

## Agency Responsibility: It's the law

On April 8, 2008, Governor Granholm signed Public Act Nos. 90 and 91 of 2008. The Governor's signing of these two acts is the culmination of MAR's hard fought efforts to obtain the enactment of what is commonly known as the Agency Responsibilities Act (the "ARA").

MAR sought enactment of the ARA based upon two (2) discoveries. First, MAR had asked its legal counsel to review what duties were imposed on agents by statute or rule when representing sellers and buyers. Astoundingly, it was discovered that the only duties imposed by statute or rule were the duty of agents to present offers to sellers within a reasonable period of time and the duty of listing brokers to review and sign closing statements. Second, it had become apparent that a wide menu of services was being offered to sellers under the general heading "Exclusive Right to Sell Contract." With so many different types of services being offered or not offered under this traditional title, it became necessary to clarify what services were or were not being provided to a seller in each agency relationship. The ARA comprehensively addresses both of these issues. This article paraphrases the actual text of the ARA for ease of reading.

### Duties imposed by law

The ARA, in MCL 339.2512(d)(2), imposes minimum required duties on any real estate broker or salesperson acting pursuant to a "service provision agreement." A "service provision agreement" is any agreement with a buyer or seller that establishes an agency relationship. "Service provision agreements" are commonly referred to as listing contracts and buyer's agency contracts. REALTORS® should have no problem complying with these minimum duties, as they reflect duties already imposed under Michigan common law and the Code of Ethics of the National Association of REALTORS®.

The minimum duties are as follows (collectively, the "Statutory Duties"):

- (1) A REALTOR® must be competent in representing a client, i.e., the REALTOR® must exercise reasonable care and skill in representing the client and carrying out the responsibilities of the agency relationship.

- (2) A REALTOR® may not breach the terms of a buyer's agency agreement or listing agreement, i.e., the REALTOR® must perform pursuant to the terms of the service provision agreement.
- (3) A REALTOR® must be loyal to his client.
- (4) A REALTOR® must comply with all laws and rules and regulations of the state and federal government.
- (5) A REALTOR® must refer their client to other licensed professionals for expert advice in matters that are not within the expertise of the REALTOR®.
- (6) A REALTOR® must account in a timely manner for all money and property received by the REALTOR® in which the client has or may have an interest.
- (7) A REALTOR® must keep confidential all information obtained in the course of the agency relationship, unless disclosed with the client's permission or as otherwise provided by law. The duty not to disclose extends to any other licensee who is not an agent of the client.

Again, REALTORS® should have no difficulty complying with the Statutory Duties. As REALTORS®, they have been complying with the Statutory Duties for many years pursuant to Michigan common law and NAR's Code of Ethics. The Statutory Duties address the vacuum which existed in Michigan statutory law with respect to duties owed to clients.

### Services and waivable services

The ARA addresses the confusion as to what services will be provided to a client under a service provision agreement by first defining the minimum services to be provided generally (collectively, the "Statutory Services"):

- (1) When representing a seller or lessor, the REALTOR® shall market the client's property as agreed upon in the service provision agreement.
- (2) The REALTOR® shall accept delivery of and present offers and counteroffers to buy, sell, or lease a client's property or property which the client wishes to purchase or lease.
- (3) The REALTOR® shall assist in developing, communicating, negotiating, and presenting offers, counteroffers, and related documents or notices until a purchase agreement or lease has been executed by the parties and all contingencies in such agreements are satisfied or waived.

Obviously, those REALTORS® offering limited services must be mindful of which services can be waived and which services cannot be waived.



- (4) The REALTOR® shall provide assistance as necessary to complete the transaction after the execution of the purchase agreement by all parties.
- (5) The REALTOR® who is involved in a closing shall furnish or cause to be furnished to the buyer and seller a complete and detailed closing statement signed by the broker or associate broker showing each party all receipts and disbursements affecting that party.

In promoting enactment of the ARA, MAR was mindful of the fact that many REALTORS® wish to have flexibility in the services they offer, and many buyers and sellers wish to have flexibility in what services they receive from REALTORS®. Thus, MCL 229.2512(d) (5) is included in the ARA to provide this flexibility. Under this section, through the use of a “limited services agreement,” a seller or buyer may waive some (but not all) of the Statutory Services. Specifically, a seller or buyer may waive any or all of the following services (collectively, the “Waivable Services”):

- (1) The facilitation of the delivery and presentation of offers and counteroffers to buy, sell, or lease a client’s property or property which the client wishes to purchase or lease.
- (2) Assistance in developing, communicating, negotiating, and presenting offers, counteroffers, and related documents or notices until a purchase agreement or lease has been executed by the parties and all contingencies in such agreements are satisfied or waived.
- (3) Assistance as necessary to complete the transaction after the execution of the purchase agreement by all parties.

To assure clarity as to what services are going to be provided to a seller or buyer, the ARA amends the statutory agency disclosure form and requires the use of a “limited services agreement” in the event a client is waiving one or more of the Waivable Services.

The statutory form of agency disclosure has been revised to set forth the list of Statutory Duties and the list of Statutory Services. Also, the list of agency relationships which must be checked off by a REALTOR® was amended to add two new categories, i.e., “Seller’s Agent – limited services agreement” and “Buyer’s Agent – limited services agreement.”

### A Limited Service Agreement and Agency Disclosure Form

When a REALTOR® will not be providing one or more of the three Waivable

Services, the REALTOR® will need to use a “limited services agreement.” A limited services agreement is a listing contract or buyer’s agency contract which includes certain statutory provisions designed to advise a prospective client that the REALTOR® must perform all of the Statutory Services unless the client chooses to waive one or more of the Waivable Services. The language advises prospective clients that they will not be provided one or more of the Waivable Services if they sign the form and initial each of the services the clients are waiving.

The ARA also amends the law to make it a violation of the Occupational Code if a REALTOR® fails to provide all Statutory Services unless expressly waived by a client in a limited services agreement.

The ARA specifically provides that it does not prevent a REALTOR® from acting as a transaction coordinator upon proper notice to all parties to the transaction. Obviously, the use of the MAR form of agency disclosure would provide such notice. Further, the ARA contains no provisions preventing REALTORS® from continuing to engage in designated agency.

The ARA becomes effective on July 1, 2008. REALTORS® who provide all of the Statutory Services will have no reason to revise their listing contracts or buyer’s agency contracts. They will simply need to use the updated agency disclosure form. REALTORS® who offer limited services must incorporate the new limited services provisions into their listing contracts and buyer’s agency contracts. The use of the new forms should bring greater clarity among REALTORS® as to what is or is not being provided in the way of services to a client. The use of the new forms should also help protect REALTORS® against any misunderstandings with their clients as to what services are or are not being provided to the client.

The ARA does not require REALTORS® to offer limited services. The decision to offer limited services is left up to each brokerage firm. Obviously, those REALTORS® offering limited services must be mindful of which services can be waived and which services cannot be waived. Beyond the new mandatory disclosure language and the limitation on which Statutory Services can and cannot be waived, the ARA leaves the remaining terms of limited services arrangements up to individual brokerage firms. **MAR**

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