

A publication of Michigan Realtors®

MICHIGANREALTOR®

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NOVEMBER 2022



RESPA

REAL ESTATE SETTLEMENT PROCEDURES ACT

refresher

PLUS

Convention Recap
Capitol Report

President's Report



Volume 21 | Number 4



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11.22



Getting Things Done

"If you spend too much time thinking about a thing, you'll never get it done. Make at least one definite move daily toward your goal." - Bruce Lee

This quote has always meant a lot to me especially toward this time of year. The remaining months of the year become not only a time for reflection of the year's goals but also a time of planning for the year to come. With a successful Convention filled with amazing classes behind, many of us are finishing continuing education for the year, completing a Realtor® designation or finalizing business plans for 2023.

The November issue of Michigan Realtor® Magazine represents the bitter-sweet moment where I say my goodbyes as President, while looking back on all the wonderful experiences from my leadership journey with Michigan Realtors®. One marquee experience that I'd like to highlight is a real testament to our strength as an association. That is the passage of the Michigan First Time Homebuyer Savings Act. I love this program because it puts us in a great position to be homeownership ambassadors for our state. It wasn't an easy lift to get this legislation passed and signed by the Governor. But WE did it and WE will be shouting from the rooftops about this program over the next several months and beyond. Additionally, we boosted our legal education resources and offerings to membership. Michigan RPAC continues to be a strong and united voice in protecting the private property rights of homeowners. The list goes on.

I want to send out a few thank-yous and well-wishes. First, a huge thank you to my amazing family. To my wife Rebecca and my two children: This opportunity would not have been possible without their support. I also want to thank my amazing broker, John North, for the encouragement and guidance all these years. Serving with you on the Michigan Realtors® Board has been a great experience. I have always felt extremely supported and well prepared, and a big reason for that is the leadership of CEO Rob Campau and the dedication of the Michigan Realtors® staff.

As my experience here concludes, I am overjoyed to see my friend Natalie Rowe continue her own journey in association volunteer leadership. Natalie has been an invaluable member of our leadership team. I am

grateful to call her a friend and for the opportunity to work with her over the past few years. She makes everybody better with her inspiring nature and her commitment to excellence. Natalie will do great things in 2023.

As you continue to learn new things, network with associates and plan for the future, I urge you to take the action as Bruce states in his quote and "make at least one definite move daily toward your goal."

Thank you all for this opportunity to serve. Thank you all for making our Realtor® family so impactful. This has been the honor of a lifetime. ●

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COMING EVENTS

January 26-27, 2023

Achieve

JW Marriott Grand Rapids

April 26, 2023

Broker Summit

Westin Book Cadillac Detroit

September 20-22, 2023

The Convention

Detroit Marriott at the Renaissance Center

ANNOUNCEMENTS

2022 STATEMENT OF OWNERSHIP



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The Denouement of 2022

The most recent election began putting the bow on the 2021-2022 legislative session. At the time of writing, it remains to be seen how many days there will be of lame duck session before it ends. Recent lame duck sessions have brought up a mix of emotions on both sides of the aisle about the type of legislations that passes and doesn't pass before legislative leadership changes in the House and Senate.

I would like to thank the wonderful Michigan Realtors® Public Policy Committee for all their hard work this year in monitoring, passing and defeating the numerous pieces of real estate-related legislation that have been introduced this year. You may not have heard of all these bills, you may not remember all the new laws, but through everything this committee keeps vigilant watch over everything in Lansing.

Thank you to this year's Chairman, Ryan Arnt from the Southwestern Michigan Association of Realtors®, for your leadership of the committee. After serving on the committee for several years it was great to see Ryan take the reins on all the policy issues 2022 had in-store. I would also like to welcome incoming Chairwoman, Karen Greenwood, who will provide strong guidance through the beginning of the new legislative session in 2023.

The work of this committee is important. The expertise of the volunteer members that serve on Public Policy help set the course for our industry and help protect vital aspects of it from government overreach, unfair taxation, burdensome regulation and the loss of private property rights. We approach these issues from a unique perspective. Unlike other associations and interest groups in Lansing, we don't just look at issues from the aspect of self-preservation. Michigan Realtors advocates for homeowners, business owners, private property rights and the ability for all people to have that piece of the American dream to build wealth for future generations.

This past year Michigan Realtors® has had several advocacy successes. First Time Homebuyers Savings Accounts are now law. Materials and guidance on establishing one of these accounts is available through the Michigan Realtors® website. I encourage you to use them with your clients, hand them out to family, or start an account of your own. The success of this program relies on our efforts to champion this program and the importance of home ownership.

We also have a new law to provide an easier process for obtaining missing manufactured home titles that will streamline the affidavit of affixture process. For over a year, buyers and sellers have had to deal with an overreaching Secretary of State's office decision to require court orders for new titles. This new law brings down the costs of purchasing a mobile home affixed to real property and allows the parties to close sooner.

Michigan Realtors® was also proud to serve as a stakeholder in the creation of Michigan's first-ever statewide housing plan. The policies within the plan to expand development and access to housing will begin under the guidance of a new Michigan Statewide Housing Council, which will include Michigan Realtors® as a member.

In addition, our 2022 state budget included over \$650 million dollars toward investment in housing and housing development and the Governor, legislature and the education and business communities reached an agreement to make sure that all Michigan high school graduates will take a course in financial literacy. Building a solid foundation for our young people to understand the importance of saving and what it means to take on debt.

Our work is not done for 2022. With the handful of session days remaining after this election, Michigan Realtors® is hoping to send to the Governor's desk:

- Legislation protecting short-term rentals.
- Ensuring a homeowner's ability to protect their home through today's new surveillance technologies.
- A bill to continue lowering the cost for local associations and MLS providers to purchase county tax records.
- A package of bills put forward by our Michigan Housing Coalition to encourage public and private efforts to make housing more affordable in Michigan.

I also want to take an opportunity to highlight some of the work our committee did this year to defeat legislation impacting our clients and our business. I feel that the often-overlooked victories of stopping bad legislation, are sometimes even more important than the bills that pass. This year our policy committee defeated proposals to:

- Mandate inspections at the time of sale or transfer for septic systems and lead based paint.

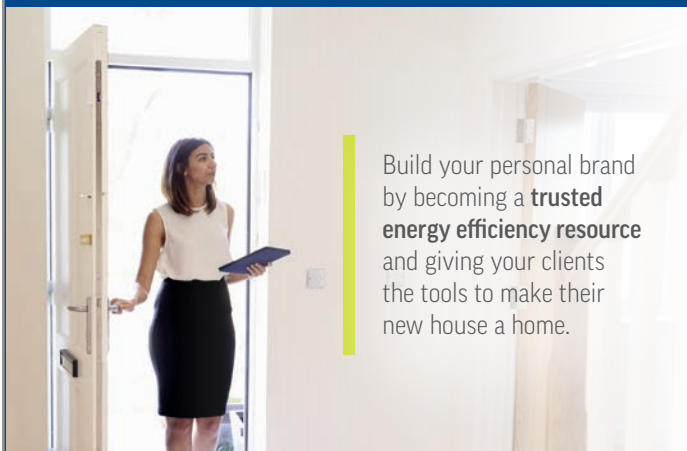
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- Eliminate real estate licensing or reduce license requirements, eliminating important consumer protections.
- Expand the Seller Disclosure form beyond the scope of a seller's knowledge of the property to require expert knowledge on environmental conditions and expertise in local property taxation.
- Broad sweeping land contract reforms that, while well intentioned, went too far in limiting the ability of the parties to come to an agreement.
- Authorize predatory Property Assessed Clean Energy programs that have wreaked havoc on homeowners and their equity in other states.
- Using the power of Michigan's Drain Code to establish a rain tax.

Finally, I would like to thank all our local associations who held candidate interviews throughout the spring and summer months to maintain and establish new relationships with those who are running for state and local office. These building blocks for working with state and local government begin with you. Thank you to those local associations and volunteers that went through the screening process this year to identify Realtor® Champions.

While committee applications have closed for 2023, if you are interested in serving on the Public Policy Committee in 2024, we are always looking for good volunteers. ●

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RESPA

BY GAIL A. ANDERSON, ESQ.

REAL ESTATE SETTLEMENT PROCEDURES ACT

refresher



A. Settlement Statement
U.S. Department of Housing and Urban Development

B. Type of Loan
1. ☐ FHA 2. ☐ FHAS 3. ☐ Other, Unins. 4. ☐ Other, Insured
5. ☐ VA 6. ☐ Other, Ins. 7. ☐ Other, Unins. 8. ☐ Other, Insured

C. Note: This form is furnished to give you a statement of actual settlement costs. Amounts paid to and by the settlement agent are shown on the left side of the form. Amounts paid outside the closing, they are shown here for informational purposes and are not included in the total settlement charges.

D. Name & Address of Borrower: _____
E. Name & Address of Seller: _____
F. Name & Address of Lender: _____

G. Property Location: _____
H. Settlement Agent: _____
I. Date of Settlement: _____

J. Summary of Borrower's Transaction
100. Gross Amount Due From Borrower
101. Contract sales price
102. Personal property
103. Settlement charges to borrower (line 1400)
104. _____
105. _____
Adjustments for items paid by seller in advance
106. City/town taxes to _____
107. County taxes to _____
108. Assessments to _____
109. _____
110. _____
111. _____
112. _____
120. Gross Amount Due From Borrower
200. Amounts Paid By Or In Behalf Of Borrower
201. Deposit or earnest money
202. Principal amount of new loan(s)
203. Existing loan(s) taken subject to
204. _____
205. _____
206. _____
207. _____
208. _____
209. _____
Adjustments for items unpaid by seller
210. City/town taxes to _____
211. County taxes to _____
212. Assessments to _____
213. _____
214. _____
215. _____
216. _____
217. _____
218. _____
219. _____
220. Total Paid By/For Borrower
300. Cash At Settlement From/To Borrower
301. Gross Amount due from borrower (line 120) _____
302. Less amounts paid by/for borrower (line 220) _____
303. Cash ☐ From ☐ To Borrower

K. Summary of Seller's Transaction
400. Gross Amount Due To Seller
401. Contract sales price
402. Personal property
403. _____
404. _____
Adjustments for items paid by seller in advance
405. City/town taxes to _____
406. County taxes to _____
407. Assessments to _____
408. _____
409. _____
410. _____
411. _____
412. _____
500. Amount Due To Seller
600. Cash At Settlement To/From Seller
601. Gross amount due to seller (line 420) _____
602. Less reductions in amt. due seller (line 509) _____
603. Cash ☐ To ☐ From Seller

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RESPA was enacted in 1974. Despite what some of you may have heard, it is not the case that RESPA is a thing of the past. Illegal kickbacks continue to be the most common RESPA violation. There are people in the real estate industry who continue to violate the statute, and there are plaintiffs' attorneys who continue to file class action lawsuits. Facts in a number of recent class action lawsuits make clear that there are still licensees who do not understand, or who have forgotten about, RESPA kickback prohibitions.

In a 2021 case, an Ohio attorney filed a class action lawsuit against the Wengerd Group, a real estate broker who allegedly paid bonuses to its agents if they placed orders with an affiliated title company. The lawsuit alleged that this arrangement violated Section 8 of RESPA which prohibits "settlement service" providers from giving or accepting compensation in exchange for referring business to one another. "Settlement services" are defined as services provided in connection with a residential loan and include title services, appraisals, inspections, home warranties and real estate brokerage services.

According to the complaint filed in this case, the broker's form contract with its agents had included the following provision:

Title Company Incentives

For every Buyer that you're able to close with Ohio Real Title, you will receive an additional \$50 paid at the end of the year.

For Example:

<i>Ohio Real Title</i>	<i>24 Closings</i>
<i>Total</i>	<i>24 X \$50 = \$1,200</i>

For the 2019 Payout – we will count from January – November and then payouts will be made at the Team Christmas Party in December.

The complaint also referenced a company-wide Facebook message that had been sent out mid-year from the owner of the company:

*I'm excited to see the bonuses our agents will be getting at our Christmas party this year for their title payouts. **That's great extra income for no additional work.** Let's keep it going the second half!*

Given this record, it was obviously difficult for the broker to claim that there had been no agreement to pay referral fees. Instead, the broker argued that these particular plaintiffs had no standing to challenge the

referral fees because they were not actually referred to the title company. The plaintiff-buyers in the case had not worked with a Wengerd Group agent but had purchased a home listed by a Wengerd Group agent. Since the plaintiff-buyers had their own agent, the broker argued, they had not been referred by the seller's agent and, therefore, did not incur damages as a result of a "referral." The Court rejected this argument. The Court said that even though the plaintiff-buyers had their own buyer's agent, they may still have been referred to the title company by the seller's agent. Therefore, the plaintiff-buyers did have standing to bring a RESPA claim against the seller's broker.

AFFILIATED BUSINESS ARRANGEMENT DISCLOSURE FORMS

RESPA does not prohibit referrals, but only payments for referrals. However, if, for example, a real estate licensee owns an interest in a title company, they cannot refer business to that title company unless they get an Affiliated Business Arrangement ("AfBA") Disclosure form signed. An AfBA Disclosure form discloses the nature of the relationship and the estimated charges for the referred business while making clear that the use of this particular title company is not required.

Some Realtors® appear to be under the mistaken impression that referral fees are permissible if the client signs an AfBA Disclosure form. That is simply not the case. Rather, the form only authorizes distributions of profit (i.e., returns on equity) based on the licensee's percentage ownership interest in the title company.

It is also the case that a licensee's ownership interest in the title company must be based upon the value of the various owners' investment in the company. The percentage ownership interest in the title company may not be calculated based upon expected referrals or adjusted later based upon actual referrals. Otherwise, the "return on equity" will be viewed as a disguised referral fee prohibited by RESPA and both the payor and the recipient will be subject to criminal and civil penalties.

THING OF VALUE

A Section 8 violation does not require that there be a direct cash payment in exchange for the referral. Section 8 prohibits providing any “thing of value” in exchange for a referral. As the United States Supreme Court once explained, even an exchange of valuable tickets to a sporting event in return for the referral of business is a violation of Section 8.

It is also an exchange of a “thing of value” if a settlement service provider assumes a financial obligation of the party making the referrals. For example, in a recent case out of Maryland, in exchange for referrals from a mortgage company, a title company made payments to a marketing company, which the marketing company applied to the mortgage company’s account. According to the plaintiff-borrowers in that class action suit:

Using third party marketing companies . . . created the false impression that [the title company] was purchasing marketing services for itself rather than on behalf of the mortgage company. Moreover, to further conceal the kickbacks . . . the title company and the mortgage company hoped to be able to use claims of “co-marketing” as a sham.

The defendants responded that they, in fact, had had a joint marketing arrangement and that the payments had been bona fide compensation for services actually performed. The Court refused the defendant’s request that it throw out the case, holding that the plaintiffs should be given the opportunity to prove their case.

AN AGREEMENT OR “UNDERSTANDING”

An illegal referral arrangement need not involve an agreed-upon quid pro quo calculation based upon actual referrals. For example, payment of a monthly fee – or providing free services – as part of an unspoken “understanding” that the recipient will refer any business that comes his way is also prohibited by RESPA.

A plaintiff in a recent class action alleged that: (1) a title company had provided various payments and free services to loan officers who worked for a particular mortgage company; and (2) those loan officers had referred customers to the title company. The Court held that it was not necessary for the plaintiff-borrower to show that any particular “thing of value” had been tied in any way to any particular consumer and that an illegal referral arrangement may be established through a pattern or course of conduct.

CONCLUSION

Many real estate professionals believe that the Government is not currently focused on RESPA. Even if this is true, that does not mean that the RESPA rules can be ignored. First of all, the Government’s focus can change without warning. Additionally, as these cases illustrate, class actions are still being filed regularly. Realtors® should continue to take the RESPA prohibitions very seriously. Violations of RESPA can result in civil lawsuits, including class actions, in which licensees can be required to pay treble damages as well as attorneys’ fees and costs. They can also result in criminal fines of up to \$10,000 and imprisonment of up to one year for each occurrence. ●

Despite what some of you may have heard, it is *not* the case that RESPA is a thing of the past.

The Convention Recap

The Annual Convention, presented by Michigan Realtors®, was held at the Amway Grand Plaza Hotel & DeVos Place in Grand Rapids, in September. Over 1,100 real estate professionals and affiliates attended the 3-day event filled with knowledge, networking and recognition. Highlights of Day 1 included:

- Grand Assembly keynote speaker, Mark Schulman
- The swearing in of 2023 Michigan Realtors® President, Natalie Rowe of the Greater Kalamazoo Association of Realtors®
- The announcement of the 2022 Michigan Realtor® of The Year, Dr. E'toile O'Rear-Libbett of the Greater Metropolitan Association of Realtors®

Another highlight of Day 1 was the 2022 RPAC Appreciation Luncheon. The winner of the 2022 Michigan Realtor® Active in Politics award was announced: Tom Long of the Southeastern Border Association of Realtors®.

Day 2 began with the Rise & Refocus Morning Keynote with Jessica Lundy. The session included the announcement of the 2022 Michigan Realtor® Good Neighbor, Kimberly Harder-Webb of the Upper Peninsula Association of Realtors®.

The RPAC LIVE and Silent auctions were once again a crowd favorite in the Expo. Local Realtor® associations

from across Michigan generously contributed unique items and gift baskets in all price points to raise money that will be used to safeguard the real estate industry. Participants were also able to bid on items through a virtual platform all week. The auctions raised \$45,175!

Day 3 concluded with the Michigan Realtors® *Within The Law* Legal Team giving an overview of timely topics followed by audience Q&A. "Legal Friday" continues to be one of the most interactive and informative opportunities for attendees. Knowledge session handouts are available by visiting <https://convention.mirealtors.com>.

The Convention is an absolute must for real estate professionals with a dedication to their industry, their career, their business, and themselves. Mark your calendar now for next year's event!

THE CONVENTION

(A Michigan Realtors® Event)

September 20-23, 2023

Detroit Marriott at the Renaissance Center, Detroit, MI

Michigan Realtors® is grateful to all the exhibitors, sponsors, and attendees. Your support and participation in The Convention help to make it the exceptional event that it is, year after year. Thank you, for your support in 2022. ●



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Michigan Realtors®
Natalie Rowe
Greater Kalamazoo
Association of Realtors®



2022 Michigan
Realtor® of The Year
Dr. E'toile O'Rear-Libbett
Greater Metropolitan
Association of Realtors®



2022 Michigan Realtor®
Active in Politics
Tom Long
Southeastern Border
Association of Realtors®



2022 Michigan Realtor®
Good Neighbor
Kimberly Harder-Webb
Cause: Imagination Factory
Children's Museum
Upper Peninsula Association of Realtors®



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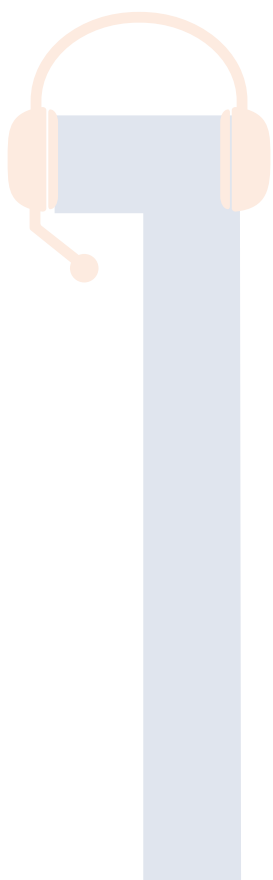
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The Legal Hotline: A Year in Review

Is there a better way to wrap up 2022 than with a review of this year's most frequently asked legal questions? We think not! To assist you in your quest for legal knowledge, your Michigan Realtors® Legal Team has compiled this year's top questions from the Legal Hotline.



I represent a buyer who submitted an offer on a home where there were multiple offers. My client's offer was not accepted. We have reason to believe that my client's offer was the "highest and best." Are we entitled to see a copy of the accepted offer so that we can verify that it was, in fact, the "highest and best" offer?

No! A seller is not legally obligated to provide a potential buyer with evidence of other competing offers. Many buyers request to see proof of competing offers because they mistakenly believe that a seller is required to accept the "highest and best" offer, and they want to see how they stack up against the selected offer. Agents should make sure that their buyer-clients understand that it does not matter whether or not the accepted offer was the "highest and best." Sellers are not required to accept the "highest and best" offer, nor are they required to treat all offers "fairly." Sellers can accept or reject an offer for any reason, as long as they do not engage in unlawful discrimination (for example, discrimination on the basis of race, sex, national origin or any other protected classification under state, federal or local Fair Housing Law).



I heard the protected classes under Michigan Fair Housing law were recently amended. Is that true and is there any new guidance that Realtors® should be aware of?

Yes! In July of this year, the Michigan State Supreme Court ruled in *Rouch World, LLC v. Department of Civil Rights* that the definition of "sex" in the Michigan Elliot-Larsen Civil Rights Act includes "sexual orientation" and "gender expression." The Michigan Realtors® Legal Action Committee authorized the filing of an amicus brief in connection with the *Rouch* case. In the amicus, Michigan Realtors® voiced their support of expanding Michigan's protected classes to protect LGBTQ+ individuals from discrimination in housing – a protection that was not previously afforded under Michigan law. The new framework of Michigan Fair Housing law not only offers protections to LGBTQ+ individuals, but also aligns with both the letter and the spirit of the Realtor® Code of Ethics.

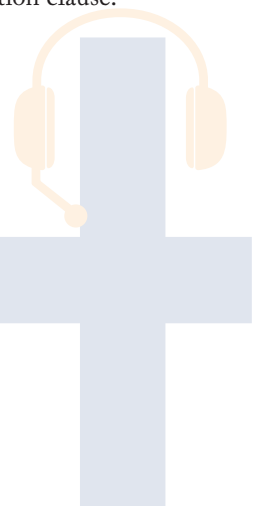


I am a real estate salesperson representing a buyer. We submitted an offer on a home and two days later the listing agent sent me a text message indicating that his seller had signed my buyer's offer. Later that same day, I received another text from the listing agent stating that the seller had decided to go with a better offer. My buyer is angry and believes that we had a binding agreement when the listing agent sent the first text message saying that seller had signed the offer. Are we correct?

No. The statute of frauds requires that a contract to purchase real estate must be signed and in writing, or else it is not enforceable. In order for the seller's acceptance to be valid, it must be delivered back to the buyer (or, buyer's agent). A text message from the listing broker notifying the buyer's agent that the seller has signed the offer does not satisfy this requirement. It has no more effect than if the listing broker had called and told the buyer's agent that the seller had accepted the buyer's offer. Remember, that an offer to purchase real estate can never be accepted orally.

I represent a buyer who entered into a purchase agreement with a 15-day inspection contingency. During the inspection, the buyer discovered numerous defects with the property. My client still wants to purchase the property but only if the seller remedies the defects. Can my buyer force the seller to do this?

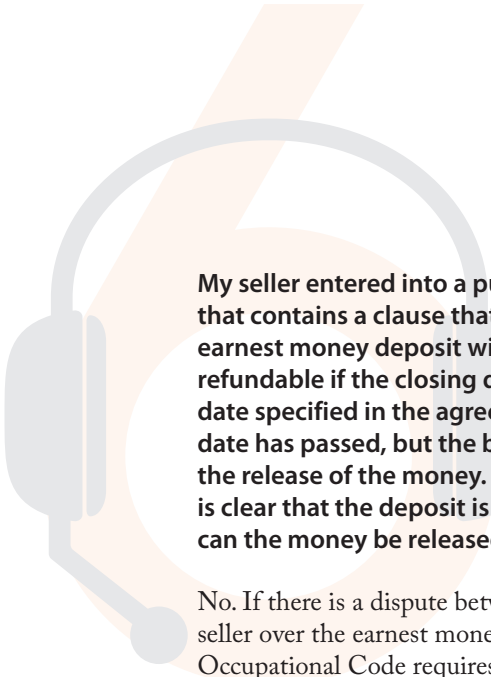
Probably not. It's true that no inspection contingency is drafted exactly the same but, typically, an inspection contingency clause gives the buyer the option to either move forward with the purchase agreement as written or to terminate the purchase agreement walk away from the transaction. A buyer can request that a seller make repairs, but typically cannot require the seller to do so. Some inspection contingency clauses even permit the seller to terminate the purchase agreement if the buyer even makes such a request. For this reason, a buyer should carefully review the language of the inspection contingency clause before they make a request for repairs. If the buyer wants the ability to walk away from the deal if the seller refuses to make repairs, then that needs to be clearly spelled out in the inspection clause.



The seller sent a counteroffer and has now received a better offer. Can the seller revoke their counteroffer?

Yes. A counteroffer can be rescinded up until the time it has been accepted. The rescission must get to the buyer (or buyer's agent) before the seller (or listing agent) receives the buyer's acceptance of the counteroffer.

Agents should not confuse the rules for "accepting" an offer/counteroffer with the rules for "revoking" an offer/counteroffer. Remember that an acceptance must be signed and in writing to be enforceable. A revocation, on the other hand, can be made orally – although writing is preferred. The revocation will be valid as long as it is delivered (either orally or in writing) before the acceptance is delivered.



My seller entered into a purchase agreement that contains a clause that says that the earnest money deposit will become non-refundable if the closing does not occur by the date specified in the agreement. The closing date has passed, but the buyer is disputing the release of the money. Since the contract is clear that the deposit is non-refundable, can the money be released to the seller?

No. If there is a dispute between the buyer and the seller over the earnest money deposit, the Michigan Occupational Code requires that the money stay in a broker's trust account until there is either an agreement between the parties or a court order that dictates to whom the money should be released. This is true even where the purchase agreement is clear as to which party is entitled to the earnest money, or when one party's claim to the deposit is clearly wrong. Keep in mind also that some courts strictly enforce time deadlines in contracts, while some don't. This means that some courts might say that a missed or delayed closing date is a breach of contract – while others may not. The lesson to be learned here is that if a buyer wants to offer a “non-refundable” earnest money deposit, they should clearly spell out in the contract when they expect to get that earnest money back. If a closing is delayed because of a buyer, a seller could very well argue that the purchase agreement is terminated, and the deposit is forfeited. But remember that some courts may interpret missed time deadlines differently. So, if the seller wants to close on a backup offer after a closing deadline has come and gone, that seller should speak with legal counsel before they accept another offer.

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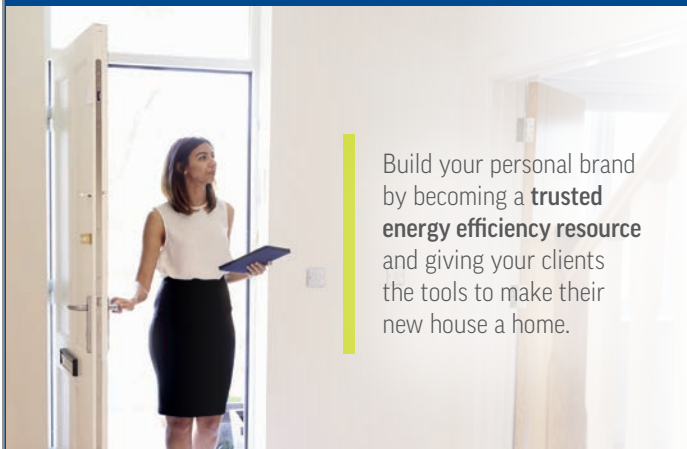
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