# CFPB: AN UPDATE

The Consumer Finance Protection Bureau ("CFPB") has not issued any comprehensive discussion, rule or any other communication which tells the real estate industry how the CFPB interprets Section 8 of RESPA. Instead, the CFPB's interpretation of Section 8 can only be gleaned from its enforcement actions and the consent orders resulting from those actions. However, it is clear that the CFPB does not feel bound by past interpretations of Section 8 by HUD or other agencies.

As a refresher, Section 8(a) of RESPA provides as follows:

> No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.

While it has always been the case that a person or entity could be in violation of Section 8(a) by either paying or receiving a referral fee, it was not until recently that the CFPB indicated that it would actually prosecute violations of Section 8(a) against those who receive unlawful referral fees (in addition to those who pay the unlawful referral fees).

In this recent case, the CFPB pursued enforcement actions against two real estate brokerage firms: RGC Services and Willamette Legacy. The CFPB found that both brokerage firms had arrangements with a mortgage lender, Prospect Mortgage, under which they received fees in violation of Section 8(a). Ultimately, both brokerage firms entered into Consent Orders with the CFPB under which RGC Services agreed to disgorge $500,000 and pay a $50,000 civil penalty and Willamette Legacy agreed to disgorge $145,000 and pay a $35,000 civil penalty. A review of the arrangements between these real estate firms and the mortgage lender sheds some light on how the CFPB interprets Section 8(a).

In its Consent Order in the action against Willamette Legacy, the CFPB briefly described its understanding of how real estate brokerage firms are organized and operate. The CFPB stated:

> Real estate brokers are real estate agents who have completed additional licensing requirements which allow them to serve as brokers. Real estate brokers may work individually or arrange to have agents work under them. Although agents typically work for brokers as independent contractors, brokers generally have the ability to hire and fire their agents. Agents typically pay monthly office fees to affiliate with a licensed real estate broker. These fees pay for rental space and other expenses related to the costs of doing business.

The CFPB's "one size fits all" model is important as it sheds light on CFPB's view of the relationship between a real estate broker and its agents as well as its view of the influence a real estate broker has over those agents.

In any case, it appears that the initial arrangement between Willamette Legacy and the lender was based on a 2011 Marketing Agreement. Under the Marketing Agreement, the lender, Prospect Mortgage ("PM Lender") paid Willamette Legacy $4,250 per month in return for which Willamette Legacy was to perform certain marketing activities. PM Lender set the fee at $4,250 per month based on the number of referrals that it projected it would receive from Willamette Legacy. Under the Marketing Agreement, PM Lender was able to subsequently adjust the monthly fee it paid to Willamette Legacy based on a number and value of referrals it actually received.

PM Lender also placed a loan officer within the offices of Willamette Legacy. Among the duties of the loan officer was to meet with representatives of Willamette Legacy to "review the capture rate and identify missed opportunities amongst agents and consumers." The "capture rate" was determined monthly by comparing the number of clients Willamette Legacy had who financed the purchase of a new home with the number of those clients who used PM Lender for that financing. The CFPB used an example whereby Willamette Legacy had ten such clients in a month and three of those clients used PM Lender; thus, the capture rate was 30%. The loan officer worked very closely with Willamette Legacy in an effort to maximize the capture rate.

The Marketing Agreement also required Willamette Legacy to market PM Lender's services to Willamette Legacy's agents. The CFPB contended that by requiring Willamette Legacy to market PM Lender's services to its agents and having Willamette Legacy identify any "missed opportunities" for its agents to steer clients, PM Lender used the Marketing Agreement to require Willamette Legacy to pressure its agents to refer clients to PM Lender.

After five months of operating under the Marketing Agreement, Willamette Legacy and PM Lender switched to a "Lead Agreement." PM Lender no longer paid a fixed monthly fee to Willamette Legacy. Instead, Willamette Legacy provided information about their clients to PM Lender and PM Lender agreed to pay a variable fee based on a number of potential clients Willamette Legacy provided to PM Lender. Originally, PM Lender paid Willamette Legacy $29 to $30 for leads about consumers selling their homes and $240 to $360 for consumers looking to buy a home. The Lead Agreement also had an exclusivity provision. That is, if Willamette Legacy provided information about a client to PM Lender, Willamette Legacy could not provide that same information to any other PM Lender.

Under the Lead Agreement, Willamette Legacy was not required to provide any other services, marketing or otherwise, in exchange for PM Lender's payments. Willamette Legacy was paid simply to provide information about its clients to PM Lender so that lender could use that information to sell its financial services. However, the CFPB found that, in actual practice, Willamette Legacy and its agents also recommended PM Lender to their clients.

Historically, the agents of Willamette Legacy had paid a monthly fee of $55 to Willamette Legacy to cover expenses such as office supplies, and errors and omissions

insurance. In September, 2013, Willamette Legacy had begun paying its agents each time they referred a client to PM Lender. The payment was made as a credit against the monthly fee paid by the agents to Willamette Legacy. The monthly credit that agents could receive for referring clients to PM Lender was paid on a sliding scale. Willamette Legacy paid:

> . . . $20.00 per lead when the agent provided one or two leads in a month, $30 per lead when the agent had three to five leads, $40 for five to nine leads, and $50 per lead when they gave ten or more leads.

Apparently several agents earned more than $500 per month under this sliding scale.

Finally, PM Lender had also entered into Desk License Agreements with Willamette Legacy. Under the Desk License Agreement, Willamette Legacy would permit one or more of the PM Lender's loan officers to lease space in Willamette Legacy's office. Obviously, PM Lender paid for the leased spaced. Under this arrangement, Willamette Legacy was also required to endorse PM Lender and to "make a good faith effort to promote [PM Lender] as a preferred mortgage lender" and to "endorse the use of [PM Lender's] services to its employees, agents, customers, and the visiting public." The payment amounts under the Desk Licensing Agreement were based upon the number of referrals produced by Willamette Legacy's office, rather than market rates for rental space in the area.

In the Consent Order, after discussing all of the various arrangements, the CFPB quoted Section 8(a) and the definition of a referral as "any act which has the effect of 'affirmatively influencing' a consumer's selection of a settlement service provider, including a lender." The CFPB also stated that repeated payments from PM Lender to Willamette Legacy which were connected in any way with the volume or value of business referred were evidence that the payments were made pursuant to an agreement for the referral of business in violation of RESPA.

In its findings against Willamette Legacy, the CFPB assumed that Willamette Legacy shared a portion of the lead fees with its agents when they recommended PM Lender to their clients. The CFPB concluded that Willamette Legacy discussed ways PM Lender could increase its capture rate of potential mortgage business coming through Willamette Legacy. Further, Willamette Legacy gave PM Lender preferential access to its agents and agreed to endorse and promote the PM Lender as a preferred mortgage lender. The CFPB concluded:

> These acts affirmatively influenced consumers – both directly and through [Willamette Legacy's] agents – to use [PM Lender] to finance their real estate transactions.

In a prior Consent Order involving Lighthouse Title in western Michigan, the CFPB had previously evidenced its belief that all Marketing Service Agreements ultimately result in a violation of Section 8. In this more recent case, it is certainly true that payments made to agents based upon the number of referrals made to PM Lender were a violation of Section 8 in anybody's book. However, the impermissibility of some of the other activities of the Willamette

Legacy described in the Consent Order is less clear. Since the Consent Order contains a laundry list of factual findings without any detailed discussion as to the appropriateness of any particular arrangement, one can only guess at the significance the CFPB attached to any particular arrangement.

***PHH Corporation v CFPB.***

The closest the CFPB has come to showing its cards with respect to its comprehensive interpretation of Section 8 of RESPA, has occurred in its prosecution of a lender, PHH. PHH referred borrowers to certain mortgage insurers. These mortgage insurers purchased reinsurance from a reinsurer who was a subsidiary of PHH. The CFPB contended that the payment by the mortgage insurers of premiums to PHH's subsidiary were violations of RESPA in the context of referrals by PHH of its borrowers to the mortgage insurers. Ultimately, the Director of the CFPB ordered PHH to disgorge $109 million, or substantially all of the insurance premiums paid to its subsidiary for reinsurance.

PHH's arrangement with the mortgage insurers for the purchase of reinsurance had been in existence for many years. HUD, the prior administrator of RESPA, had approved of the arrangement. So long as the premium received by PHH's subsidiary was equal to or less than the value of the reinsurance product provided by the subsidiary, there was no violation of RESPA. In other words, PHH was receiving no fees or other valuable consideration for making referrals to the mortgage insurers. PHH's and HUD's position was consistent with the provisions of Section 8(c)(2) which provides that it is not a violation of Section 8 when there is "payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed."

The CFPB chose to reject HUD's longtime interpretation of Section 8(c)(2) and the other exemptions in Section 8(c). Instead, the CFPB determined that the exemptions are interpretative and are not exemptions in any situation in which there is a referral. Somehow the existence of a referral eliminates the exemptions and taints the transaction.

PHH appealed this decision by the CFPB to the United States Court of Appeals for the District of Columbia Circuit Court (the "Circuit Court"). On October 11, 2016, a three-judge panel of the Circuit Court rendered its decision in favor of PHH. Since the decision was issued, the primary focus has been the Court's determination that the single-director structure of the CFPB is unconstitutional. More importantly from the standpoint of people that must live with and try to comply with RESPA, were the following rulings contained in that decision:

(1) the CFPB's new interpretation of Section 8(a) and (c) was incorrect and "facially nonsensical";

(2) the CFPB's attempt to prosecute PHH under its new interpretation by overturning an old interpretation that had been in place for many years violated due process; and

(3) actions by the CFPB for violations of Section 8 are subject to a three-year statute of limitations (thereby overturning the CFPB's ruling that there is no statute of limitations on administrative actions by the CFPB).

In sum, the decision by the three-judge panel of the Circuit Court was a complete defeat for the CFPB and its interpretation of Section 8(a) and (c) and a restoration of the interpretation of Section 8 in conformity with decades of prior decisions and interpretations.

On February 16, 2017, the CFPB filed a petition with the Circuit Court for a rehearing before the entire Court. This petition was granted by the Circuit Court.

On May 24, 2017, the arguments in the case were reheard before the eleven (11) appellate judges. The questions from the court and arguments of legal counsel focused primarily on the issue of whether the structure of the CFPB with a single director removable only for cause by the President was constitutional. Little time was spent on the arguments as to the appropriate interpretation of RESPA Section 8.

It is not known when the Circuit Court will issue its new opinion. If the Circuit Court finds that the structure of the CFPB is constitutional but adopts the prior decision with respect to the proper interpretation of Section 8, it will still be a substantial victory for persons who have to comply with RESPA on a daily basis. It would hopefully rein in the CFPB and its expansive interpretations of Section 8.

## CONTRACTS: A STRICTER INTERPRETATION?

Fifteen (15) years ago, the following hypothetical was included in a white paper on the enforcement of time deadlines in purchase contracts. Assume Seller Jones and Buyer Smith enter into a Buy and Sell Agreement contingent upon Buyer Smith obtaining financing within fourteen (14) days and requiring a closing within twenty-one (21) days. Buyer Smith's loan application is delayed several times. In the meantime, Seller Jones receives a second offer on his home which is better than Buyer Smith's offer. At what point is Seller Jones free to sell his home to the second buyer? In 2002, our conclusion was that there was no date at which Seller Jones could proceed "risk free" with the second buyer. As discussed in that white paper, historically, Michigan courts had not strictly enforced time deadlines in purchase agreements. It was concluded that while delays caused by financing problems or other reasons might be irritating or frustrating to a seller, in general, Michigan law does not permit a seller to terminate a purchase agreement and accept a more favorable offer merely because the closing date specified in the first purchase agreement has been delayed. However, over the past 15 years, there have been several decisions by the Michigan Supreme Court which may alter our 2002 conclusion.

The law regarding the enforcement of time deadlines in contracts was originally described by the Michigan Supreme Court in 1921 in a case named *Waller v Lieberman*.[1] In that case, Waller had signed a purchase agreement to buy property from Lieberman, and the deal was to have closed on September 8, 1916. Waller was hospitalized on September 7th, and had not

[1] 214 Mich 428; 183 NW 235 (1921).

provided the money and documents needed by the escrow agent for closing before being hospitalized. Lieberman subsequently learned of Waller's illness and consented to postponing the transaction. Lieberman later attempted to cancel the transaction on December 12th, claiming that Waller had defaulted. Waller then sued to enforce the purchase contract.

In his defense, Lieberman argued that "time was of the essence." In the real estate context, this basic principle of contract law means that where parties have agreed that the time for performance is an essential element of the contract, the closing must occur on or before the date specified or the agreement will be void. The court rejected this argument, observing that in that case, there was:

> nothing in the written contract, or in the conduct of the parties, tending to establish the fact that time was of the essence of the contract, other than the naming of the due date; and it has been frequently held that the naming of the date on which the payment shall become due does not in itself make time of the essence of the contract.

In addition, the Supreme Court held that even though parties to a purchase agreement intend that the contract be performed within the time specified, they may waive the time deadline by oral or written agreement. Such an agreement then operates as a waiver by the [seller] of the right to rescind the contract due to the purchaser's failure to comply strictly with the terms for payment.

Since 1922, Michigan courts continued to follow the basic rule established in *Waller v Lieberman* in cases decided as late as 1976. Michigan courts repeatedly emphasized that due to the drastic effect of a "time is of the essence" provision in a real estate purchase agreement – that is, the complete termination of the agreement if the specified closing date is not met – the buyer and seller must clearly intend the time deadline to be an "essential element of their agreement." Time is not generally regarded as of the essence unless the contract so states, or it is clearly indicated from the nature of the contract and surrounding circumstances.[2]

During this same time, Michigan courts also held that the use of form purchase agreements prepared by state or local boards of Realtors®, and the inclusion of a specific closing date or time limit in the space provided on the form, does not independently make "time of the essence" to the parties' agreement.[3] The courts recognized that these types of forms are used for convenience, and do not necessarily constitute a true negotiated expression of the parties' intent to stress the importance of a specific time for performance. For example, in 1976[4], the Michigan Court of Appeals rejected a buyer's attempt to rescind a purchase agreement based upon a delay by the sellers, where the testimony of the real estate broker indicated that he had inserted a thirty-day closing requirement in the purchase agreement as a "matter of course," and not because of any concern by his clients that the closing happen within the timeframe.

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[2] *Nedelman v Meininger*, 24 Mich App 64, 74; 180 NW2d 37 (1970).
[3] *Kennedy v Brady*, 43 Mich App 760, 763-764; 204 NW2d 779 (1973).
[4] *MacRitchie v Plumb*, 70 Mich App 242, 246; 245 NW2d 582 (1976)

This line of cases obviously did not call for strict enforcement of deadlines included in purchase agreements. Thus, when a seller or buyer was unable to close due to a delay beyond his or her control, it was and has been a gray area as to when the purchase agreement shall be deemed terminated. However, over the last 15 or so years, there have been a series of cases from the Michigan Supreme Court which indicate the Court may no longer take this "kinder and gentler" approach to contract interpretation when it comes to performance deadlines.

During the last approximately 15 years, the following "general rules" have been announced by the Michigan Supreme Court with regard to contract interpretation:

(1) "The law presumes that the contracting parties' intent is embodied in the actual words used in the contract itself.";[5]

(2) Courts must interpret language in a contract using its plain and ordinary meaning unless otherwise defined in the contract;[6]

(3) If language in a contract is plain and unambiguous; the contract must be enforced according to its terms;[7]

(4) Michigan courts do not have the authority to modify unambiguous contracts or rebalance the contractual equities, as such an act would be "contrary to the bedrock principle of American contract law that parties are free to contract as they see fit, and the courts are to enforce the agreement as written absent some highly unusual circumstance such as a contract in violation of law or public policy;[8]

(5) A contract must be enforced by a court according to its terms, construing and enforcing a contract as written if the contractual language is clearly unambiguous, a court must honor a parties' contract as written;[9] and

(6) "One who signs a contract will not be heard to say, when enforcement is sought, that he did not read it, or that he supposed it was different in its terms."[10]

Let us return to the hypothetical discussed in 2002. Recall that Buyer Smith was to obtain financing within fourteen (14) days and to close within twenty-one (21) days. He could not close because his loan application was delayed. Assuming the purchase agreement is unambiguous with respect to the closing deadline, application of contract interpretation case law over the last fifteen (15) years would dictate that Seller Jones could terminate the buy and sell agreement if the closing did not occur within twenty-one (21) days. Under the reasoning of this

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[5] *City of Grosse Pointe Park v Michigan Municipal Liability and Property Pool*, 473 Mich 188, 218-219; 702 NW2d 106 (2005).
[6] *English v Blue Cross and Blue Shield of Michigan*, 263 Mich App 449, 471; 688 NW2d 523 (2004).
[7] *Burkhardt v Bailey*, 260 Mich App 636, 656; 680 NW2d 453 (2004).
[8] *Wilkie v Auto Owners Insurance Inc*, 469 Mich 41; 664 NW2d 776, 782 (2003) and *Rory v Continental Insurance Co*, 473 Mich 457; 703 NW2d 23, 26 (2005).
[9] *Reicher v SET Enterprises Inc*, 283 Mich App 657, 664; 770 NW2d 902 (2009).
[10] *Farm Mutual Insurance Group v Nikkel*, 460 Mich 558, 567-568; 596 NW2d 915 (1999).

more recent case law, when faced with this situation, a court would apply the plain and unambiguous terms of the contract to enforce the time deadlines as written.

Unfortunately, it is extremely rare for the Michigan Supreme Court to expressly overrule a prior decision. Instead, a new rule is simply announced and the old decision is generally ignored. Moreover, none of the more recent cases discussed involved the enforcement of a time deadline in a real estate buy and sell agreement (all of these cases involved other types of contractual provisions). Thus, it is still possible, based on older Michigan case law, for a party to argue that time deadlines in a real estate purchase agreement are not strictly enforceable. However, today's buyer or seller would appear to have a much higher likelihood of success in relying on time deadlines to terminate a buy and sell agreement. This is by no means a sure thing however; and clients who are considering taking such a step should always be advised to seek the advice of counsel.

## SALES OF NEW CONDOMINIUM UNITS

Realtors® who are listing units in a newly-created condominium project need to be aware that there are different legal requirements for these sales than for any other type of real estate sales. Many years ago, the State of Michigan reviewed and approved the condominium documents for all new projects. This old process was very costly and time-consuming, so in 1980, the State wholly rewrote the Condominium Act. Rather than require State approval of all condominium documents for new projects, the State put together a fairly elaborate statutory framework that dictates many of the sale terms and, in addition, requires a developer to make a number of very specific disclosures. The State no longer has any authority to enforce the terms of the Condominium Act. Only a judge has authority to order a developer or an association to comply with the Condominium Act.

The good news for Realtors® is that a developer of a new condominium project will necessarily have a lawyer, as well as a surveyor, architect or engineer involved in putting together his or her project. These professionals will do much of the heavy lifting. Nonetheless, Realtors® who list new condominium units for these developers should be familiar with the basic requirements of the Condominium Act.

The Condominium Act governs traditional condominium projects as well as site condominium projects. A project is created through the recording of a Master Deed with Condominium Bylaws and a Condominium Subdivision Plan attached. The recording of the Master Deed serves to divide the property into units just as the recording of a subdivision plat serves to divide the property into lots. A Master Deed cannot be recorded unless the real property taxes on the entire parcel are current. In the year following the year in which the Master Deed is recorded, real property taxes will be assessed against the individual units rather than against the property as a whole. By statute, the common areas are not separately assessed for tax purposes; rather, the value of the common elements is allocated among the units themselves.

In addition to the Master Deed, Condominium Bylaws and Condominium Subdivision Plan, a developer's attorney will create a nonprofit corporation to serve as the condominium

association. The association is created through the filing of Articles of Incorporation with the Department of Licensing and Regulatory Affairs. The association may have its own Association Bylaws, or alternatively, the corporate provisions may be included in the Condominium Bylaws attached to the Master Deed. A condominium association is a private, not a public entity. The association is not subject to the Open Meetings Act.

A Realtor® should not use his or her standard purchase agreement form for sales of newly-created condominium units. The developer's attorney will need to create a specialized form of purchase agreement. The Condominium Act contains a list of provisions that must be included in all purchase agreements for newly-created residential condominium units, including a discussion of the developer's rights and obligation to construct "must be built" improvements, a purchaser's statutory right to cancel the purchase agreement under certain circumstances and a mandatory arbitration clause. A Realtor®'s standard form of purchase agreement will not comply with the Condominium Act and should not be used for the sale of new condominium units. The appropriate form should be obtained from the developer's attorney.

Under the Condominium Act, a buyer's earnest money deposit must be held by a title company. A licensed real estate broker cannot hold an earnest money deposit on the sale of a new condominium unit in its trust account. Moreover, the title company holding the funds must sign an Escrow Agreement for that specific condominium project in which it agrees that all deposits will be held in compliance with the Condominium Act. Basically, the title company must agree not to release any proceeds until the developer completes the "must be built" improvements or provides adequate security for the completion of those improvements. A copy of the signed Escrow Agreement for the project should be attached to the Purchase Agreement for every unit.

The Condominium Act also requires that the terms of all of the condominium documents and various other information about the project be summarized in a "Disclosure Statement" document which, in concept, is similar to a shorter version of the operating manual for your new car. It also describes the developer's experience with condominium projects, any warranties, the extent to which financial arrangements have been made for the "must be built improvements" and an itemized budget. The Disclosure Statement is not recorded or filed anywhere.

All of the condominium documents, including the Disclosure Statement, are then combined and put in a "Purchaser's Informational Packet" which must be given to every potential purchaser. A typical packet includes:

1. Receipt and Instruction Sheet;

2. Master Deed (with Condominium Bylaws and Condominium Subdivision Plan attached);

3. Purchase Agreement (with Escrow Agreement attached);

4. Articles of Incorporation and Association Bylaws (if separate);

5. Disclosure Statement; and

6. "The Condominium Buyer's Handbook"

A signed Purchase Agreement is not binding on a purchaser until nine days after he or she receives the "Purchaser's Information Packet."

Of course, Realtors® involved in the sale of new condominium units should not forget real estate basics. A seller's disclosure statement is required in connection with the sale of traditional condominium units unless the seller is a licensed builder and the residence has never been occupied. An agency disclosure form will be required in all instances.

Finally, agents who represent buyers of new condominium units should make sure that their buyer clients receive a complete "Purchaser's Information Packet." Buyer-clients should be encouraged to have that packet reviewed by a real estate attorney who has experience with condominium projects. A buyer of a new condominium unit may be subject to a binding purchase agreement before construction is complete. A knowledgeable attorney can help make certain that the buyer is protected if the project is not constructed on time and/or in accordance with plans.

In summary, the State regulates condominium projects through a statutory framework that regulates not only the creation of the project but also the initial sale of the condominium units by the developer. Realtors® who are involved in the sale of new condominium units will need to work closely with the developer's attorney to make certain that all of the sale requirements are met.

## MAINTAINING YOUR CORPORATE SHIELD

One of the most basic risk reduction techniques used by real estate brokerage firms is to organize as a corporation or as a limited liability company. It is relatively easy and inexpensive to file articles of incorporation for a corporation or articles of organization for a limited liability company, obtain a real estate brokerage license for the company and begin operations. Generally, the owner as a shareholder of the corporation, or as a member of the limited liability company, will not be liable for the obligations of the corporation or the limited liability company.

Assume that Mary Smith has long operated Smith Realty through a d/b/a she filed with the county in which she resides. If a disgruntled buyer sues claiming that an agent with Mary Smith's firm breached her fiduciary duties by failing to disclose that the home had previously been used as a meth lab, Mary Smith could have personal liability. Because she was operating as a d/b/a, Mary Smith remains personally liable for the obligations of her business. If, on the other hand, Mary Smith had incorporated as "Smith Realty, Inc.," ordinarily Mary Smith would not be personally liable for any judgment the disgruntled buyer obtained.

Michigan courts typically consider corporations legally distinct from their shareholders, even if a single shareholder owns all the stock. The same is true for limited liability companies.

However, in some instances the courts will permit a party, such as the disgruntled buyer in our hypothetical, to "pierce" the corporate veil – or in other words, ignore the entity and permit a lawsuit against the individual agent involved and/or the owners of the company.

One situation in which a court may allow someone to "pierce" the corporate veil is where the owners of the company did not observe corporate formalities, or in other words, operate as a separate, legal entity. Even if a broker is a one-person shop, he must maintain separate books and records for his company apart from his personal account. Funds of the company should not be comingled with the broker's personal funds. Debts of the corporation should not be paid from the individual owner's personal account and vice versa. If the company borrows money from the individual owner, those loans should be documented, and interest should be paid. It is not enough to simply file the necessary paperwork to create a corporation or limited liability company. Thereafter, the business must be operated as a separate legal entity apart from the individuals who own the company.

Another situation in which a court may permit action against the individual agent and/or owners of the company is the situation where business was not conducted in the name of the company. Where it appears to the public from the wording in an advertisement that the business is being conducted by an individual rather than a company, a court may decide that the individual is personally responsible for any liability arising in connection with the conduct of that business. This may be true even where the advertisement simply drops the abbreviation "Inc." or "LLC" – so, for example, when "John Smith, Inc." advertises as "John Smith." It is also possible that in such a situation, the brokerage company's insurance company could deny coverage on the basis that the conduct complained of was not conducted in the name of the insured company.

By now, most Realtors® are aware of the new advertising rule, effective January 1, 2018, that requires the type size used for the firm's name to be at least as large as the type size for the individual licensee's name. This new requirement has served to remind everyone of the decades-old requirement that all advertising must include the licensed name of the broker (as on file with DLARA). What many Realtors® may not fully appreciate is that advertising in the name of the company is not only an Occupational Code requirement. If an individual agent or team does not advertise in the name of the company, the individual agent (or team member) may be personally liable for any judgment arising out of the agent's business.

If, for example, I respond to a solicitation to list my home from "Team Smith" and later find out that unbeknownst to me, "Team Smith" is simply a group of agents within "XYZ Realty Corporation," a court may hold the "Team Smith" agents personally liable for any damages I incur relating to my listing. The analysis of this issue under the law is fairly straightforward. In order for me to be forced to look only to the corporation's assets for any damages, it must be shown that at the time I contracted for service, I was aware – or should have been aware – of the fact that that I was dealing with a corporation.

A number of states have statutes that prohibit an individual or team from advertising "in a way that suggests that the individual or team is an independent real estate brokerage." Other states require that the firm name be "more prominent" than the name of the individual agent or

team. By regulating relative type size, Michigan adopted a more objective approach. That being said, Michigan Realtors® should keep in mind that in addition to complying with the relative type size requirement, for liability reasons, licensees also need to make certain that the advertising makes clear that the agent or team is part of the real estate company and not a separate entity. For example, a team name that uses the word "group" or "company" may be viewed as suggesting that the team is an independent entity. Even if such advertisement complies with the Occupational Code's relative type size requirements, a court could nonetheless find that in this situation, the team members are not protected by their brokerage firm's corporate shield.

## ADVERSE POSSESSION, ACQUIESCENCE AND PRESCRIPTIVE EASEMENTS

Contrary to popular belief, the doctrine of adverse possession does not permit me to acquire my neighbor's yard by gradually expanding my lawn mowing efforts each week. Adverse possession can be used, for example, to reestablish property lines throughout a neighborhood where, as the result of prior survey errors, everyone's home encroaches several feet onto their neighbor's yard. In order to acquire property via adverse possession, a person must be in continued, visible and hostile possession of the property for 15 years. While "hostility" does not mean that there must be animosity between the owner and the possessor, the possessor's use of the property cannot be permissive. For the most part, what this means is that the true owner of the property must be able to tell that the property is being taken over by a stranger.

It is not necessary that the owner of the property be actually aware that someone has taken control over his or her property. An out-of-state property owner can lose his property under the doctrine of adverse possession. All that is required is that the use was sufficient to put the owner on notice <u>if</u> the owner had chosen to visit the property. In one case, a family was able to acquire their out-of-state neighbor's vacant lot, notwithstanding the fact that she had paid real property taxes on the land for over 40 years.[11] The testimony was that the family had used their neighbor's lot as their own backyard by regularly cutting the grass, trimming the trees, planting flower gardens, erecting a fence and hosting parties. The court held that it did not matter that the out-of-state property owner had no actual knowledge of these activities. All that was required was that the use was such that it would have put the land owner on notice had she been diligent.

The extent of the visible and uninterrupted activity that is required in order to establish title via adverse possession may vary depending on the type of property involved. Less activity may be required, for example, where the disputed strip of property is a hunting property or a summer home. Seasonal use may not be enough to establish a claim for adverse possession where the property is used by other people during other times of the year. An important part of an adverse possession claim is that the possessor has had <u>exclusive</u> use of the property.

It does not matter whether the possessor knows that he is claiming land beyond what he actually owns or is simply mistaken. In order to meet the 15-year requirement, a claimant may not automatically include the possession periods of prior owners of her property. A claimant may only "tack on" the possession periods of prior owners if the disputed strip of land was

[11] *Beauchamp v Yeo*, unpublished opinion per curiam of the Court of Appeals, issued June 13, 2006 (Docket No. 259940).

mentioned in the deed or discussed orally at the time of the purchase. If the use starts out as hostile, but the property owner subsequently grants permission for the use to continue, such permission stops the running of the 15-year period. For this reason, it is often easier to stop a potential adverse possession claim by granting the possessor temporary permission to use the land than by demanding that the use stop. If the use becomes permissive, or if the owner temporarily reacquires possession of the disputed property, then the fifteen-year clock starts again from the beginning.

Adverse possession can also be used to establish easement rights. The only difference is that the claimant need only have used someone else's property for a particular purpose for 15 years – rather than exclusively possessed someone else's property for 15 years. One owner of a commercial business was able to acquire a prescriptive easement to use his neighbor's parking lot by showing that his employees and customers had been using that parking lot for over 30 years.[12] An easement established in this manner is referred to as a "prescriptive easement." Again, however, the use must be hostile; it cannot be permissive. It does not matter whether the property owner actually knew that the neighbor was using his property. The requirement is only that the use had been sufficiently visible that the property owner would have been put on notice had he chosen to visit the property. You can both acquire an easement or expand your rights under an existing easement through adverse possession.

If a parcel of land is split so that one of the newly-created parcels is landlocked, a court may imply an easement by necessity in order to establish access to the landlocked parcel. An easement by necessity does not require a showing of adverse possession for a particular time period. The justification for this doctrine is that by separating a parcel of land in a way that landlocks one of the newly-created parcels, the grantor must have intended to provide for an access easement. An easement by necessity cannot exist in the absence of a common grantor in the chain of title.

Where the issue is the location of the boundary line between two adjoining property owners, it is often easier to establish that line through the doctrine of "acquiescence" than the doctrine of adverse possession. Acquiescence applies where, for example, two neighboring property owners "acquiesce" as to the location of the property line between their parcels for 15 years, which location turns out to be incorrect. Under a theory of acquiescence, there need not be evidence of an actual dispute, nor does there need to be any hostility. The court simply determines that by a preponderance of the evidence that the parties have treated a particular boundary line as the property line for at least 15 years. "Permission" may defeat an acquiescence claim as it suggests that both parties recognized that the true property line was somewhere else.

Acquiescence can also be established if there is a boundary established after a dispute, regardless of the length of time that has elapsed since the settlement was reached. Finally, in a third type of acquiescence, if it can be shown that the parties intended to deed land to a marked

[12] *Faris Bros Realty, Inc v JP Partnership*, unpublished opinion per curiam of the Court of Appeals, issued November 15, 2005 (Docket No. 261644).

boundary, then the parties will be deemed to have acquiesced to that boundary line, even if a different legal description was mistakenly used.[13]

When trying to understand these doctrines and to predict how the rules will be applied to particular facts, keep in mind that the standards are very subjective. For example, when, exactly, is the possession of property sufficiently "visible" and "continuous" for an adverse possession claim? Without question, a court's decision on the visibility and continuity of the possession will be affected by its view of the actions of the parties. If the possessor is viewed as a trespasser who is attempting to take unfair advantage of his neighbor's inattentiveness, a court is likely to conclude that the possessor's use of his neighbor's property was not sufficiently visible or continuous. A court is much more likely to find that the possession has been sufficiently visible and continuous, if, for example, it thinks the property owner is seeking to extort money from a neighbor for a relatively small portion of a driveway that has been in place for many years.

## ESCALATION CLAUSES

In many areas in Michigan, shrinking inventories have caused some buyers to resort to something called an escalation clause. These buyers have lost out on too many bidding wars for their dream home and do not intend to lose again.

A hypothetical is the easiest way to examine the ins and outs of escalation clauses. Buyer A makes an offer on 123 Elm Street for its list price, $150,000. Buyer A's offer goes on to provide:

> Buyer A will increase his offer by $2,000 more than any competing offer made for 123 Elm Street (the "Escalation Clause").

Does the use of the Escalation Clause pose risks to Buyer A? Most certainly. The question is whether those risks can be reduced or eliminated. The Escalation Clause on its face subjects Buyer A to limitless financial exposure. If Buyer A offers $150,000 on 123 Elm Street, a competing offer could be received for $300,000, making Buyer A contractually liable to $302,000. This risk can be reduced by using the following:

> Buyer A will increase his offer by $2,000 more than any competing offer made for 123 Elm Street **in an amount not to exceed $160,000**.

The revised Escalation Clause still could subject Buyer A to a "fake" competing offer. Suppose the Seller's cousin submits an offer for $158,000. Buyer A could be on the hook for $160,000. Buyer A can attempt to reduce this risk by adding the words "bona fide" or "good faith" into the Escalation Clause as follows:

[13] *Sackett v Atyeo*, 217 Mich App 676 (1996).

> Buyer A will increase his offer by $2,000 more than **any bona fide or good faith** competing offer made for 123 Elm Street, in an amount not to exceed $160,000.

While the terms "good faith" or "bona fide" may be ambiguous enough to result in a lawsuit, any attempt to further define those terms will only make the paragraph longer.

Buyer A could further try to protect himself from fake offers by indicating he will only pay $2,000 more than any competing offer if it is supported by a bank pre-qualification or pre-approval letter indicating the second buyer is qualified to purchase 123 Elm Street at the price offered by that buyer. It could provide as follows:

> Buyer A will increase his offer by $2,000 more than any bona fide or good faith competing offer made for 123 Elm Street, in an amount not to exceed $160,000. **Buyer A must be provided with a copy of the competing offer together with a bank pre-qualification or pre-approval letter demonstrating, to Buyer A's sole satisfaction, that the second buyer is qualified to purchase 123 Elm Street at the price set forth in the competing offer.**

As most Realtors® are aware, many lenders freely offer various forms of pre-qualification or pre-approval letters; thus, the effectiveness of this requirement as proof of ability to pay may be limited.

Buyer A could also protect himself by inserting other contingencies in the contract to provide himself with an out in the event the contingencies in the Escalation Clause fail. For example, Buyer A could insert a contingency which permits him to elect to terminate the purchase agreement if the property does not appraise at an amount equal to the purchase price. Alternatively, Buyer A could include an extremely broad inspection clause. Further, if Buyer A's contract is contingent on financing, he may well be protected if the property will not appraise to support the higher purchase price. The problem, of course, is the insertion of any or all of these additional contingencies may make a buyer's offer less desirable to the seller.

Buyer A must also determine how long he wishes to be at risk through the Escalation Clause. He can address this risk by putting an end date on the Escalation Clause. This would provide as follows:

> Buyer A will increase his offer by $2,000 more than any bona fide or good faith competing offer made for 123 Elm Street in an amount not to exceed $160,000. Buyer A must be provided with a copy of the competing offer together with a bank pre-qualification or pre-approval letter demonstrating, to Buyer A's sole satisfaction, that the second buyer is qualified to purchase 123 Elm Street at the price set forth in the competing offer. **This offer shall remain effective until five days after the date of this offer.**

Buyer A also needs to make sure that his contract with the Escalation Clause and the competing offer are compared as apples to apples. Assume that the competing offer is for $158,000 but with $8,000 of seller's concessions and $2,000 for personal property. Would Buyer A be bound to pay $160,000 or would the competing offer be treated as having an equivalent value of $148,000? There is no Michigan case law or statute on this issue. In order to address this potential problem, Buyer A will have to define how the amount of any competing offer will be determined. For example, it could provide as follows:

> Buyer A will increase his offer by $2,000 more than any bona fide or good faith competing offer made for 123 Elm Street in an amount not to exceed $160,000. Buyer A must be provided with a copy of the competing offer together with a bank pre-qualification or pre-approval letter demonstrating, to Buyer A's sole satisfaction, that the second buyer is qualified to purchase 123 Elm Street at the price set forth in the competing offer. This offer shall remain effective until five days after the date of this offer. **Prior to increasing the purchase price pursuant to this paragraph, the total of all seller concessions and any separate consideration for personal property provided for in the competing offer shall be deducted from the purchase price contained in said offer.**

The potential for conflict increases simultaneously if more than one competing offer has an Escalation Clause. What happens if Buyer A submits his Escalation Clause without a cap and another buyer submits a substantially similar Escalation Clause, *i.e.*, $1,500 more than any competing offer? Obviously the price cannot continue to increase into infinity. Can the seller accept both of the competing Escalation Clause offers, or would the unsuccessful buyer have standing to object? Do the two competing Escalation Clauses cancel each other out?

As can be seen, it is not possible to eliminate all risks in the use of an Escalation Clause. In the event of ambiguities or disputes, a court may determine that an Escalation Clause is too vague to be enforceable. The risk of lengthy and expensive litigation must be taken into consideration when considering the use of an Escalation Clause.

## TEN COMMON LEGAL MISTAKES THAT REALTORS® MAKE

The following list of common legal mistakes made by Realtors® is not the product of a scientific or empirical survey. Instead, it is based on the observations and experience of attorneys who regularly deal with those mistakes.

1. When a Realtor® takes a new listing after the expiration of the prior listing with another agent, the Realtor® should not simply copy the information from the prior listing. Realtors® have found themselves in difficult situations when, for example, they have copied the square footage figure from a prior listing, and that square footage number has turned out to be incorrect. Realtors® should handle the input of re-listings in the same manner that they handle any new listing.

2. Realtors® should not mark up an offer and submit it as a counteroffer. There have been any number of disputes arising from a situation where, for example, the listing agent has the seller make various pen changes to the original offer and has the seller initial those changes. The situation becomes more complicated if the buyer then accepts some, but not all, of the seller's changes by initialing those changes and in addition makes her own pen changes. When this happens, it may be very difficult to determine the controlling terms of the contract. Realtors® should always use addendum forms (or start with a new purchaser agreement form) when preparing a counteroffer (or a counter to a counteroffer).

3. Realtors® sometimes fail to fill in all of the blanks in a purchase agreement form. If a Realtor® leaves a provision entirely blank, it is often not clear whether the intent was that the provision not apply at all. For example, suppose a purchase agreement form calls for the parties to select one of the following three possible tax proration methods: 1) due date in advance; 2) due date in arrears; and 3) calendar year in arrears. If a Realtor® does not select any of these tax proration methods, does that mean that there will be no tax proration at all? When using a purchase agreement form, Realtors® shall fill in all of the blanks and cross out the inapplicable paragraphs.

4. When a transaction fails, a Realtor® cannot condition the release of the earnest money deposit upon the parties' execution of a mutual release. If there is no dispute over the earnest money deposit, the Realtor® cannot use his or her control over the earnest money deposit to force the parties to agree to release the Realtor® from any liability relating to the transaction. (The Realtor® can, but is not required to, require the parties to sign a release as it relates to the earnest money deposit only.)

5. An agent working with a buyer must deliver the earnest money deposit check to her broker upon receipt. A broker can wait to deposit the check until there is a binding purchase agreement in place, but a salesperson cannot wait to deliver the check to the broker.

6. A Realtor® representing a seller should be very careful to make sure that he or she does not take any steps that could result in a situation where more than one buyer claims to have a binding purchase agreement. Any number of disputes have arisen where, for example, after a seller has received multiple offers, the listing Realtor® prepares multiple counteroffers and delivers them simultaneously to all of the buyer's agents with the message that these are the terms the sellers will accept. A listing agent who does this runs the risk that more than one buyer will accept the sellers' counteroffer.

7. Realtors® working with buyers sometimes rely solely on the offer of compensation through the MLS. This can be risky. Realtors® working with buyers need to protect themselves by entering into buyer's agency contracts. If they do not do so, they may end up not being paid. Suppose, for example, Realtor® A has worked with Buyer Smith for many months. Buyer Smith has narrowed his choice down to three homes. Then, out of the blue, Buyer Smith purchases an entirely different home through Realtor® B. Realtor® A will not be paid as he or she is not the procuring cause of the transaction that closed.

8. Realtors® must remember that the submission of a proposed amendment to a contract does not, in fact, enable the recipient to cancel the existing contract. Suppose, for example, Realtor® A lists 122 Elm Street, and an offer is submitted and accepted by the seller. During the time of the financing contingency, the buyer submits a proposed addendum to Realtor® A asking for an extension of the time to close. Realtor® A declares the addendum to be a counteroffer which the seller rejects and then accepts a better offer from another buyer waiting in the wings. The house has now been sold twice.

9. If a Realtor® represents that a property is serviced by public sewer and water, and that ends up not to be true, the buyers may be very unhappy. This is particularly the case if, for example, the septic drain field is saturated, and the nearest public sewer is $20,000 away. Realtors® who are not familiar with the area in which a home is located should confirm the existence of a public sewer by calling the municipality and/or asking for a copy of the sellers' water/sewer bill.

Finally, Realtors® should take great care to date all documents. Purchase agreements are typically full of terms that must be performed by a specific date, which is most often calculated from the date the contract becomes binding. For this reason, it is very important that all signatures are dated.

## WORKING WITH FSBOs

Realtors® working with buyers must be particularly cautious when working with a buyer who becomes interested in a FSBO home. Ordinarily, if a Realtor® wants to get paid on this type of transaction, the Realtor® will need the FSBO sellers to sign a written agreement in which they agree to pay a commission should this particular buyer purchase their home. A Realtor® can work with a FSBO seller as either a seller's agent or a buyer's agent. The "One Party Agreement" available on MR's website (Form "N") can be used in either situation. It is very important that the Realtor®'s agency capacity is clearly established early on and that both the buyer and seller understand that role. Remember that the law requires agency disclosure before any confidential information is disclosed.

If you are working with a buyer-client – *i.e.,* if you have an agency relationship with the buyer, then it is probably unwise to create an agency relationship with the seller as well. While it is certainly legally permissible to do so as long as you enter into a disclosed dual agency agreement, we believe most Realtors® would agree that single agency is a much easier role to fill. Remember, you do not need to create an agency relationship with the FSBO seller in order to get paid. Rather, you can use the One Party Agreement and check the box indicating that you represent an identified buyer and that the sellers agree to pay you a commission in the event your buyer purchases their home. Remember to make it very clear to the sellers that even though the sellers will be paying your commission, you will, at all times, be working for the buyer.

What if you do NOT have an agency relationship with the buyer? In this situation, you should use the One Party Agreement to create an agency relationship with the sellers. In this situation, you need to make certain that the buyers that you have been working with understand that you now have an agency relationship with the sellers. Even if the buyers were given an agency disclosure form months ago when their search began, a careful Realtor® may very well

want to go back to his buyer customers and give them another agency disclosure form that specifically references this particular home and these particular sellers.

If you represent the buyer rather than the FSBO sellers, you should encourage the FSBO sellers to hire an attorney to assist them in negotiating a purchase agreement and closing the sale. In the event that the FSBO sellers choose not to have an attorney, then a Realtor® must be very careful when presenting his client's offer to those sellers. A Realtor® working as a buyer's agent should never advise the sellers as to the wisdom or reasonableness of a particular provision. A FSBO seller should NEVER be told that a particular clause is "just boilerplate" or that something "is always done this way." While such statements may be viewed as nothing more than persuasive argument where the seller is working with a listing agent who can offer his/her own opinion, the statements may be deemed misleading and overreaching where the seller is unrepresented.

A buyer's agent who is asked to help the FSBO seller prepare a counteroffer may find himself in a difficult situation. It is probably fairly easy to prepare a counteroffer at a seller's dictated price without overreaching or creating the appearance of an agency relationship. But what if the seller wants you to prepare an addendum dealing with post-closing occupancy responsibilities? What if the seller wants to treat your buyer's offer as a backup offer? The farther you stray from the "standard" form, the more difficult it will be for you to prepare clauses dictated by the seller while at the same time representing the buyer's best interests. In some instances, it may be advisable to take the seller's verbal requests back to your client and prepare a new offer on behalf of your buyer-client which contains the term or terms that the seller has requested (assuming that these terms are acceptable to your buyer-client). In this way, it will be more readily apparent that the clauses are being drafted on behalf of, and in the interest of, the buyer-client.

Of course, as Realtors® are well aware, the work is not done once the purchase agreement is signed. Realtors® working with FSBOs often express frustration at the fact that they must do the work of two agents. Of course, the simple fact is that the transaction must move forward and the Realtor® is typically the only person involved that knows how to get this done. (A Realtor® may wish to keep this in mind when negotiating his commission amount for a one party agreement.) Again, Realtors® working with FSBOs as buyer's agents should assist the seller in ministerial matters only. While it is perfectly appropriate for a buyer's agent to order title insurance on the seller's behalf, it is not appropriate for a buyer's agent to advise the seller as to his rights and obligations under the sales contract.

What if the seller is not a FSBO, but instead a seller that has entered into a limited service agreement with another company? In a limited services relationship, the seller has agreed to waive certain services typically provided by a listing agent. For example, a seller may agree that the listing agent will not assist in the negotiation of the purchase agreement or in the completion of the transaction after the purchase agreement is signed. A limited service waiver is available on MR's website (Form "Y"). At the outset, the Realtor® contacting such a seller should make certain that he or she has the consent of the listing broker to deal with that broker's client directly. This advice is not only good legal advice, but is also consistent with the Realtors® Code of Ethics. Article 16 of the Code of Ethics prohibits a Realtor® from taking any action

inconsistent with another Realtor®'s agency relationship. Realtors® are well-advised to ask the limited service broker to fax or email over written authorization to contact the seller directly. At a minimum, the Realtor® should obtain the listing broker's verbal consent and then make a note for his file.

Once a Realtor® has authority to deal with the seller directly, the Realtor® should identify his agency role, either as a buyer's agent or a subagent of the seller. (Where the seller has entered into a limited service agreement with his listing broker, another Realtor® cannot act as a dual agent or a transaction coordinator in the transaction.) In presenting an offer to a seller with a limited service agreement, a buyer's agent should take the same precautions he would take if the seller was a FSBO.

To summarize, when talking directly to FSBO sellers, buyer's agents should make their agency status known early on and are well-advised to remind these sellers of that role from time to time throughout the transaction. While a buyer's agent may assist the FSBO seller with ministerial tasks, buyer's agents should never offer FSBO sellers advice or attempt to persuade them that a particular provision is either unimportant or nonnegotiable.

# One Party Agreement

N-1

Contract Date: _____

Brokerage Firm: _____ ("Broker")

Address of Firm: _____

REALTOR®: _____

REALTOR®'s Email Address: _____

REALTOR®'s Phone # _____ REALTOR®'s Facsimile # _____

Seller(s): _____ ("Seller")

Seller's Home Address: _____

Seller's Email Address: _____

Seller's Phone # _____ Seller's Facsimile # _____

1. **PROPERTY DESCRIPTION:** Seller is the owner of property located in the ☐ Village ☐ Township ☐ City of _____, County of _____, MI.

Street Address: _____

Legal Description/Tax Parcel ID: _____

_____

_____ (the "Property").

SELLER WARRANTS THAT THE PROPERTY IS NOT PRESENTLY LISTED WITH A LICENSED REAL ESTATE BROKER OR ANY OTHER PARTY.

2. **REPRESENTATION:** Broker has a potential buyer ("Buyer") for the Property, the identity of whom will be disclosed upon the execution of this Agreement. (Check one):

☐ Seller hereby appoints Broker as his/her exclusive agent for purposes of marketing the Property to Buyer.

or

☐ Seller acknowledges that Broker will exclusively represent the Buyer in this transaction. Broker is not representing Seller.

3. **TITLE/YEAR BUILT:** Seller represents title to the Property to be good and marketable title. In addition, (check one):

☐ Seller represents and warrants that the Property was **built in 1978 or later** and that therefore the federally-mandated lead-based paint disclosure regulations **do not apply** to this Property.

or

☐ Seller represents and warrants that the Property was **built before 1978** and that therefore the federally-mandated lead-based paint disclosure regulations **do apply** to this Property.

4. **COMMISSION:** If within _____ (_____) months of the date hereof, Seller sells all or a portion of the Property to Buyer, Seller agrees to pay Broker at closing a fee equal to $_____ and a commission equal to _____% of the sale price.

5. **EXCLUSIVITY:** Seller shall deal exclusively with the Broker for all negotiations with Buyer during the term of this Agreement.

6. **ADVERTISING/SHOWINGS:** Seller acknowledges that Broker will NOT market or advertise the Property for sale. Seller grants Broker permission to show the Property only to the Buyer identified below; all showings to be by appointment only. Seller shall indemnify and hold harmless Broker and Broker's agents from any and all liability for any reason as a result of injury to persons or damage or loss to property arising out of the showing of the Property.

7. **SUBSEQUENT LISTINGS:** Seller's commission obligation hereunder shall apply regardless of whether Seller subsequently lists the Property with another licensed real estate broker or any other party. Seller is advised that if Seller later

enters into a listing agreement to sell the Property with another real estate broker or any other party, Seller should exclude Buyer from said listing agreement. Failure to do so could result in Seller being responsible for two commission payments.

8. **NON-DISCRIMINATION:** It is agreed by the Broker and the Seller, parties to this Agreement, that as required by law, discrimination because of religion, race, color, national origin, age, sex, disability, familial status or marital status by said parties in respect to the sale of the Property is PROHIBITED. Local ordinances may offer protection against additional discrimination.

9. **SELLER DISCLOSURE:** Seller agrees to provide Buyer with a "Seller's Disclosure Statement" prior to accepting a Buy and Sell Agreement from the Buyer, unless the transaction is exempt under Michigan law. Seller agrees to release and hold harmless Broker and its agents from any liability arising as a result of Seller's failure to comply with Seller's disclosure obligations at law, such obligations to include, but not be limited to, reasonable attorneys' fees and costs.

10. **ELECTRONIC COMMUNICATION:** The parties agree that this Agreement, any amendment or modification of this Agreement and/or any written notice or communication in connection with this Agreement may be delivered by electronic mail or by fax via the contact information set forth above. Any such communication shall be deemed delivered at the time it is sent or transmitted. The parties agree that the electronic signatures and initials shall be deemed to be valid and binding upon the parties as if the original signatures or initials were present in the documents in the handwriting of each party.

11. **OTHER:** _____

_____

_____

_____.

12. **CANCELLATION:** This Agreement can be CANCELLED or REVOKED only by mutual consent in writing.

13. **RECEIPT:** Seller has read this agreement and acknowledges receipt of a completed copy of this Agreement.

Accepted by:

_____ _____

(REALTOR®) (Seller)

For:

_____ _____

(Broker) (Seller)

**DISCLOSURE OF IDENTITY OF BUYER**

Broker and Seller agree that the term "Buyer" as used in the above-referenced Agreement shall mean:

_____

_____

and his/her/their spouse or other immediate family member and any entity in which he/she/they have a controlling interest.

Accepted by:

_____ _____

(REALTOR®) (Seller)

For:

_____ _____

(Broker) (Seller)

**Disclaimer:** This form is provided as a service of Michigan Realtors®. Please review both the form and details of the particular transaction to ensure that each section is appropriate for the transaction. Michigan Realtors® is not responsible for use or misuse of the form, for misrepresentation, or for warranties made in connection with the form.

Form Y

# Limited Service Waiver

THIS FORM SHOULD BE USED IN CONJUNCTION WITH A SERVICE PROVISION AGREEMENT.

Pursuant to Michigan law certain services provided by a real estate licensee may be waived.

A real estate licensee is required to perform certain services for his or her client unless these services are waived by the client. By signing below, you agree that the real estate licensee will not be required to perform the services initialed (only initial the services waived).

| | Initial if waived: |
|---|---|
| --Acceptance of delivery and presentation of offers and counteroffers to buy, sell, or lease your property or the property you seek to purchase or lease. | ____ ____ |
| --Assistance in developing, communicating, negotiating, and presenting offers, counteroffers, and related documents or notices until a purchase or lease agreement is executed by all parties and all contingencies are satisfied or waived. | ____ ____ |
| --After execution of a purchase agreement by all parties, assistance as necessary to complete the transaction under the terms specified in the purchase agreement. | ____ ____ |

**Agreement to Waive**

By signing below, I acknowledge that the duties owed to me pursuant to Michigan law have been explained to me and that I knowingly agree that the real estate licensee who represents me will not provide the services that are initialed above. I also understand that in any proposed real estate transaction, no other real estate licensee is required to provide the waived services unless I subsequently hire them to do so. I also acknowledge that in order to protect my interests I may need to retain other professionals, such as an attorney.

| | |
|---|---|
| Seller or Buyer | Date |
| Seller or Buyer | Date |
| Real Estate Broker or Salesperson | Date |
| Brokerage Name | |

**Disclaimer** This form is provided as a service of Michigan Realtors®. Please review both the form and details of the particular transaction to ensure that each section is appropriate for the transaction. Michigan Realtors® is not responsible for use or misuse of the form, for misrepresentation, or for warranties made in connection with the form.

## DUELING BUYERS, MULTIPLE OFFERS AND BACKUP OFFERS

In today's market, many buyers are finding themselves in a situation in which they are competing with one or more other buyers for the home of their dreams. Buyers in this situation often have the mistaken belief that the seller has an obligation to treat all potential buyers equally or at least fairly. This is simply not true.

There is no requirement that a seller with multiple offers consider the offers in any particular order or that a seller reject the "first" offer prior to considering a "second" offer. Additionally, there is no requirement that a seller reject an offer in writing or even acknowledge receipt of the offer. A seller who receives an offer can accept, reject or counter that offer. In addition, the seller can choose to do nothing. A seller can choose to "sit" on an offer while waiting for a second offer, or not. A buyer can request that a seller respond in writing, however, the seller has no legal obligation to do so. Further, a Realtor® acting on behalf of the buyer is generally ethically prohibited from contacting directly any seller who is represented by a Realtor®.

When considering multiple offers, a seller can even discriminate, as long as the seller does not discriminate on the basis of religion, race, color, national origin, age, sex, disability or familial or marital status. A seller is not required to take the highest offer. A seller can decide, for example, to accept a lower offer because it is a cash offer or because that particular buyer has a preapproval letter from a lender. A seller could even accept a lower offer because she knew that the offer was from an avid gardener and believed that he would take good care of the garden she had put so much time into over the years.

That being said, it is certainly true that most sellers will in fact accept the highest price offer. In fact, Realtors® and others in the real estate business often instruct buyers in this situation to present their "highest and best." To some buyers, this term suggests that this is in fact an auction-type situation in which the terms of the offers must be kept confidential and the highest offer must be accepted. Again, this is simply not true. The seller can choose to disclose the amount of the other offers to some but not all of the potential buyers. It is also the case in these "highest and best" scenarios that the seller can offer one of the buyers an opportunity to submit another bid, <u>without</u> offering the other buyers a similar opportunity.

Listing agents working with multiple offers on the same property should carefully pay particular attention to the rules of offer and acceptance, as the failure to do so could result in a situation where more than one buyer claims to have a binding contract to purchase. Remember that acceptance requires a signature and delivery of the signed contract. Do not attempt to verbally accept or counter any buyer's offer. Perhaps the most common dispute in multiple offer situations arises when a listing agent orally advises one agent that her client's offer has or will be accepted and then the seller accepts another buyer's offer. Even if the first buyer has no legally enforceable right, it can take significant time and money to establish that fact during which time the closing on the sale to the second buyer is delayed.

Buyer's agents with clients bidding against other buyers should also be ever-mindful of the rules of offer and acceptance. Buyer-clients should be advised that a seller with multiple

offers has total discretion as to how the offers will be handled. To assist buyer's agents in so educating their clients, MR has put together a form for buyers entitled, "A Primer on Multiple Offers," which is available on its website. Realtors® are encouraged to provide their buyer clients with this form. Buyers who understand the process at the outset may be less likely to conclude that something nefarious has happened to them if they are not the successful bidder.

The dueling buyer situation becomes even more dicey when the competing buyers are represented by the same agent (in a designated agency office) or by two agents in the same firm (in a traditional agency office). An agent in this situation owes competing duties of disclosure and confidentiality to both clients. The best way to address this situation is in advance in the buyer agency contract. A buyer agency contract should inform the buyer of the "dueling buyer" possibility and describe in advance how the situation will be handled.

Some forms simply provide that the agent will continue to represent both buyers but will keep each client's offer strategy confidential. For example:

> In the event Agent works for two competing buyer-clients in connection with any specific property, Agent will be working equally for both buyer-clients and without the full range of fiduciary duties owed by a buyer's agent to a buyer. In this situation, the competing buyer-clients are giving up their rights to undivided loyalty and will be owed only limited duties of disclosure, obedience and confidentiality.

Other buyer agency forms provide that the agent will not introduce a client to any home while another client remains interested in pursuing that home. For example:

> Agent shall not show any client a property in which another client has expressed an interest, unless and until the first client expressing an interest in the property shall discontinue such interest; provided, however, if Agent notifies Client of another client's interest, Agent may assume that Client's interest has been discontinued unless Client advises Agent to the contrary within 48 hours.

Most forms also include a provision whereby the buyer's agent is relieved of any obligation to disclose confidential information learned in a prior or current agency relationship. For example:

> Client understands and agrees that Broker shall not disclose information learned during the course of a prior or pending business or real estate transaction.

If a buyer's agent does not have a buyer agency contract in place that deals with this situation, the buyer's agent will not be able to continue to represent both of the dueling buyers.

Finally, sellers who are lucky enough to have more than one offer on their home may wish to have a second offer in place in case the first transaction fails for some reason. While there is nothing wrong with accepting a back-up offer, great care must be used in drafting back-up offer language. Perhaps the most common problem arises when the Seller and Buyer #1 want to renegotiate or modify a term in the first purchase agreement. Buyer #2 may argue that its offer is only subject to original deal with Buyer #1 and that once that deal is not proceeding as

originally drafted, Buyer #2's offer has priority. To address this potential problem, an agent representing the seller may wish to include the following language in the backup offer:

> Buyer acknowledges that this Agreement is a back-up offer which shall be effective only in the event that the closing on the prior purchase agreement on the property does not take place for any reason. Buyer acknowledges that nothing in this Agreement shall in any way restrict the right of the Seller to modify the terms of the prior purchase agreement as Seller shall, in his sole discretion, deem advisable.

There is another potential issue with backup offers from the Buyer #2's perspective. How long is Buyer #2 required to wait to see if deal with Buyer #1 is going through? When can Buyer #2 safely assume that he has just lost out and look for another home? This can be clarified by a provision in the backup offer which provides:

> In the event that the Seller does not notify the Buyer that this backup offer is in first position within two (2) weeks of the date hereof, the Buyer may at any time thereafter declare this agreement null and void by providing written notice of same to the Seller.

# A Primer On
# MULTIPLE OFFERS

As the housing market recovers, more and more buyers are finding themselves in a situation where they are competing with one or more other buyers for the home of their dreams. Understandably, in this situation, the unsuccessful buyers are disappointed and often angry. Many times, the unsuccessful buyers' anger is directed at the REALTOR® who helped them try to buy the home, and their anger is misplaced.

The only law governing the presentation of offers is a rule that requires a real estate licensee to forward all offers he or she receives to the seller. R 339.22307. After the offers are delivered, there is no requirement that a seller consider them in any particular order or that the seller reject the "first" offer prior to considering a "second" offer. Additionally, there is no requirement that a seller reject an offer in writing or even acknowledge receipt of the offer. A seller who receives an offer can accept, reject or counter that offer. In addition, the seller can choose to do nothing. A seller can choose to "sit" on an offer while waiting for a second offer, or not. A buyer can request that a seller respond in writing, however, the seller has no legal obligation to do so. Further, a REALTOR® acting on behalf of the buyer is generally prohibited from contacting directly any seller who is represented by a REALTOR®.

When considering multiple offers, there is no requirement that a seller treat each potential buyer equally or even fairly. A seller can even discriminate, so long as the seller does not discriminate on the basis of religion, race, color, national origin, age, sex, disability or familial or marital status. A seller is not required to take the highest offer. A seller can decide to accept a lower offer because it is a cash offer or because that particular buyer has a preapproval letter from a lender. A seller could even accept a lower offer because she knew that the offer was from an avid gardener and believed that he would take good care of the garden she had put so much time into over the years.

That being said, it is certainly true that most sellers will in fact accept the highest price offer. In fact, REALTORS® and others in the real estate business often instruct buyers in this situation to present their "highest and best." To some buyers, this term suggests that this is in fact an auction-type situation in which the terms of the offers must be kept confidential and the highest offer must be accepted. This is simply not true. As stated above, the seller can accept any offer. The seller can disclose the amount of the other offers to none, some or all of the other potential buyers. A seller can offer one buyer an opportunity to submit another bid, without offering the other buyers a similar opportunity.

# A Primer On
# MULTIPLE OFFERS

Buyers in a multiple offer situation should certainly put forward their "highest and best." While there is no way for a buyer to guaranty that his offer will be the one selected, as a general rule, sellers prefer clean offers with few contingencies, short timeframes and evidence of ability to perform.

**Finally, when competing with other potential offers, buyers should keep in mind the following rules of law relating to offers and acceptances:**

**1.** An offer cannot be accepted orally. Even if you are advised via telephone that your offer is the one that has been accepted by the seller, you do not have a binding contract until the written acceptance is delivered to you (or to your real estate agent).

**2.** Generally, an offer or counteroffer can be revoked at any time before it is accepted. This is true even if the offer contains a stated expiration date.

**3.** While offers and acceptances relating to the purchase of real estate must be in writing, an offer can be revoked orally.

**4.** A buyer cannot simultaneously accept and materially change a seller's counteroffer. If, for example, you "accept" the seller's counteroffer, but add a provision whereby the sellers are required to throw in their pool table, you have in fact "countered" the seller's counteroffer.

**5.** Once an offer is countered, it has been rejected. So, in the above example, if the sellers do not agree to throw in their pool table, you cannot go back and "accept" the seller's original counteroffer.

**6.** A seller is not required to accept a full price and terms offer. A list price is not an "offer" that can be accepted by the buyer.

Buyers are cautioned not to get too caught up in the bidding process. For many of us, a home purchase is the biggest financial purchase we will make in our lifetime. While a waiver of an inspection contingency may make it more likely that you will be the successful "bidder," it is certainly a risky course of action. Remember that there are many other houses out there. You will fall in love again.

## DUTIES AND SERVICES REQUIRED OF A LICENSEE

The Occupational Code and the administrative rules include requirements for "service provision agreements." A "service provision agreement" is defined in the Occupational Code as a listing agreement or buyer's broker agreement that establishes an agency relationship.[14] Since 2008, the Code has defined both agency responsibilities (or duties) as well as the minimum services that a licensee must provide to his or her client.

The language in a service provision agreement will establish whether the licensee will be acting as a *traditional agent* or a *designated agent* and whether he or she will be providing *full* or *limited services*. If the service provision agreement is silent on these matters, the default position under the Code is a traditional agency relationship providing full service.

In traditional agency firms, a client of the firm has an agency relationship with the firm and every licensee within the firm. If a firm opts to practice designated agency, a client of the firm has an agency relationship with only the firm, the individual licensee working with that client, and, if that licensee is a salesperson, the named supervisory broker.[15]

Regardless of whether the licensee is a designated agent or traditional agent and regardless of whether the licensee is providing full or limited services, the Occupational Code provides that any broker or salesperson acting under a service provision agreement is responsible for the following duties:

1. Exercising reasonable care and skill in representing the client and carrying out the responsibilities of the agency relationship.

2. Complying with the terms of the service provision agreement.

3. Maintaining loyalty to the interest of the client.

4. Complying with applicable laws, rules, and regulations.

5. Referring the client to other licensed professionals for expert advice not within the expertise of the licensee.

6. Accounting for all money and property received by the agent.

7. Maintaining the confidentiality of all information obtained in the course of the agency relationship, unless disclosed with the client's permission, including the duty not to disclose confidential information to any licensee who is not an agent of the client.[16]

[14] MCL 339.2501(j).
[15] MCL 339.2517(6)–(10).
[16] MCL 339.2512d(2).

A buyer or seller cannot waive any of these fiduciary duties. In other words, every licensee under a service provision agreement owes all of the listed duties to his or her client. This is true for both designated and traditional agents and for both full and limited service agents.

In addition to the duties that I have listed, the Occupational Code provides that a broker or salesperson acting under a service provision agreement must provide the following services to the client, which cannot be waived:

1. When the real estate broker or real estate salesperson is representing a seller, marketing the client's property in the manner agreed upon in the service provision agreement.

2. For a broker or associate broker who is involved at the closing causing 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 disbursement affecting that party.[17]

Again, the services listed above cannot be waived – meaning that every licensee under a service provision agreement must provide these services to his or her clients. However, since April of 2017, an associate broker need not review and sign a closing statement if the closing is conducted by a licensed title agency.

A broker or salesperson acting under a service provision agreement must provide the following additional services unless those services are waived by the client in writing:

1. Accepting delivery of and presenting offers and counteroffers. At the time of execution of a purchase offer, a licensee is required to recommend to the purchasers that they require the seller to provide them with a title insurance policy.

2. Assisting in the development, communicating, negotiation, and presentation of offers, counteroffers until a purchase agreement is executed.

3. After execution of a purchase agreement by all parties, assisting as necessary to complete the transaction under the terms specified in the purchase agreement. A licensee may not close the transaction contrary to the terms of the written purchase agreement without the written approval of both parties.

A waiver of any or all of these services must be done through a limited service agreement and then disclosed on the agency disclosure form.[18] The Code contains specific language that must be included in any limited service agreement.[19] A limited services waiver is available on MR's website (Form "Y").

[17] MCL 339.2512d(3).
[18] MCL 339.2512d(5), 339.2517.
[19] MCL 339.2517(4).

In summary, regardless of the type of service provision agreement, the Code provides that a licensee owes traditional agency responsibilities to his or her client – including reasonable care, loyalty, confidentiality and an accounting. In addition, unless the client signs a written limited services agreement, a licensee must provide a client with assistance in preparing and exchanging offers and counteroffers and then, once a purchase agreement is signed, assistance in moving the transaction toward closing. A licensee must review and sign the closing statement unless that work is done by a licensed title agency. And finally, in all events, a licensee working with a seller must market a property as he or she has agreed to do in the listing contract.

## ROLE OF A TRANSACTION COORDINATOR

A number of Realtors® have inquired as to whether they can avoid these statutory duties and services by acting as a transaction coordinator. As stated earlier, the duties and services listed in the Code only apply in an agency relationship. By definition, a transaction coordinator does not have an agency relationship with either party. Realtors® should keep in mind, however, that the restrictions on the role of a transaction coordinator are such that its use is quite limited.

A transaction coordinator's role was developed from century-old case law holding that a real estate broker who introduced a buyer to a farmer could collect a commission as a "middleman," so long as he did not negotiate on behalf of either party. When acting as a transaction coordinator, a Realtor® simply introduces the buyer to the seller, and the parties conduct any negotiations or other activities necessary to acquire the property on their own. If a transaction coordinator accidentally slips out of his or her neutral role, then he or she forfeits any right to a commission.

A transaction coordinator cannot list property for sale. In order to list property for sale in an MLS, a Realtor® must be an agent of the seller. A listing agent can be a limited services agent – but would still be acting in an agency capacity.

When a seller has a listing agent, a transaction coordinator can introduce the buyer to the transaction. But the transaction coordinator cannot represent the buyer. In this case, the transaction coordinator is still a neutral party. Here, the transaction coordinator is, in effect, bringing the buyer and the listing agent together so that they can make the deal.

What if there is no other licensee involved in the transaction? How much assistance can a neutral transaction coordinator provide to the parties? The applicable century-old case law speaks only of bringing the parties together and letting them put together the deal. In today's world of much more complicated real estate transactions, as a practical matter, it is seldom the case that once introduced, a buyer and seller can simply put the transaction together on their own. Questions often come up as to what additional assistance the transaction coordinator can provide, if any. While it is certainly the case that a transaction coordinator cannot be involved in the price negotiations, are there other, more administrative-type services that a transaction coordinator can provide? For example, can a transaction coordinator assist the parties in completing the purchase agreement? Order title work? Locate an inspector? There are no definite answers to these questions, and it is certainly true that the more assistance that a

transaction coordinator provides, the more likely she will be deemed to have stepped out of her neutral role and have forfeited her right to a commission.

In summary, a transaction coordinator cannot list property or represent the buyer. A transaction coordinator must at all times remain neutral. Case law states that the transaction coordinator can introduce the parties and let them put the transaction together. Each additional service beyond that makes it more likely that a court would conclude that the licensee has stepped outside the role of a transaction coordinator and therefore forfeited his right to commission. For this reason, Realtors® are discouraged from attempting to use the transaction coordinator role in their day-to-day business. While from time-to-time, a Realtor® may run across a transaction in which the transaction coordinator role makes sense, it is not a one-size-fits-all replacement for an agency relationship.

## COMMISSION CLAIMS – KNOW WHEN TO WALK AWAY

We often get calls from Realtors® who are understandably unhappy because they have lost a commission they believe they had earned. Often times during these calls, the discussion is about whether it makes economic sense to pursue the seller-client for the commission owed. Other times the discussion is about procuring cause and whether it makes sense to file an arbitration request against a fellow Realtor®. But unfortunately sometimes, the answer is that under the facts, there is no means available for the Realtor® to collect the commission. The following are two real life scenarios that we think will help Realtors® identify those situations where a commission cannot be collected.

1. The first scenario arose out of a binding purchase agreement that was breached by the seller. The seller had simply decided that she did not want to sell. The buyers chose not to pursue the matter and found another house to buy. The buyers' salesperson decided to file a lawsuit against the defaulting seller in small claims court asking for the commission that she would have earned if the transaction had closed. For any number of reasons, the salesperson's lawsuit should be thrown out of court.

First, in Michigan, a right to a commission, if it exists, belongs to the buyer's brokerage firm, not the individual salesperson who worked with the buyer. A real estate salesperson is prohibited by law from receiving a commission from anyone other than his or her broker.

Second, in order to have a right to a commission, a broker must have a contract. Here, as is typically the case, the buyers' broker had no contract with the seller. The buyers' broker's right to a commission was through a "contract" with the listing broker through the MLS. By listing a home in the MLS, a listing broker agrees (or in other words, "contracts") with other MLS participants, that if one of them produces the buyer of the listed home, the listing broker will pay that MLS participant the commission split offered through the MLS. Again, however, this is an obligation of the listing broker to potential cooperating brokers. The seller has no contractual obligation to pay a commission to a cooperating broker.

Third, one of the Realtors®' membership requirements is that a cooperating broker who claims a commission from a listing broker cannot go to court to collect that commission, but

instead must file an arbitration request with the appropriate local Realtor® board. By joining the Realtor® trade association, a real estate licensee agrees that a local board, not the courts, will decide any commission disputes.

Fourth and finally, in order to be entitled to arbitration, the transaction must have been successful. If the sale does not close for any reason, the buyer's broker has no claim to a commission.

In summary, a salesperson never has a legal right to a commission from any party to a transaction. The right, if it exists, belongs to the salesperson's broker. (The only right to a compensation that a Michigan salesperson has is from his or her own broker.) Moreover, a buyer's broker never has a claim for a commission against the seller – but only against the listing broker. And finally, a buyer's broker who is a Realtor® cannot file a claim in court, but must arbitrate, and there is no arbitrable claim if the sale does not close for whatever reason.

B. In the second scenario, upon the expiration of his first listing contract, the seller listed his property with a different broker. During the second listing, a buyer who had previously looked at the home resurfaced. The new listing broker received an offer on the property from that buyer, which was accepted by the seller.

The seller was clearly obligated to pay a commission to the second listing broker. But what about the first listing broker? In this scenario, the first listing broker filed an arbitration request against the second listing broker claiming that since the buyer had originally looked at the property during the term of his listing contract, he was the broker who was entitled to the listing commission.

Whether or not the first listing broker is entitled to the listing commission has nothing to do with the second listing broker. Whether the first listing broker is entitled to a commission depends on the wording of the protection period in his own listing contract. Most protection period clauses contain "exceptions" so that the protection period does not apply if the property is relisted with another broker. These "exceptions" are not uniform. For example, some of the "exceptions" apply if at the end of the listing contract, the seller lists the property "**with any licensed broker**;" others apply only if the seller lists the property "**with another REALTOR®**." Other "exceptions" apply only if the second listing broker "**used substantial efforts**."

There is no legal requirement that a protection period clause have any "exceptions" at all – and some of them do not. If there are no "exceptions" or if for some reason the "exceptions" do not apply, sellers who have entered into successive listing contracts with different companies can find themselves legally obligated to pay two commissions.

Regardless of the terms of the particular protection period clause, as a legal matter, the first listing company has no claim against the second listing company. One listing company has no right to file a lawsuit against another listing company on the basis that the commission received from that company belongs to it. Similarly, there can be no arbitration where two successive listing brokers each claim a commission in connection with the sale of a particular home. If a listing company wishes to enforce a protection period clause in its listing contract, it

can only do so by filing a lawsuit against the seller. As a matter of contract law, a seller is not excused from paying the first listing company just because the seller has already paid the second listing company. If a seller is not careful when entering into two successive listing contracts, theoretically he or she could owe a commission under both listing contracts. (As a practical matter, a judge is not going to like this outcome and is likely to go out of his or her way to reach a different conclusion.) But under no circumstances will a listing broker ever be able to recover the commission collected by the second listing broker even if the buyer first looked at the home during the first listing.

## ADVERTISING RULES – BEFORE AND AFTER

As many Realtors® have heard by now, effective January 1, 2018, in any advertising that includes the name of an associate broker, salesperson or team, the individual licensee's name (or team name) cannot be in larger type size than the name of the firm. This change has caused many brokers to reexamine both existing law and their current advertising.

Under the advertising rules that have been in place for decades, all real estate advertising must include the licensed name of the broker.[20] This requires that a broker use the name on file with DLARA. The broker's logo or franchise name is not sufficient. If the broker has an assumed name on file with DLARA, the broker can advertise in that name.[21] In addition to the broker's name, the advertising must include either the broker's telephone number or street address.

The requirements are different if a salesperson or associate broker is the actual owner of the property. A salesperson can advertise property for sale in his or her own name, without including the name of the broker, only if the property is the principal residence of the salesperson.[22] A salesperson can advertise any of his property for lease in his own name without including the name of his broker. An associate broker can advertise any of his property in his own name for sale or lease; however, the advertisement must clearly indicate that the person advertising is a licensed associate broker.[23]

As of January 1, 2018, in any real estate advertising, the type size used for the firm's name must be at least as large as the type size used for the individual licensee's or team name.[24] The names do not need to be in the same font or color, and it is not the case, for example, that if the salesperson's name is in bold type then the broker's name must also be in bold type. It is still the case that the advertisement must include the broker's name as licensed or an assumed name on file with DLARA. The advertisement must still include the broker's phone number or address; however, the rules do not regulate the size of the type for the phone number/address.[25]

[20] Rule 329; now MCL 339.2512e(1).
[21] Rule 301; now MCL 339.2512e(5).
[22] Rule 329; now MCL 339.2512e(4).
[23] Rule 329; now MCL 339.2512e(2).
[24] MCL 339.2512e(3)(b).
[25] MCL 339.2512e(3)(a).

When comparing the type size of the name of the associate broker, salesperson or team (what we will refer to as the "Licensee") with the type size of the name of the employing broker (what we will refer to as the "Firm"), either of the following tests may be used:

Test No. 1. The height of the block containing the name of the Licensee may not exceed the height of the block containing the name of the Firm; or

Test No. 2. The point size of the majority of letters in the name of the Licensee may not exceed the point size of the tallest word in the name of the Firm.

An advertisement that satisfies **EITHER** of these tests is in compliance.

The following visual illustrations provide examples of compliant advertising within the above tests.


1. The first advertising illustration satisfies test number 1; that is, the block size of the name of the salesperson, "Simone Licensee," is 4.5 inches, and the block size of the name of the Firm, "Acme Brokerage Capital City Firm," is also 4.5 inches. The advertising also includes the office phone number for the Firm, so it is otherwise compliant with the Code requirements. Note, however, that if the legal name of the Firm in this illustration was only "Acme Brokerage," the advertisement would not be compliant with test number 1 because the block size of "Acme Brokerage" alone is smaller than the block size of "Simone Licensee."


2. The second advertising illustration also satisfies the first test because the block size of "Simone Licensee" is smaller than the block size of the name of the Firm – Again, the legal name of the Firm on file with DLARA in this illustration is "Acme Brokerage Capital City Firm."


3. The third advertising illustration also satisfies the first test because the block size of the name of the Licensee – in this case, the Team – is equal to the block size of the name of the Firm. Remember that the block size of the name of the Firm must be greater than or equal to the block size of the name of the Licensee. Phone numbers and addresses are not included in the calculation.


4. In the fourth advertising illustration, the point size of the majority of letters in the name of the Licensee is compared to the point size of the tallest word in the name of the Firm. Here, while the point size of the first and last name of the Licensee is not the same, the point size of the last name is used for comparison purposes because that word has the most letters. Similarly, while all of the words in the Firm name are not the same point size, the point size of "Acme Brokerage" is used because those letters are taller than the letters in "Capital City Firm." Since the point size of "Licensee" is equal to the point size of "Acme Brokerage" – both at 240 points – this advertising illustration is in compliance with the second test.


5. The fifth advertising illustration includes both the name of an individual Licensee, "Simone Licensee," and the name of a team, "Simone Team." Under the advertising rules, both

the name of the individual Licensee and the name of the team is compared to the name of the Firm. Since the point size of both the name of the individual and the team are equal to the point size of the Firm name, the advertisement is in compliance with the second test. Note again that for purposes of comparison, we look at the tallest word in the Firm name, in this case, "Acme Brokerage," at 180 points. Note also that the type need not be the same font – 180 point size in Bell MT Bold font is the same as 180 point size in Arial Narrow Bold font regardless of whether the two fonts appear to be of equal size.


6. In the last advertising illustration, the agent uses large stylized lettering for the first letter of both her first and last names. Under the second test, the focus is on the size of the majority of letters in the Licensee's name – so, the relevant point size here is 210 points, not 420 points. Since the letters in the name of the Firm are also 210 points, this advertising illustration is in compliance with the second test.

In summary, the requirement is that the size of the name of the Firm must be greater than or equal to the size of the name of the Licensee. This requirement can be met by comparing either block size or point size. An advertisement that satisfies either test is compliant. It is not necessary to satisfy both tests. The purpose behind having two separate tests is to preserve the goal of the advertising rule – that is, to make sure that the advertising makes clear what company is doing the advertising – while at the same time, providing licensees with creative flexibility. Remember that these are minimum requirements. A Firm can always adopt more stringent requirements than the law dictates.

## SUING UNDER THE OCCUPATIONAL CODE

As Realtors® are well aware, real estate brokers and salespersons are licensed and regulated under Article 25 of the Occupational Code (the "Code"). In addition, real estate brokers or salespersons are subject to Articles 1-6 of the Code which contain general administrative, regulatory and enforcement procedures as well as penalties for violations of the Code and the administrative rules. The Department of Licensing and Regulatory Affairs ("DLARA") is specifically charged with enforcement of the obligations and duties imposed

under all Articles of the Code. As far back as 1997, the Michigan Court of Appeals held that there is no right to file a lawsuit on the grounds that a real estate licensee has violated Article 25. Instead, a complaint should be filed with DLARA. Yet, plaintiffs' lawyers continue to bring private lawsuits under Article 25. Why is this the case?

A recent cyber fraud case filed against a Realtor® provides some insight. In this case, the Plaintiff lived in a single-family home outside of Traverse City, Michigan. In early 2016, the Plaintiff decided to sell his home in the Traverse City area and move to Ann Arbor. In the summer of 2016, the Plaintiff entered into a contract to sell his Traverse City home with the transaction scheduled to close at a Traverse City title office in late July.

Sometime prior to the sale of his Traverse City home, the Plaintiff retained the services of a Realtor® to help him find a home in the Ann Arbor area. The Realtor® was successful and the Plaintiff agreed to purchase a home in the Ann Arbor area with the closing scheduled to take place in early August at an Ann Arbor title office. The Plaintiff's plan was for the Traverse City title company to wire the proceeds from the sale of his Traverse City home directly to the Ann Arbor title company so that these funds could be applied against the purchase of his new home. About a week before closing, the Ann Arbor Realtor® allegedly emailed wiring instructions to the Plaintiff that "implicitly" instructed the Plaintiff to arrange for the proceeds from the sale of his Traverse City home to be wired to the Ann Arbor title company's bank, Northstar Bank of Bad Axe, Michigan. Two days later, the Plaintiff received another email purportedly from the Ann Arbor Realtor® telling him to disregard the prior wiring instructions and, instead, to have the Traverse City title company wire the funds to a different bank. Unfortunately, the second email with the new wiring instructions was provided by a scam artist and resulted in the Plaintiff wiring almost $320,000 to the scam artist's bank. Ultimately, the Plaintiff claims that he lost approximately $113,000 of the $320,000.

Plaintiff has now sued the Ann Arbor Realtor® claiming that he was responsible for the Plaintiff's loss. Plaintiff's biggest hurdle in this case is the fact that under Michigan law, there is a general rule that an individual has no duty to protect someone from the criminal acts of a third party. Under this analysis, the Ann Arbor Realtor® had no more duty to protect the Plaintiff from the scam artist than he would to protect the Plaintiff from someone breaking into Plaintiff's car and stealing his cell phone while he was attending a closing.

So how does the Plaintiff's lawyer get around this general rule? The Michigan Supreme Court has determined that under certain limited circumstances, an individual has a duty to take some action to protect another person from criminal activity if there is a "special relationship." So far, this "special relationship" doctrine has been extended only to landlords and business owners who have been held to have a duty to contact the police once they become aware of criminal activity. Even in these limited circumstances, however, a person is not required to actually intervene and stop a crime. For this reason, it seems unlikely that a court would hold that even in the case of a "special relationship," the Ann Arbor Realtor® had a duty to anticipate potential cyber fraud and take action to prevent it. But the Plaintiff won't even get to try and make this argument unless he can first establish that as a legal matter, he had a "special relationship" with the Ann Arbor Realtor®.

One way of attempting to create a "special relationship" is by looking to Section 2512d(2) of Article 25 of the Code. This section of the statute provides that a real estate licensee owes certain duties to his or her client including a duty to exercise reasonable care and skill, a duty of loyalty and a duty of confidentiality (collectively, the "Statutory Duties").

In the lawsuit against the Ann Arbor Realtor®, Plaintiff points to the Statutory Duties under Article 25, specifically the duty to exercise "reasonable care and skill in. . . carrying out the responsibilities of the agency relationship." The Plaintiff argues that the Ann Arbor Realtor® breached his duty of reasonable care by failing to maintain a secure email system and by failing to warn the Plaintiff of the potential for wire fraud. Plaintiff also alleges that the Ann Arbor Realtor® breached his Statutory Duties when he failed to advise the Plaintiff never to wire money without first calling to verify the wire instructions.

The Plaintiff in the Ann Arbor litigation is, essentially, suing the Ann Arbor Realtor® for a violation of the Code. A violation of Section 2512d of Article 25 subjects a Realtor® to statutory penalties set forth in Article 6 of the Code. Article 6 of the Code provides various penalties including suspension or revocation of license, restitution and/or a civil fine of up to $10,000. These penalties are the exclusive remedies provided by the Code and enforceable only by DLARA or, when appropriate, the Michigan Attorney General.

Under Michigan law, a statute which creates a duty or right not present under common law, can only give rise to a private cause of action if it does so expressly or its a means of enforcement is clearly inadequate such that a private cause of action can be implied.[26] Article 25 of the Code does not provide for private cause of action. There is nothing in the Code that expressly permits a third party to sue based upon a Realtors®' alleged violation of the Code. The means for enforcement (complaint, contested hearing, etc.) and remedies under the Code are more than adequate.

For these reasons, in the past, it has been successfully argued to the Michigan Court of Appeals that the legislature limited enforcement of violations of Article 25 to DLARA and that plaintiffs do not have a private remedy based on Article 25.[27] This 1997 decision has been followed by both the Michigan Court of Appeals as well as federal courts in Michigan.[28]

In January of 2017, when faced with this issue once again, the Court of Appeals erroneously concluded that the prior decisions did not apply to claims brought under all Sections of Article 25 of the Occupational Code.[29] Because the Section in question did expressly reference the remedies in Articles 1-6, the Court wrongfully concluded that there was no statutory enforcement mechanism precluding a private cause of action. In reaching this conclusion, the Court of Appeals failed to recognize that Articles 1-6 are applicable to <u>all</u> professions and <u>all</u> articles of the Occupational Code, including <u>all</u> Sections of Article 25. The

[26] *Lamphere Schools v Lamphere Federation of Teachers*, 400 Mich 104, 126; 252 NW2d 818 (1977)
[27] *Claire-Ann Co v Christensen & Christensen Co*, 223 Mich App 25; 566 NW2d 4 (1997).
[28] *Vodopyanov v Keller Williams Realty*, Docket No. 296939, 2011 WL 3760894. *Martell v Turcheck*, Docket No. 2:07-CV-14068, 2008 WL 2714210 (ED Mich July 7, 2008) and *Weiner v Weiner*, No. 1:06-CV-642, 2009 WL 752112 (WD Mich Mar 20, 2009).
[29] *Schwartz v Real Estate One, Inc*, unpublished opinion of the Court of Appeals, January 26, 2017 (Docket No. 328727).

Michigan Realtor® Legal Action Committee is currently involved in the appeal of this decision to the Michigan Supreme Court. Even if we prevail – and there is every reason to believe we will do so – these cases will not be the last time that a plaintiff will try to use Article 25 to claim damages against a Realtor®. Realtors® and their lawyers need to be vigilant in defending these cases, as they serve as a potential platform for plaintiffs' lawyers to try to assert new claims against Realtors® such as failing to protect a client from the criminal activities of others.