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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 anyone asking for tickets without making a purchase." The Michigan Supreme Court has even gone so far as to find consideration 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. 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.

PICK ME!

In these days of multiple offers, many buyer's agents are trying to come up with creative ways to increase the chances that their clients' offer will be the chosen one.

1. One common technique is to offer an "appraisal guaranty" in which the buyer agrees to cover all or some of the shortfall in the event the appraisal comes in lower than the sale price. There is nothing wrong with this technique – although, based on the calls we get, it is often the case that these clauses are not carefully drafted. Appraisal guaranties should be drafted carefully so that both the seller and buyer understand their obligations. Both parties need to understand what happens if the difference between the sale price and the appraised value is greater than the agreed-upon cap. Buyers also need to understand that their total cash commitment includes not only the appraisal guaranty amount but also the down payment component of the mortgage contingency. One way to make this clearer is to combine the mortgage contingency and the appraisal guaranty in one clause:

> This agreement is subject to a buyer's ability to obtain a mortgage in the amount of _____% of the appraised value of the property; Buyer shall pay the balance of the sale price in cash, up to a maximum $_____ total down payment. If the balance of the sale price is greater than this amount, this purchase agreement shall terminate unless within three (3) business days either: (a) Buyer waives this contingency in writing; or (b) Seller and Buyer otherwise agree in writing.

2. Other agents have proposed offering the listing agent some kind of bonus for "prioritizing" their client's offer. What if the buyer's agent offers the listing agent a bonus? Such a practice could be a problem for both the listing agent and the buyer's agent. First, it is arguably a breach of fiduciary duty for a listing agent to try to encourage a seller-client to accept a particular offer because it would result in a benefit to the listing agent. Moreover, under the Code of Ethics, a listing Realtor® has an ethical obligation to present all offers "objectively."

Finally, the Occupational Code prohibits a salesperson from accepting a commission from anyone other than his own broker.

Alternatively, the buyer's agent could enhance his/her client's offer by offering a commission rebate to the seller. DLARA takes the position that payment by a licensee directly to a buyer or seller is not an illegal referral fee.

3. Some buyers have tried to get the seller's attention by offering a sizable nonrefundable earnest money deposit. This is certainly permissible. Remember, however, that these days courts tend to enforce time deadlines in contracts quite strictly. So, if a buyer agrees to a sizable nonrefundable deposit and for some reason the loan process is delayed beyond the agreed-upon closing date, the seller may try to declare the purchase agreement terminated and the deposit forfeited. (After all, these days the seller is not likely to have any trouble selling the home to someone else.)

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

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.

Fair Housing & Advertising

Social media has become an integral part of how we do business in real estate and it's easy to understand why. Social media has enabled us to reach larger audiences, quickly list properties, generate interest, and grow clientele all with a simple click. Growing a business has never been easier, but, despite its perks, social media has created some unexpected avenues of legal liability. One particular area of concern is Fair Housing law and the unintentional discrimination that has subsequently stemmed from advertising for housing on social media platforms.

As Realtors® continue to rely on virtual platforms for advertising, it's paramount that brokers and their agents understand that advertisements for housing must comply with the basic requirements under the law and advertising via social media is no exception. Online advertisements are not exempt from federal, state and local Fair Housing laws. In fact, it's arguably more important that online advertisements are fair housing compliant since agents are reaching a much larger audience compared to traditional in-print advertising.

Broker supervision will play an important role in maintaining Fair Housing compliance as we enter a new era of conducting business online. If an agent violates the Fair Housing Act, the agent's firm is liable for that action. A meaningful internal policy that addresses fair housing can act as a great defense to a Fair Housing claim alleged against an agent or a brokerage. Such a policy will not automatically absolve the broker from liability, but it's a good place to start. Firms are strongly encouraged to monitor their agents' online advertising and other practices that may potentially violate Fair Housing law. The less control a broker has over an online housing advertisement means a greater potential for legal liability. Alternatively, the more supervision a

broker exercises means a lesser likelihood that discriminatory content slips through the cracks and reaches the audience.

Facebook Woes

Fair Housing advocacy groups across the country are working diligently to combat discrimination in online housing practices. In 2018, Facebook was sued by the National Fair Housing Alliance over its data collection practices and the effect that those practices had on discrimination in the housing industry. The lawsuit alleged that Facebook's advertising platform violated the Fair Housing Act by target marketing to certain users and excluding others from seeing advertisements for housing based on their race, sex, familial status, and other protected classifications.

Facebook argued that it was merely acting as an "interactive service provider" and, therefore, not liable for violating the Fair Housing Act. In making this assertion, Facebook relied on a case from 2008 in which Craigslist successfully convinced the Court that, as an "interactive service provider", it could not be held liable for discriminatory posts made by 3rd party users because Craigslist did not help create the discriminatory posts and because interactive service providers are immune from liability for content created by 3rd parties.

The Department of Justice intervened in the case and determined that Facebook should not be afforded the same immunity as Craigslist because, unlike Craigslist, Facebook collected user data and used the users' demographics to purposefully exclude members of protected classes from seeing certain advertisements for housing. Facebook played an active role in creating discriminatory content that violated Fair Housing law. For those reasons, the DOJ determined that Facebook should be liable, as a publisher, for those discriminatory advertisements.

The case was settled in 2019 and, as part of the settlement agreement, Facebook agreed to pay 1.95 million dollars in damages as well as make comprehensive changes to its online housing, employment, and credit advertising platform. The most important change was the removal of targeted marketing practices based on protected classifications such as race, color, sex, national origin, disability, religion, and familial status.

Shortly after the initial lawsuit was filed, the Department of Housing and Urban Development (HUD) filed its own complaint against Facebook, alleging that Facebook's targeted marketing and data collection practices enabled online housing discrimination. Despite the settlement agreement, HUD expressed that it would still be pursuing its own complaint against Facebook and seeking the maximum civil penalties. The interest and attention that this case generated from HUD, as well as the Department of Justice, indicates that regulatory bodies are paying attention to the way real estate professionals conduct themselves on social media, especially in the context of fair housing. This is likely not the last we'll hear of this issue.

Are You a Publisher and Does it Matter?

Determining who is and who is not a "publisher" is important when considering liability for Fair Housing violations. This distinction matters, because the publisher of the advertisement will be held liable along with the creator of the advertisement. What does this mean for real estate professionals? Simply put, a Realtor® who publishes online content (blogs, social media posts, listings, etc.) may find themselves liable for third party comments that violate State or Federal Fair Housing law or at the very least explaining why they aren't liable. Brokerages would be wise to implement some type of "Take Down" policy that outlines a procedure for monitoring and/or removing inappropriate or discriminatory material from the brokerage's public-facing social media pages. Agents are solely responsible for monitoring their personal

business pages and should be aware that they face liability as a publisher of whatever content they create.

Remember, an employing broker bears the ultimate responsibility for any adverse actions, including Fair Housing issues, that arise out of an agent's practice within that brokerage. Thus, brokers have great incentive to adopt policies that promote fair housing compliance and to set standards for an agent's behavior – particularly online. This is especially relevant now, as we navigate the changes created by COVID-19. Increased remote work and online business outreach may very well be the new normal. Now, more than ever, is the time for brokerages to keep a watchful eye on social media usage and online activity.

Michigan Realtors® has created a model social media policy which may be useful for brokerages looking for additional guidelines in using social media responsibly and safely. The policy should be viewed as a risk-reduction tool that will provide real estate professionals with a framework to keep their social media usage professional, ethical, and compliant under the law. The model policy can be found at can be found under the Legal Resources Page at law.mirealtors.com.

THINGS YOUR AGENTS MAY NOT KNOW

1. Purchase agreements should never predate the start of the term of the listing agreement. A listing agreement only entitles the listing broker to a commission if the property is sold during the term of the listing agreement. So, if the purchase agreement predates the start date of the listing agreement, the listing broker has no contractual right to a commission.

2. Agents should be instructed NEVER to arrange for a temporary "office exclusive" period – no matter how short the period is – without an office exclusive form. "Office exclusive" forms are not just an MLS requirement, but also provide the listing broker with necessary protection if the seller later claims that the price would have been higher had the listing agent put the home in the MLS. "Office exclusive" forms require the seller to acknowledge and waive the benefits of widely marketing their home through the MLS.

3. Even if the sellers have never lived in a home, they must still answer all questions on the seller's disclosure statement to the best of their ability. The fact that the sellers have never lived in the home does not necessarily mean that they do not know anything about the condition of the home. Sellers cannot avoid liability by choosing not to answer a question on the seller's disclosure form. If, for example, the sellers know that the basement leaks, they will have committed fraud if they do not disclose that information – whether they say that they do not know if the basement leaks, or they do not answer the question at all.

4. If a buyer doesn't sign a buyer's agency agreement agreeing to a designated agency relationship with only one agent in your firm, that buyer has an agency relationship with every agent in your firm. A salesperson who does not bother to get a buyer agency form signed has created a dual agency situation on all in-house listings. If the listing agent is not aware of this

particular buyer's agency relationship with the entire firm and does not get a consensual dual agency form signed, the firm forfeits its right to a commission.

5. If an unrepresented buyer wants to make an offer on a property that the agent has listed, that agent can treat that buyer as a customer. The agent does not need to create an agency relationship with the buyer and then become dual agent. Legally, it is easier/less risky to continue to act as the seller's agent than to create an agency relationship with the buyer for the purpose of creating a dual agency situation.

6. It is not typically the case that buyers who default on a purchase agreement can simply forfeit their earnest money deposit ("EMD") and not risk any further liability. While a seller's rights in the event of the buyer's default depend on the specific language in the purchase agreement, typically in the event of default, the seller has the right to the buyer's EMD and to pursue other legal remedies (e.g., damages). Buyer-clients who are having second thoughts should be told to consult with an attorney.

7. Offers can be revoked before their stated expiration date and time. A stated expiration date and time means that the offer will automatically expire at that time if it has not been previously revoked by the offeror. The purpose of such a date is not to guaranty availability for a particular time period but to keep the offer from being open indefinitely.

8. Real estate taxes are prorated differently in different parts of the state. Failure to determine how taxes are customarily prorated in a particular area can be very costly to your client. By way of example, assume a property tax bill in September is $6,000 and that the property is sold in October. If the taxes are prorated in arrears, at closing, the seller will owe the buyer $500. If the taxes are prorated in advance, at closing, the buyer will owe the seller $5,500. (If taxes are prorated on a calendar year basis, the buyer would owe the seller $1,500.)

9. An agent cannot call a FSBO seller who is on the national do-not-call registry unless the agent has a specific buyer interested in that specific home. A single willful violation of the federal Telephone Consumer Protection Act can result in a $1,500 fine.

10. Dual agents cannot avoid liability simply by not telling either buyer or seller anything. A dual agent still owes both clients a duty of disclosure. The only limitation on that duty is that the agent cannot disclose confidential information learned from the other client. Nondisclosure of a matter that is not confidential is generally not a "neutral" stance. For example, if it is public knowledge that the neighborhood school is closing, an agent who does not disclose this information is not being "neutral," but is acting in the best interest of the seller.

11. Under "procuring cause" rules, a cooperating agent is not entitled to the commission split offered through the MLS if his or her transaction does not close, regardless of the reason that the transaction does not close. A cooperating agent is not entitled to a commission if the seller breaches the purchase agreement.

12. The legal test for determining whether or not something is a fixture (and thus included in the sale) or is personal property is based on intent and is somewhat subjective. While all purchase agreement forms attempt to address this issue by including a boilerplate list of "included" property, listing agents are well advised to work with their sellers to identify any "unique" items (and/or leased items) that should be expressly excluded. A discussion of excluded items at the time the listing agreement is signed can help avoid future disputes with the eventual buyer.

DO WE HAVE A DEAL?

Consider the following common scenario:

> *Realtor® A, a buyers' agent, presents an offer on behalf of her buyer-clients to Listing Realtor®. Listing Realtor® contacts Realtor® A and advises her that the offered price is significantly lower than what the sellers will accept. The two agents continue negotiating via text, and eventually the Listing Realtor® sends Realtor® A the following text: "Good news. I have spoken to my clients and we have a deal." Realtor® A passes on the good news to her buyer-clients. The next day, the Listing Realtor® advises Realtor® A that the sellers have changed their minds and have accepted another offer. Can the sellers do this? Absolutely. Do Realtor® A's buyer-clients have any recourse? No.*

Agents in a situation such as this must remember that there is no "deal" unless and until the buyers and sellers sign a purchase agreement. The fact that parties can now agree to conduct business electronically does not change the fact that contracts for the sale of real property must be in writing signed by the parties.

Under the Uniform Electronic Transaction Act ("UETA"), Realtors® can arrange to have their clients sign a purchase agreement electronically. Once signed, the Realtors® can then deliver that contract electronically (typically by email). But the UETA does not authorize Realtors® to enter into a binding contract on behalf of their respective clients via text or email (any more than they can do so verbally). And this is true even if the Realtors®' negotiations are done with the knowledge and consent of both clients.

What if the sellers and buyers exchange emails or texts directly (rather than through their agents)? If they reach an agreement, would such an agreement be enforceable, or would the parties need to incorporate the agreed-upon terms into a written contract? The answer depends on a number of factors aimed at determining whether the parties intended to be legally bound:

1. Did the parties agree to conduct business electronically?
2. Did the email/text exchange "contain the essential elements of a contract with sufficient certainty and definiteness regarding the parties, property, consideration, terms and time of performance."

3. Did the exchange include the electronic signatures of both parties? The term, "electronic signature," includes any method adopted by a person "with an intent to sign." To avoid any uncertainty, if a party wishes to enter into an agreement via email, the email should clearly evidence an intent to sign, for example, by typing the word, "signature," next to the party's name.

4. From the language of the email/text exchange, does it appear that the parties anticipated that the terms would be incorporated into a subsequent agreement? If it appears from the substance of an electronic exchange that the parties anticipated that there would be a subsequent signed agreement, a court is unlikely to conclude that the email/text exchange created an enforceable agreement.

Needless to say, it would be a rare case where someone could assert with any degree of certainty that an email/text exchange between the seller and buyer created a binding contract. There are simply too many variables.

And it is always the case that an email/text exchange between the listing agent and the buyer's agent does not create a binding purchase contract on behalf of the clients.

It is often the case that agents will – with the consent of their clients – discuss contract terms prior to responding to a written offer or counteroffer. Sometimes these discussions take place electronically via email or text. Negotiations between agents that take place electronically are no more binding than discussions that take place in person or on the phone. Until the "agreement" is reduced to writing and signed by both clients, there is no binding contract. Realtors® must keep this in mind and make certain that their clients understand this as well. Clients who were told that they had "a deal" prematurely are typically very unhappy clients.

Unlicensed Assistants

In today's industry, many brokers and salespersons hire assistants to aid them in providing real estate services. These assistants can be hired to assist an entire firm or they can be hired to assist a single salesperson or team. The assistants can be either licensed or unlicensed. In some situations, an assistant must be licensed in order to remain compliant with Michigan law. This licensure requirement will depend on the types of tasks the assistant is expected to perform under the brokerage's business model.

Making a distinction between licensed and unlicensed assistants is actually very important. Licensed assistants can perform any real estate-related activity that is permitted under Michigan's licensing statute. An unlicensed assistant, however, may not perform real estate-related activities that require a license. This means that if you plan to have assistants who perform tasks that require a license, such as holding open houses or showing properties, it's necessary that that assistant is also a licensee.

Before hiring assistants, brokers and salespersons would benefit by making a list of duties that the assistant will be expected to perform and then comparing that list to duties that require a real estate license. This will help to determine whether or not it's necessary to hire a licensed assistant over an unlicensed assistant.

Different states have different standards when it comes to what activities an unlicensed assistant may or may not perform. Understanding these standards is a crucial step in staffing a brokerage and remaining compliant with Michigan's licensing requirements. In the State of Michigan historically, it has been understood that an unlicensed assistant may perform the following activities:

1. Tasks that are strictly clerical (such as answering phones, directing calls, greeting

customers, etc.);

2. Acting as a courier in picking up or delivering documents on behalf of the licensee;
3. Assisting licensees during an open house. The key word being "assist" – as unlicensed assistants cannot independently show property or host open houses. At the open house, an unlicensed assistant may:

- Greet potential homebuyers as they arrive;
- Hand out prepared printed materials;
- Have prospects sign a guest book to record names, addresses, and phone numbers;
- Escort potential buyers throughout the home for security purposes, but not to answer material questions about the home.

In keeping compliant with state licensing law, it is crucial that brokerages identify those activities that are off limits to individuals who do not have a real estate license. In the State of Michigan, it has historically been understood that an unlicensed assistant may not engage in the following activities:

1. Independently hold open houses for Realtors®;
2. Show properties to potential buyers;
3. Solicit listings or other business via phone;
4. Answer any questions relating to financing, title insurance, or closings;
5. Have their names printed on business cards or stationary in a way that would imply that they are a real estate salesperson or broker;
6. Hold themselves out as a real estate salesperson or broker;
7. Perform any acts for which a license is required under Michigan Real Estate License Law
8. Provide any additional information to the public aside from information that has already

been set forth in prepared promotional material that has already been distributed to the public (MCL 339.2501).

Staying compliant with Michigan's licensing law is an absolute must for a brokerage. Licensees who allow unlicensed assistants to engage in real estate-related activities on their behalf face hefty penalties for non-compliance with the Occupational Code. These penalties include:

- Placement of a limitation on the license
- Suspension of license
- Denial of license renewal
- Revocation of license
- Censure
- Probation
- Restitution
- Administrative fine up to $10,000.

For this reason, brokers should adopt policy and training to ensure that all personnel understand the scope of their respective role and remain compliant with the state licensing law. Finally, while we will discuss this issue in more detail in a future video, keep in mind that an unlicensed assistant will never qualify as an independent contractor and that a licensed assistant will only qualify as an independent contractor in very limited circumstances. If the assistants in your office are not treated as employees, it is important that you consult with an attorney