range in price from \$300 a night to \$5,000 a night, but all guests are treated with the same care at the check-in desk. They are not treated differently. Do the same.

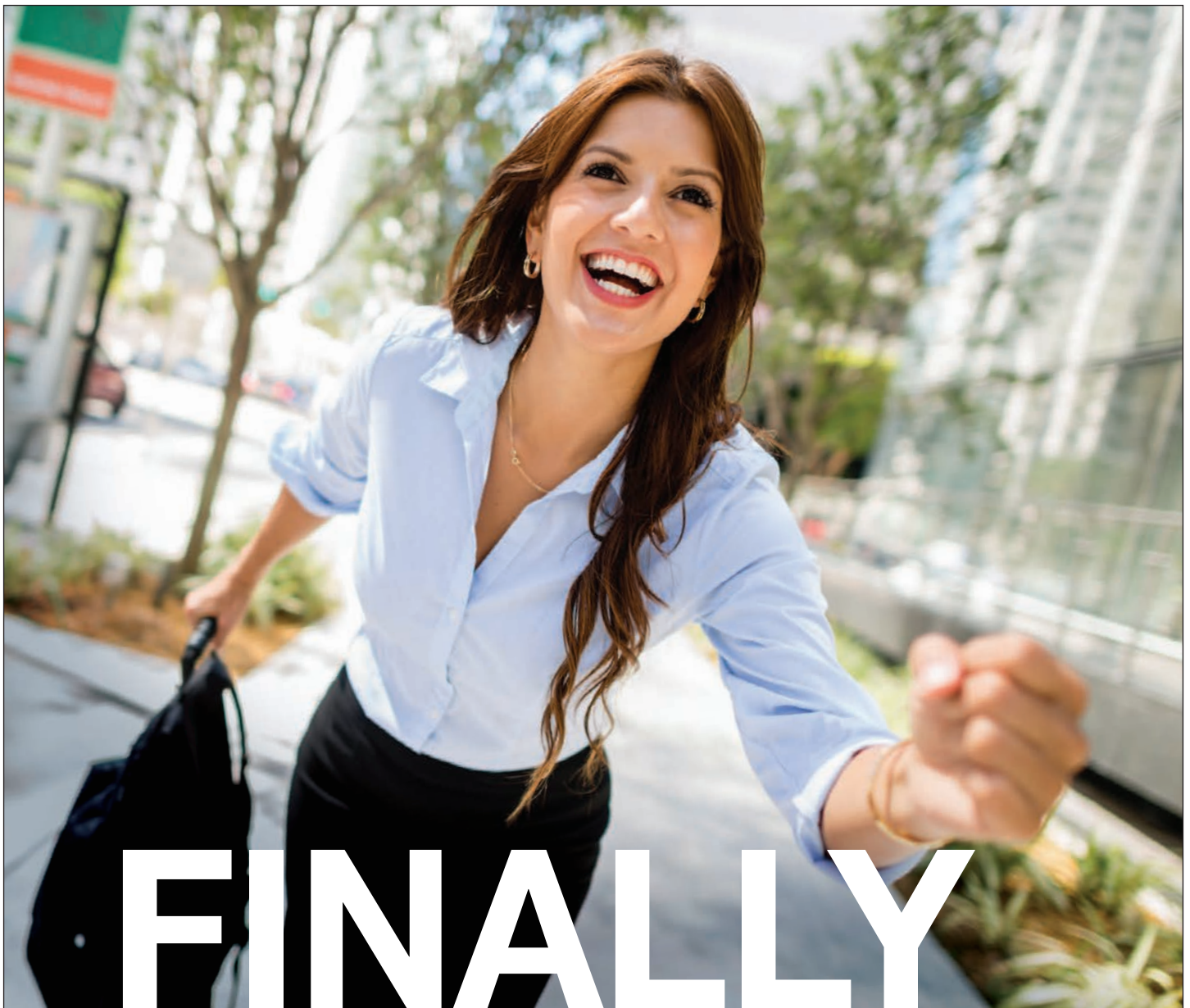
A real estate friend of mine was referred to one of the richest men in the world by the man's limo driver who had purchased a low-priced, two-bedroom condo. Even though he was buying a lower-priced home, the limo driver received the wow and told the rich man about it. As a result, my real estate friend became the go-to agent for all of the corporate executives at the wealthy man's company—and consistently earns over \$1 million a year.

5. Follow-up and Flow. Have you ever sent a referral to an agent and never heard back? Unfortunately, this is the industry standard. When you follow up, you are differentiated in our industry, and you get even more referrals. You need a follow-up system (mailings, emails, phone calls) that are driven by your calendar and keeps you in flow with your clients and referral sources.

Maximizing your referrals is a simple five-step process that pays big dividends. Why don't more real estate professionals do it? Because they would have to organize themselves and commit to their relationships. It's easier for most of them to buy leads and chase strangers. If you follow the five steps, you'll have all the business you can handle, you'll build great relationships, and you'll have a high net income per hour. You will also be so differentiated. You will be a Category of One! ●



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*Google Analytics, January 2017

Understanding Michigan's Principal Residence and Disabled Veteran's Exemptions – Two Exemptions You MUST Be Aware Of!!!

BY MICHEAL R. LOHMEIER,
MMAO(4), PPE, FASA, MAI, SRA



Two of the most important exemptions for Michigan residents to be aware of and understand are the *Principal Residence Exemption* and *Disabled Veterans Exemption*. If you're a new resident, or a first-time home buyer, in Michigan the *Principal Residence Exemption* (PRE) is an important tool for relieving a portion of local school operating taxes, up to 18 mills. If you're a disabled veteran who was discharged from the U.S. military under honorable conditions, you may qualify for 100% exemption of all ad valorem property taxes.

PRINCIPAL RESIDENCE EXEMPTION

Michigan Compiled Laws (MCL) 211.77cc provides an owner an exemption from the tax levied by a local school district for school operating purposes up to 18 mills (a mill is \$1 per \$1,000). That can be considerable annual savings for a homeowner. For example, if a property's taxable value is \$100,000 that's a saving of up to \$1,800 (\$100,000 x 0.018 = \$1,800). In this example, the 0.018 tax rate was calculated at 18 mills divided by 1,000, as a mill is \$1 per \$1,000.

MCL 211.dd defines *Principal Residence* as the "one place where an owner of the property has his or her true, fixed, and permanent home to which, whenever absent, he or she intends to return and that shall continue as a principal residence until another principal residence is established." To qualify for the PRE, a person must own and occupy the property as his or her principal residence on or before June 1st for summer tax levying purposes or November 1st for winter tax levying purposes.

The owner must file a PRE Affidavit (Form 2368) with the local assessor's office attesting that they own and occupy the property. The owner has the burden to prove he or she is entitled to the PRE. When the assessor believes the owner is not entitled to the PRE, it must deny the exemption. The person

applying must meet the definition of an "owner." An "owner" is identified as any of the following:

- *Person owns the property or purchasing the property under a land contract.*
- *Person as a partial owner of the property.*
- *Person owns the property as a result of being a beneficiary of a will or trust, or as a result of intestate succession.*
- *Person holding a life estate in the property previously sold or transferred to another.*
- *Grantor placed the property in a revocable trust or a qualified personal residence trust.*
- *Sole present beneficiary of a trust if the trust purchased or acquired the property as a principal residence for the sole present beneficiary of the trust, and the sole present beneficiary of the trust is totally and permanently disabled.*
- *A cooperative housing corporation.*
- *A facility registered under the continuing care community disclosure act.*

As used above, a "person" is an individual. A person is not a corporation, LLC, association, partnership or other type of legal entity. The percentage of ownership is not a controlling factor, as a person who has a 1% ownership of a property and occupies the entire property as his or her principal residence may qualify for a PRE at 100%.

It's often difficult to determine whether a person is occupying a property as its principal residence. Some evidence which may be helpful in proving occupancy, and intention to return, includes having the property address listed on the taxpayer's driver's license, voter registration card, cancelled checks, financial and medical records and any insurance policies. No one document

is automatically adopted as the controlling factor of occupancy or a person's intention to return. But collectively they may help to qualify a property for a principal residence. Some of the considerations in evaluating an owner's eligibility include:

- *Husband and wife are only entitled to one PRE when they file, or are required to file, a joint Michigan income tax return.*
- *Person does not qualify for a PRE in Michigan when filing an income tax return as a resident of another state, active military personnel excluded.*
- *Person does not qualify for a PRE in Michigan when claiming a substantially similar exemption in another state which has not been rescinded.*
- *Person does not qualify for a PRE in Michigan when filing a non-resident Michigan income tax return, active military personnel excluded.*
- *Person may qualify for a PRE in Michigan when he or she, or his or her spouse, owns property in another state for which either person claims the exemption similar to Michigan's PRE but only when they file separate income tax returns.*

When a property is used for multiple purposes, only the percentage occupied by the owner as the principal residence may be used to qualify for the PRE. Owners may rent a portion of their home, and still receive 100% PRE, provided less than 50% of the total square footage is rented. However, when the owner rents the entire property out for more than 14 days then he or she is not entitled to a PRE.

An owner who no longer owns or occupies a residence must file a Request to Rescind Homeowner's PRE with the local assessing officer. The PRE will then be removed for the following year. Under some



Two of the most important exemptions for Michigan residents to be aware of and understand are the **PRINCIPAL RESIDENCE EXEMPTION** and **DISABLED VETERANS EXEMPTION.**



circumstances, an owner may qualify to continue the exemption through a Conditional Rescission, which enables the owner to continue its PRE for up to three years. The Conditional Rescission of PRE (Form 4640) has to be filed with the assessor for each of the three years, and the owner must meet certain criteria. The criteria include the owner purchasing a second property in Michigan which is occupied as his or her principal residence and the previous principal residence must not be occupied, must be actively marketed for sale, must not be rented and cannot be used for any business or commercial purposes.

DISABLED VETERANS EXEMPTION

MCL 211.7b provides that a disabled veteran who was discharged from the armed forces of the U.S. under honorable conditions is exempt 100% from property taxes. Similar to the PRE, an Affidavit (Form 5107) must be filed with the local assessor. In order to qualify for the exemption the disabled veteran must own and occupy his or her

home as a homestead and must meet one of the following three criteria:

- *Been determined by the United States Department of Veterans Affairs (USDVA) to be permanently and totally disabled as a result of military service and entitled to veterans' benefits at the 100% rate.*
- *Has a certificate from USDVA, or its successors, certifying that he or she is receiving or received pecuniary assistance due to disability for specially adapted housing.*
- *Has been rated by USDVA as unemployable.*

In the event the disabled veteran dies, the exemption remains available to, or continues for, his or her unmarried surviving spouse. The surviving spouse must comply with the requirements for the exemption and must indicate on the Affidavit that he or she is the surviving spouse. The exemption continues as long as the spouse remains unmarried.

Special assessments are not considered property taxes and would not be exempt, and as would still be required to be billed and paid by the veteran or his or her unremarried spouse.

These exemptions are important to be aware of when you are reviewing a property's tax history as they can reduce significantly or altogether, as in case of the Veteran's exemptions, the taxes which have been paid. When reviewing a property's tax history, you should ask what may be affecting the tax bills related to the property, including any cushion between assessed and taxable value as the taxable value will be "uncapped" in the year subsequent to any sale involving the property.

Although this article is brief in substance, I hope it provides some insight into two highly important residential exemptions. Each may provide substantial annual savings to Michigan residents. Additional information may be obtained by reading the following guides published by the State Tax Commission and available on its website: (1) *MCL 211.7b Disabled Veterans Exemption Frequently Asked Questions* (February 2018 and (2) *Guidelines for the Michigan Principal Residence Exemption Program* (May 2018.) ●



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Website Accessibility Lawsuits Soared in 2018

What are you doing to make your website more accessible?

BY SUE JOHNSON

Thanks to a 2017 decision by the Department of Justice (DOJ), legal challenges over website accessibility for disabled individuals are a rising threat to companies with an Internet presence.

The federal law governing website accessibility is Title III of the Americans with Disabilities Act (ADA), was enacted to prevent discrimination against people with disabilities in places of “public accommodation” such as offices, retail outlets and events.

Passed in 1990, before the advent of the Internet, the law says nothing about websites. However, the DOJ has made it clear that it considers a company’s website to be a place of “public accommodation” subject to the ADA, and it announced in 2015 that it would propose website accessibility standards under Title III by 2018.

Then, in December 2017, the DOJ withdrew all pending ADA Title III rulemakings, saying that it is evaluating how best to address the availability of next-generation services that provide text, pictures and video capabilities.

In this regulatory void, the number of website accessibility lawsuits filed by the plaintiff’s bar and disabled advocacy groups against private companies has skyrocketed.

THE FUNDAMENTAL FACTS

According to the law firm of Seyfarth Shaw, the number of ADA Title III lawsuits filed in federal court in 2018 hit a record high of 10,163—up 34 percent from 2017 and triple the number of cases filed in 2013. California, New York, and Florida led the pack by a wide margin as the states with the most Title III lawsuits, with Texas, Georgia, Pennsylvania, Arizona, Massachusetts, New Jersey and Alabama making the top ten. Seyfarth Shaw noted that its statistics do not even include the number of filings under state anti-discrimination laws, which it does not track.

Actual and potential defendants include companies across the whole range of industries. The law firm of Ballard Spahr recently reported accessibility claims against mortgage websites that allegedly hinder disabled individuals from accessing applications and other online content. The National Association of Federal Credit Unions (NAFCU) said that hundreds of credit unions in 26 states received demand letters

in 2017-2018 from law firms representing disabled clients who allegedly could not access the credit union’s website. The National Association of Realtors® (NAR) has that letters to real estate brokerages from law firms threatening website accessibility litigation are plentiful.

WHAT’S AT STAKE?

Plaintiffs cannot sue for monetary damages under the ADA, but they can seek a court order requiring the company to redesign its website. The court’s ruling for plaintiffs typically need businesses to implement the Web Content Accessibility Guidelines (WCAG) 2.0, Level AA, a universally accepted set of guidelines for accessible online content.

Plaintiffs also can seek reimbursement of attorneys’ fees. Seyfarth Shaw says that a majority of federal courts have not been willing to grant early motions to dismiss, and advises that defendants who are unwilling to settle should prepare to go through discovery and summary judgment, if not a trial.

LEGAL DEFENSES ARE DWINDLING

Many defendants have filed motions to dismiss based on a denial of due process, pointing to the lack of DOJ regulatory guidance. Some district courts have agreed. This argument was rejected in January 2019 by the Ninth Circuit Court of Appeals in *Robles v. Domino Pizza*, which found that Domino’s has been on notice of DOJ’s position that its website must effectively communicate with disabled customers since 1996. The court also found that the district court erred in applying the “primary jurisdiction” doctrine, under which courts do not decide cases where enforcement agencies with particular expertise should weigh in first.

Some district courts also have dismissed website accessibility cases in which the plaintiff has not alleged that barriers on the website impeded access to an actual physical place. But appeals courts in recent cases (like the Ninth Circuit in *Domino’s* and the Eleventh Circuit Court of Appeals in *Haynes v. Dunkin’ Donuts*) have taken the position that the ADA is not limited to tangible barriers that disabled persons face but can extend to intangible barriers, such as online services of a physical location.

A January 2019 National Law Review article written in the aftermath of the Dunkin Donuts case concluded that “the arguments available to businesses seeking to dispose of website accessibility claims at the outset of litigation as a matter of law are dwindling, which may result in opportunistic plaintiffs’ attorneys filing even more claims regarding website accessibility.”

REDUCE LEGAL RISKS

Given this recent spike in lawsuits, it’s advisable to assess your website’s compliance with Title III of the ADA now, with the assistance of legal counsel experienced in website accessibility issues. Not only can you reduce your legal risks, but you will also be accommodating a potentially valuable segment of the marketplace. •



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Sue Johnson is the former executive director of RESPRO, the Real Estate Services Providers Council Inc. She retired in 2015 and is now a strategic alliance consultant.



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doing to make your

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Were There Any Unexpected Outcomes to Placemaking?

The collaboration between the community organizers, residents and downtown merchants was a terrific outcome for the painted wall in Howell. I didn't expect the work of art to become a walkable viewing destination and a pleasant back drop for a public parking lot. The community engagement process of Placemaking; continues to create local identity and pride.



Project Name

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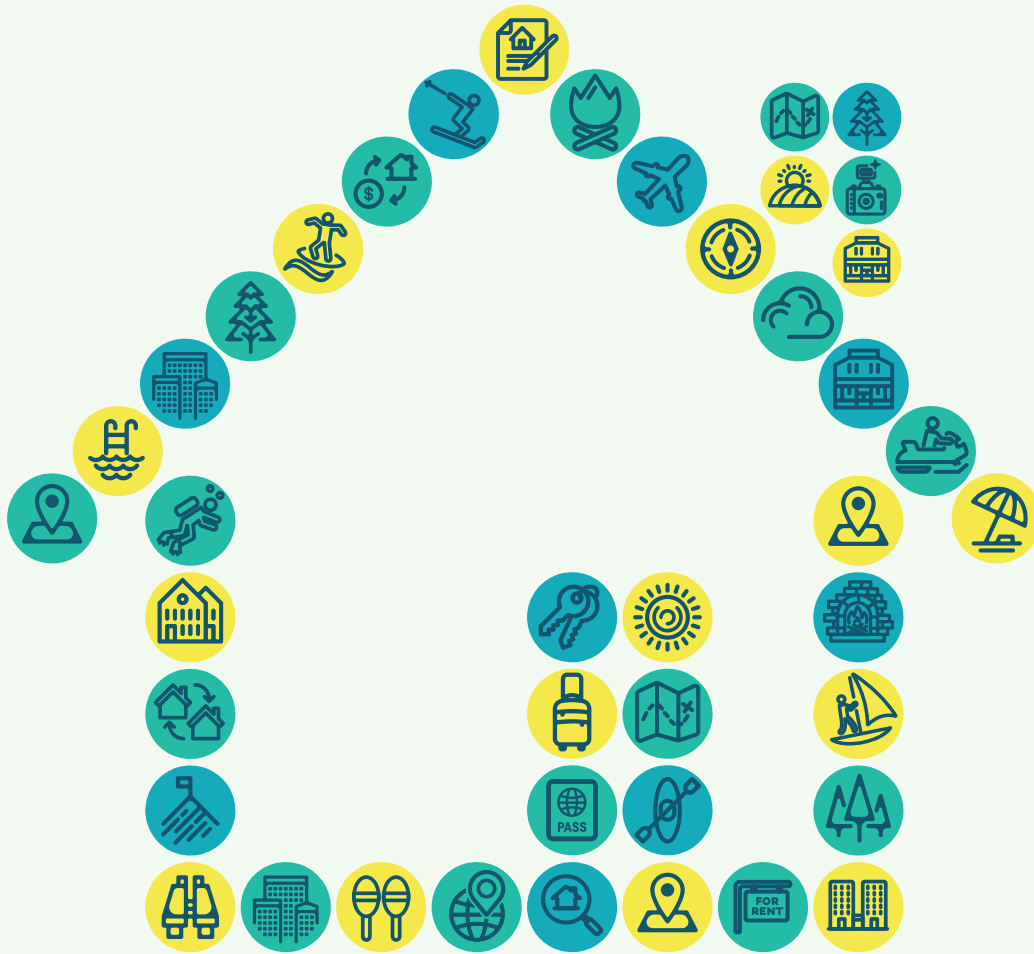
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