

## **PROMOTIONAL INCENTIVES**

### **INTRODUCTION**

Michigan Realtors® are coming up with more and more innovative ways of attracting business. Some Realtors® want simply to offer incentives to buyers and sellers in the form of merchandise or cash rebates. Others want to come up with a legal way to encourage persons or organizations to send business their way. This article will examine the laws that impact these types of programs.

### **PAYING REFERRAL FEES**

When considering a promotional incentive policy, the first question to be answered is “who is getting the cash or prize?” If the answer is someone other than a potential buyer or seller, then the promotion may be an illegal referral fee.

A Realtor® cannot give cash, merchandise or other valuable consideration to an unlicensed person or entity that refers a buyer or seller to the Realtor®. It is important to remember the fact that the referring organization may be a religious or charitable organization does not change the analysis. While Realtors® can implement a program whereby they agree to make a charitable donation in the name of every seller-client, they cannot agree to pay a charitable organization for the referral of business. In other words, a Realtor® can agree that for each and every property listed and sold by him, he will donate \$500 to the Lake Wobegone Lutheran Church. A Realtor® cannot agree that he will donate \$500 to the Lake Wobegone Lutheran Church for each and every member of the congregation that lists and sells their home with the Realtor®. The latter is a referral fee being paid to a third party, in this case a charitable organization, to refer business to the Realtor®.

**PAYMENTS TO BUYERS AND SELLERS**

If a promotional program involves the payment of cash or a prize to potential buyers or sellers, then it is not considered a referral fee. Where the cash or prize is paid directly to the buyer or seller, the question is whether the incentive program involves the elements of “chance” and/or “consideration.” An incentive program aimed at buyers or sellers that involves “consideration” but not “chance” is permissible. So, for example, a Realtor® could offer every seller who lists with him during the month of December a new iPad.

An incentive program that involves “chance” but not “consideration” is also permissible (so long as it is not being used to promote a specific piece of real estate). The important thing to remember here is that, in this context, the law imposes a very broad definition of “consideration.” In analyzing the “consideration” element, both the Attorney General and the Michigan Supreme Court have looked at whether there is a financial benefit gained by the business offering the drawing. For example, the Michigan Supreme Court has held that a promotion whereby a theatre gave all patrons a ticket to a drawing was deemed to be an illegal lottery, even though the patrons paid no additional amount beyond the cost of the theatre ticket. In that case, the Court stated:

The fact that prizes of more or less value are to be distributed will attract persons to the theaters who would not otherwise attend. In this manner those obtaining prizes pay consideration for them, and the theaters reap a direct financial benefit.

The Michigan Supreme Court has likewise found consideration in a program whereby gas stations provided tickets for a drawing to their patrons and “to any one asking for tickets without making a purchase.” The Michigan Supreme Court has even gone so far as to find consideration

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where participants were not required to purchase any items, but were only required to visit a store twice within a week – once to have a qualification card punched, and once to attend the drawing.

Similarly, the Michigan Attorney General was once asked about a credit union's promotional program which provided that in order for an individual to be eligible for a prize drawing, he or she must deposit funds in the credit union.<sup>6</sup> The Attorney General opined that there was consideration being paid (and thus, there was an unlawful lottery) because the program "requires a participant to forego other uses of the deposit funds and enhances the assets of the credit union."

The one case in which the Michigan Supreme Court found no "consideration" involved a television program in which participants at home matched numbers with numbers from either a card distributed by the sponsor or a card that had been prepared by the participant and registered with the television station. This game of chance was deemed permissible in large part because it did not require the participant to visit the sponsor's stores. (Or, as the holding was later described by another Michigan court, this promotional program was legal because "it did not promote the purchase of any item, but only promoted further television viewing.") The Court found that this promotion could be distinguished from other promotions that provide a direct financial benefit or profit to the sponsor (and are thus illegal).

Even if a Realtor®'s incentive program does not involve consideration, it is not permissible if it is being used to promote a specific piece of real estate. MCL 339.2511. So, it would not be permissible, for example, to give out a ticket for a drawing to everyone who attends the open house of 123 Main Street.

## **CONCLUSION**

Realtors ® are free to give customers or clients cash or merchandise, as long as there is no element of chance involved – in other words, so long as the prize given to the buyers and sellers does not involve a chance to win a bigger prize. The “prize” given could be a charitable donation to a named charity or a charity of the client’s choosing. Realtors ® cannot give cash or merchandise to a charity or any other unlicensed person or entity that refers a buyer or seller to the Realtor®.

Realtors ® may conduct raffles so long as there is no “consideration” required to participate. Realtors ® should be cautioned, however, that given the law’s broad definition of “consideration,” it will be very difficult, if not impossible, to come up with a promotional incentive program that does not involve “consideration.” In determining whether or not a particular program requires “consideration,” the Michigan Supreme Court has framed the question as to whether the sponsor of the promotion gains some benefit. A promotional incentive program that does not confer any benefit on the Realtor® who sponsors the program is probably not a great business model.

Finally, remember that an illegal game of chance is not only a violation of the Occupational Code but a violation of a criminal statute, punishable by imprisonment of up to two years and a fine of up to \$1,000.

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