HISTORICAL REVIEW

1. Hotline (1987)

2. Agency disclosure (1990s)

   a. Subagency v buyer's agency

      Until the early 1990s, cooperating agents were always subagents of the seller – both agents in the transaction worked for the seller. The only form of cooperation permissible to a participant in an MLS was sub-agency. Buyer agency came to Michigan when NAR mandated that offers of cooperation and compensation be included in an MLS. When buyer agency was first introduced, many REALTORS® balked at the idea of sellers paying a commission to someone who was working for the other side. MR put together an agency task force to educate REALTORS® on how to structure their business now that they could no longer assume that all agents were working for the seller.

   b. Agency disclosure law

      One of the techniques that the task force came up with was the Michigan agency disclosure law. Developed in part in response to the Minnesota *Edina Realty* case.

      (i) Transaction coordinator concept (in original)

      Concern at the time was that for liability reasons, some listing brokers would stop offering compensation to subagents. In this instance, if a cooperating agent's buyer did not want a buyer's agent, what role would that cooperating agent serve? How would they get paid? NAR said REALTORS® could serve in a non-agency capacity if permitted under State law.

      (ii) Designated agency concept (added in 2000)

      MR put together another agency task force in 1999 to discuss the imputed knowledge issue – the fact that the knowledge of any agent in a company is imputed to all agents within the company. Decision was made to ask Michigan Legislature to adopt designated agency concept.

      (iii) Created exemption for commercial transactions (added in 2000)

      Statute applies only "where the interest in real estate consists of not less than one or more than four residential dwelling units or consists of a building site for a residential unit" on either a lot or a condominium unit.

(iv) Added limited services disclosure requirements (added in 2008)

Purpose was to make sure that sellers understood the nature of the limited services they were getting.

3. Seller disclosure law (1993)

a. In the early 1990s, MR worked with the Michigan Legislature to develop the Michigan seller's disclosure law. It was modeled in part on the California statute at the time and a voluntary form previously developed by MR and adopted by NAR.

At the time the statute was enacted, a number of commentators were concerned that we had opened the floodgates to litigation against sellers. In actuality, the SDA has not changed the law as it relates to seller's liability for misrepresentation/ nondisclosure and has reduced lawsuits based on defects.

b. Case law (SDA)

(i) *Timmons v DeVoll,* Court of Appeals Docket Nos. 241507 and 249015 (February 24, 2004) – After closing, there is no separate cause of action under the SDA, rather a buyer must look to traditional common law theories of recovery such as fraud, etc. (Of course under the SDA, if the seller fails to provide the buyer with an accurate, complete seller's disclosure statement, the buyer has the right to terminate the purchase agreement at any time up until the actual closing).

(ii) *Huhtasaari v Stockemer,* Court of Appeals Docket No. 256926 (December 20, 2005) – If something occurs after Seller's Disclosure Statement is completed but before closing that renders the statement inaccurate, and such inaccuracy relates to "structural/mechanical/ appliance systems," then the seller has a duty to amend. (A failure to amend when required can give rise to a cause of action for silent fraud.)

(iii) *Pena v Ellis,* Court of Appeals Docket No. 257840 (April 18, 2006) – Court said no time limitation on the question, "Has there been evidence of water?" in the Seller's Disclosure Statement. Sellers were required to disclose the fact that house flooded 26 years ago.

(iv) *Roberts v Saffell,* 280 Mich App 397 (2008) – Sellers cannot be liable for an innocent misrepresentation in a Seller's Disclosure Statement. Sellers do not have any duty under SDA to inspect or otherwise take specific action to learn about the condition of their property.

c. Amendments to SDA form

(i) Added discussion re: farm operations, etc. (1995):

Farm or farm operation in the vicinity; or proximity to a landfill, airport, shooting range, etc? unknown____yes___no____

(ii) Added sex offender registry notice (2000):

BUYERS ARE ADVISED THAT CERTAIN INFORMATION COMPILED PURSUANT TO THE SEX OFFENDERS REGISTRATION ACT, 1994 PA 295, MCL 28.721 TO 28.732, IS AVAILABLE TO THE PUBLIC. BUYERS SEEKING THAT INFORMATION SHOULD CONTACT THE APPROPRIATE LAW ENFORCEMENT AGENCY OR SHERIFF'S DEPARTMENT DIRECTLY.

(iii) Added flood insurance/mineral rights disclosure (2000):

Flood insurance: Do you have flood insurance on the property?
unknown____yes___no____

Mineral rights: Do you own the mineral rights?
unknown____yes___no____

(iv) Added assessment/litigation disclosures (2000):

Any outstanding utility assessments or fees, including any natural gas main extension surcharge? unknown____yes___no____

Any outstanding municipal assessments or fees?
unknown____yes___no____

Any pending litigation that could affect the property or the seller's right to convey the property? unknown____yes___no____

(v) Added reassessment notice (2000):

BUYER IS ADVISED THAT THE STATE EQUALIZED VALUE OF THE PROPERTY, HOMESTEAD EXEMPTION INFORMATION, AND OTHER REAL PROPERTY TAX INFORMATION IS AVAILABLE FROM THE APPROPRIATE LOCAL ASSESSOR'S OFFICE. **BUYER SHOULD NOT ASSUME THAT BUYER'S FUTURE TAX BILLS ON THE PROPERTY WILL BE THE SAME AS THE SELLER'S PRESENT TAX BILLS. UNDER MICHIGAN LAW, REAL PROPERTY TAX OBLIGATIONS CAN CHANGE SIGNIFICANTLY WHEN PROPERTY IS TRANSFERRED.**

(vi) Added discussion about inclusion of appliances (2000):

Appliances/Systems/Services: The items below are in working order **(the items below are included in the sale of the property only if the purchase agreement so provides):**

(vii) Added mold notice (2005):

BUYER SHOULD OBTAIN PROFESSIONAL ADVICE AND INSPECTIONS OF THE PROPERTY TO MORE FULLY DETERMINE THE CONDITION OF THE PROPERTY. THESE INSPECTIONS SHOULD TAKE INDOOR AIR AND WATER QUALITY INTO ACCOUNT, **AS WELL AS ANY EVIDENCE OF UNUSUALLY HIGH LEVELS OF POTENTIAL ALLERGENS INCLUDING, BUT NOT LIMITED TO, HOUSEHOLD MOLD, MILDEW AND BACTERIA.**

4. History of various "no duty to disclose" provisions of Occupational Code (Section 339.2518):

An action shall not be brought against a real estate broker, an associate broker, or a real estate salesperson under the following circumstances:

(a) For failure to disclose to a purchaser or lessee of real property that a former occupant has or is suspected of having a disability. As used in this section, "disability" means handicap as that term is defined and interpreted under, and disclosure of which would constitute unlawful discrimination under, sections 804, 805, 806, or 817 of the fair housing act, title VIII of the civil rights act of 1968, Public Law 90-284, 42 U.S.C. 3604, 3605, 3606, and 3617. (1993)

(b) For failure to disclose to a purchaser or lessee of real property that the real property was or was suspected to have been the site of a homicide, suicide, or other occurrence prohibited by law which had no material effect on the condition of the real property or improvements located on the real property. (1998)

(c) For failure to disclose any information from the compilation that is provided or made available under section 8(2) of the sex offenders registration act, 1994 PA 295, MCL 28.728. (1998)

5. Handling earnest money deposits on failed transactions

a. Development of interpleader kit (1994)

b. Change in license law – must hold deposit if there is dispute – Rule 313 (amended 2002):

Disbursement of an earnest money deposit shall be made at consummation or termination of the agreement in accordance with the agreement signed by the parties. **However, any deposit in the trust account of the broker for which the buyer and seller have made claim shall remain in the broker's trust account until a civil action has determined to whom the deposit must be paid, or until the buyer and seller have agreed, in writing, to the disposition of the deposit. The broker may also commence a civil action to interplead the deposit with the proper court.**

c. Establishment of Michigan Consumer Protection Act exception – *Hartman & Eichhorn Building Co, Inc v Dailey, 478 Mich 891* (2007); *Liss v Lewiston-Richards, Inc,* 478 Mich 203 (2007) (decided 25 years after *Diamond Mortgage* case)

d. Enhanced escheats enforcement. Annual reporting requirements. Unclaimed funds must be reported to the State after 3 years, failure to comply can result in interest and significant penalties.

6. Commissions

a. Oldest Michigan case located using the term "realtor" is a 1904 case involving a REALTOR® who sued to collect a commission. He had no written agreement but claimed it was "customary" for a seller to pay a commission when the seller had accepted his services to facilitate a sale. Court agreed that this was the rule but said this rule did not apply in this case because it appeared that REALTOR® had represented the buyer.

b. 1915 enacted statute whereby commission agreements must be in writing.

Early cases applied the writing requirement not only to contracts between sellers and brokers but also agreements between brokers to share a commission.

By the 1950s, Michigan courts decided the statutes only applied to agreements with owners. "The purpose of the legislation was to protect real estate owners from unfounded claims of brokers," not to protect brokers from each other.

Still the rule today.

c. Rule that listing agreements must contain a definite expiration date has been in place since at least the 1940s. Brokers were using protection period clauses in the 1970s, but they were not explicitly ruled to be enforceable until 1989. *Hawkins v Smithson,* 181 Mich App 649 (1989). Broker had shown the property to the eventual buyer a few

days before the listing expired. Buyer failed to show up to appointment with the listing broker for preparation of offer and then entered into contract after listing expired.

d. A listing has been held not to be an offer that can be accepted – *Eerdmans v Maki,* 226 Mich App 360 (1997). A seller is free to reject a full price offer.

   Generally, brokers are entitled to commissions if a buyer has presented a full price and terms offer, even if the seller refuses to accept the offer. The question then becomes "what is a full price and terms offer?" While such a determination is made on a case by case basis, generally a broker has not produced a ready, willing and able buyer for purposes of earning commission if the offer to purchase includes contingencies. In *Gil Henry & Assoc v General Alum Mfg Co,* Court of Appeals Docket No. 251849 (2005), however, a broker was deemed to be entitled to a commission for producing a purchase agreement that was not acceptable to the seller, even though it required the seller to pay for a number of items, including title insurance, survey and an environmental assessment, which arguably made it NOT a full price offer.

e. Commercial brokers lien law (2010) (Initial work on this legislation began in 1994).

   (i) Primary objection comes from the State Bar -- Real Property Section who claimed, by way of example:

   1. The proposed legislation provided for a non-consensual lien which interferes with basic property rights.

   2. The proposed legislation made brokers a special preferred class of persons and provided a very extraordinary remedy of a lien against real property.

   3. Providing lien rights to brokers would encourage other parties dealing with real estate such as appraisers, property managers, property inspectors, lawyers, title companies, escrow agents and accountants to request similar rights.

   4. Once broker's liens were granted for commercial property there would be a substantial risk that lien rights will be subsequently extended to include residential property.

   5. The proposed legislation was patterned after the Construction Lien Act, but the justification for protecting artisans who create physical improvements to property did not apply to brokers.

(ii) Requirements of commercial lien law:

1. Property must be commercial – includes residential property with more than four units.

2. Only brokers, not salespersons, have lien rights.

3. Cooperating brokers do not have lien rights.

4. Lien must be recorded prior to closing.

5. If commission amount is escrowed must release lien

Anton, Sowerby & Assoc, Inc v Mr. C's Lake Orion, LLC, Court of Appeals Docket Nos. 317935 and 321827 (March 12, 2015). Broker refused to provide release of lien even though the commission amount had been escrowed. Broker argued that the statute only said a broker must provide a release if the "parties to the transaction" signed an escrow agreement and the broker had not signed. Court held that broker was not a "party to the transaction" and that he was required to release the lien (and to pay the buyer's attorney's fees because he had not provided the release).

6. Lawsuit must be filed within one (1) year after lien is recorded.

f. Historically, it has been held on any number of occasions that most listing agreements can be revoked by the seller at any time during the listing period prior to the broker producing a ready, willing and able buyer. There were only two exceptions to the rule: (1) when the revocation is made in bad faith with the intent to deprive the broker of a commission; or (2) if the broker had provided valuable consideration to the seller. *Schostak v First Liquidating Corp,* 320 Mich 406 (1948); *Seelye v* Broad, 279 Mich 289 (1967).

(i) Recently, in an unreported decision, court took different approach: *Michigan Motel Brokers v Doud Boys, LLC,* Court of Appeals Docket No. 308616 (Dec 6, 2012). Court held that to make a listing agreement irrevocable, there are the following three requirements: (1) a provision for exclusive sales rights; (2) a reasonable time limit (*i.e.,* reasonable term for the agreement); and (3) substantial performance of the broker's duties as promised, although the broker is not required to furnish an actual purchaser. The Court of Appeals found that the broker provided consideration through the use of commercially reasonable efforts to sell the property, to present the property to other license real estate companies upon request and to engage in marketing efforts to expose the property. The listing agreement was deemed irrevocable and the seller was required to pay a commission to the broker when the seller sold the

property during what would have been the term of the listing agreement which the seller had breached. The Court also found the broker was not required to prove damages (*i.e.,* costs incurred by the broker) other than the entitlement to a specific commission.

7. No private cause of action under Occupational Code.

   a. *Burland, Reiss, Murphy & Mosher, Inc v Schmidt*, 76 Mich App 670 (1977). Fact that listing contract violated rule requiring a definite expiration date did not prevent broker from recovering an otherwise earned commission – violation only subjects broker to administrative/complaint penalties under Article 6 of the Occupational Code: suspension or revocation of license, administrative fine, censure, probation and/or restitution.

   b. *Claire-Ann Co v Christenson and Christenson, Inc,* 223 Mich App 25 (1997). After broker did not notify seller that buyer's $25,000 earnest money deposit check had bounced, seller sued broker on a number of theories, including violation of the Occupational Code. The Court of Appeals held that there is no private cause of action under the Occupational Code, but that a violation will subject the licensee to penalties that may be imposed by the Department under Article 6.

8. Independent contractor status.

   a. *Caramagno v Tuchel,* 173 Mich App 167 (1988) ("Lee Realty"). Salesperson was involved in a car accident while showing a home. The father of the injured child sued the salesperson and her broker. The trial court threw out the case against the broker on the basis that the salesperson was an independent contractor, rather than an employee. The Court of Appeals overturned the trial court's decision based in large part on the "employment" language in the Occupational Code. The Michigan Supreme Court then reversed the Court of Appeals.

   b. Amendment to Occupational Code (1993):

      (b) "Independent contractor relationship" means a relationship between a real estate broker and an associate broker or real estate salesperson that satisfies both of the following conditions:

      (i) A written agreement exists in which the real estate broker does not consider the associate broker or real estate salesperson as an employee for federal and state income tax purposes.

      (ii) Not less than 75% of the annual compensation paid by the real estate broker to the associate broker or real estate salesperson is from commissions from the sale of real estate.

9. Disclosure/Duties – Seller's agents

   a. *McMullen v Joldersma,* 174 Mich App 207 (1988) – Court held that seller's listing agent cannot be liable for silent fraud – owes no duty to disclose material defect in a property to the buyer (unless there was information subsequently acquired rendering previous misstatements untrue or misleading) ". . . the imposition of such a duty would necessarily conflict with the duty [the seller's agent] owed to the seller."

   b. *Andrie v Chrystal-Anderson & Assoc REALTORS®, Inc*, 187 Mich App 333 (1991) – Court held that seller's agent owed no duty to potential purchasers to accurately and truthfully present their offer to purchase a home to the seller. "In negotiating a real estate sale, any relationship between the seller's agent and the potential buyer is a commercially antagonistic one with each side working for his best advantage and not for the benefit of the other."

   c. *Anderson v Wiegand*, 223 Mich App 549 (1997) – Seller's agent who "took control" of property held liable for a slip and fall.

      MR Response – amend listing agreement form to provide:

      INDEMNIFICATION: Seller shall indemnify and hold harmless Brokerage Firm and Brokerage Firm's agents and cooperating brokers and agents from any and all liability for any reason as a result of injury to person(s) or damage or loss to property arising out of showing of Seller's home pursuant to this listing.

10. Disclosure/Duties – Buyer's agents

    Davies v Johnson, Court of Appeals Docket No. 304944 (July 19, 2012) – Court held that buyer's agent owes no duty to buyer to discover and warn of dangerous conditions. Buyer's agent does not have superior knowledge as to the condition of the home – potential buyer and buyer's agent are equally able to discover and avoid dangers.

11. Releases

    a. *Brooks v Holmes,* 163 Mich App 143 (1987) – Buyers alleged that listing and cooperating REALTOR® had made fraudulent representations about the condition of the home. Case was thrown out based upon a release in the closing statement pursuant to which the purchaser had released both REALTORS® "with respect to all claims arising out of the performance of [the buy/sell agreement]." Court said such a release is enforceable unless signed under duress or there was fraud or overreaching conduct used to obtain the release.

    b. *Hall v Small,* 267 Mich 330 (2005) – Buyers sued listing broker and buyer's broker for failing to discover and disclose defects in the home they had purchased. Buyers argued that the release they had signed at closing was not enforceable because there

was no consideration given and because only the buyers, not the brokers, had signed the release document. The court rejected these arguments, holding that the release document was signed as part of the entire transaction and was thus enforceable.

12. Unauthorized Practice of Law

    a. *Ingham County Bar Assoc v Walter Neller Co,* 342 Mich 214 (1955) – Licensed real estate brokers may fill out standard printed forms when such action is incidental to the business they are transacting and there is no extra charge for this service.

    b. *Dressel v Ameribank,* 468 Mich 557 (2003) – Does not matter if a separate fee is charged for filling out forms, so long as the person does not counsel or "assist in matters requiring legal discretion or profound, legal knowledge."

13. Miscellaneous "big picture" cases

    a. *Price v High Pointe Oil,* 493 Mich 238 (2013) – In the case of negligence causing damage or destruction to real property, the property owner is only entitled to economic damages (value of damaged or destroyed property) and not to emotional distress type damages.

    b. *Toll Northville v Twp of Northville,* 480 Mich 6 (2008) – Cost of public service improvements (*e.g.*, sewer and water) cannot be added to taxable value of property.

       A municipality must correct an assessment to comply with *Toll Northville* going forward, even if the taxpayer/developer did not object in the year the assessment increase was made.

    c. *Kim v JP Morgan Chase Bank, NA*, 493 Mich 98 (2012) – Defects or irregularities in a foreclosure proceeding result in a foreclosure that is voidable, not void *ab initio*.

    d. *Lake Isabella Dev Inc v Village of Lake Isabella,* 259 Mich App 393 (2003) – Invalidated MDEQ rule whereby as a condition precedent to the MDEQ's consideration of a private owner's application for a sewage system permit, required that the application be accompanied by a resolution from the local government that it will assume responsibility for maintenance of the system if the property owner fails to do so.

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