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ELECTRONIC RESPONSIBILITIES

NAR has amended the Standards of Practice to the Code of Ethics to reflect the fact that REALTORS® are now functioning fulltime in the electronic age. Standard of Practice 9 2 to Article 9 now provides:

“When assisting or enabling a client or consumer in establishing a contractual relationship (e.g., listing and representation agreements, purchase agreements, leases, etc.) electronically, REALTORS® shall make reasonable efforts to explain the nature and disclose the specific terms of the contractual relationship being established prior to it being agreed to by a contracting party.”

Further, Standard of Practice 1 2 of Article 1 has been amended by NAR to make it clear that electronically conducted real estate activities fall squarely within the Code of Ethics. Standard of Practice 1 2 provides:

“The duties imposed by the Code of Ethics encompass all real estate-related activities and transactions whether conducted in person, electronically, or through any other means.”

In order to satisfy the most basic requirements of contract law and the new requirements of the Code of Ethics, REALTORS® will need to be able to adequately advise and assist their clients and

customers in forming the basic agreements referred to in Standard of Practice 9 2, i.e., listing and representation agreements, purchase agreements and leases. Presently, this may be easier said than done.

Legislation was passed both by the United States Congress and the Michigan Legislature some years ago to recognize the electronic signature of a person as binding as if it were written in pen. Unfortunately, there has been a long lag in the development of a financially feasible way for securing reliable and trustworthy electronic signatures. In the meantime, a recent decision by the Michigan Court of Appeals may be misconstrued as indicating that a simple keystroke by a person will, alone, establish that person’s signature to a document. REALTORS® must not be misled by this decision.

On December 28, 2006, the Michigan Court of Appeals in *Kloian v Domino’s Pizza* published an opinion which is already being mischaracterized by the media. One publication described the decision as, “E-mail signature counts in contracts.” This mischaracterization could lead members to believe that their clients or customers may enter into contracts with others for the sale of real estate simply by exchanging e-mails.

Obviously, there was litigation pending between Kloian and Domino’s Pizza. On March 18, 2005, in an effort to settle the litigation, Kloian’s attorney sent an e-mail to Domino’s attorney stating that his client would accept \$48,000 in exchange for a dismissal with prejudice of all claims and the release of all possible claims his client had against Domino’s. In response, on March 18, 2005, Domino’s attorney e-mailed back: “Domino’s accepts your settlement offer... .” Domino’s attorney prepared the necessary settlement documents and sent them to Kloian’s attorney for review. Kloian’s attorney then sent an e-mail requesting, in addition, a mutual release, i.e., Domino’s would grant Kloian a release in addition to Kloian granting Domino’s a release. Apparently, Domino’s was not willing to enter into a mutual release, and the settlement stalled. On May 18, 2005, Domino’s went to court to enforce the settlement agreement. The trial court found that the parties entered into a binding settlement agreement through their exchange of e-mails on March 18, 2005.

This decision does not stand for the proposition that an exchange of e-mails can establish a contract, whether to sell real estate or otherwise. In finding the e-mails to be binding, the trial court and the

Court of Appeals relied upon a Michigan court rule that *only* applies to settlement agreements to end litigation. The Michigan court rule provides that a settlement agreement is only binding if it is made in open court or is "...in writing *subscribed* by the party against whom the agreement is offered or by that party's attorney." The Court of Appeals found that when the attorneys each placed their name at the end of their e-mail, that constituted a sufficient subscription (as opposed to a signature) to create an enforceable settlement agreement to end the litigation between Kloian and Domino's.

The Court of Appeals specifically found that the requirements of the Michigan court rule to establish a binding settlement agreement are not the same requirements which are imposed under Michigan's statute of

frauds to, for example, enter into a binding agreement for the sale of real estate. That statute requires that the contract be "in writing and signed" by an authorized person. The court specifically found that the Michigan court rule governing settlement agreements, unlike the Michigan statute of frauds, does not require a "signature," but instead only requires a "writing subscribed" by the party against whom enforcement is sought. The court specifically found that the words "in writing and signed" (necessary for a binding real estate agreement) and the words "writing subscribed" (necessary only for a settlement agreement in litigation) must be treated differently.

It is anticipated that a practical, economically feasible way will soon be available for members to guide their clients and customers in the formation of

real estate contracts by way of an electronic signature under the Uniform Electronic Transactions Act. However, in the meantime, members should not be misled by this recent Michigan Court of Appeals decision. Clients and customers cannot enter into electronic contracts under the Uniform Electronic Transactions Act simply by keystroking their name at the end of an e-mail. Members need to be aware of this limitation in order to satisfy their new ethical obligations under the Code of Ethics. ☞

