

Advertising in the Name of the Brokerage

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

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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

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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.