The Legal Hotline: UNPLUGGED

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BROKER SUMMIT

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RESPA and Joint Ventures

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One of my agents has a close friend who works in the title business. They routinely refer clients to their title agent friend.

Can they do that?

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RESPA Background: Section 8 – Anti-kickbacks

Section 8(a) of RESPA provides that a <u>real estate settlement service provider</u> shall not give or accept any <u>fee, kickback, or thing of value</u> in exchange for the <u>referral of business</u> to another settlement service provider in connection with a federally related mortgage loan.

Settlement service providers include:

- Real estate brokers and agents
- Mortgage bankers and brokers
- Title companies and title agents
- Home warranty companies
- Hazard insurance agents
- Appraisers
- Flood and tax service providers
- Home and pest inspectors

Settlement service providers do <u>NOT</u> include:

- Moving companies
- Gardeners
- Painters
- Decorating companies
- Home improvement companies

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Payment for Referrals

- **RESPA does not prohibit <u>REFERRALS</u> — only the <u>PAYMENT</u> for referrals.**

- **NOTE**: RESPA's prohibition on on the payment for referrals is not limited to direct cash payments. Section 8 also prohibits providing any "thing of value" in exchange for a referral.

- An exception exists that allows the payment for referrals **<u>between real estate licensees</u>**.

- Another exception exists that allows a real estate licensee to refer a client to a **<u>joint venture company</u>** (affiliated business) in which they hold an ownership interest and, therefore, will receive a benefit from that referral ("affiliated business arrangement").

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I am a real estate broker who also owns a 5% interest in a title company. My agents often refer clients to my affiliated (joint venture) title company. The title company does not pay me (or my agents) a "referral fee" or any "thing of value" for these transactions. Instead, the title company pays me based on the volume of business that my brokerage sends to the title company.

Is that permissible under RESPA?

Rules for Affiliated Business Arrangements (Joint Ventures)

1. A licensee cannot be paid based on the **volume of business they send** to the joint venture company. **NOTE:** The only compensation that a real estate licensee can receive from the joint venture company is a **share in the overall profits** of the company based upon the licensee's **ownership interest** in the company.

2. A brokerage **cannot require** any client to use joint venture company as a condition of the sale.

3. The client must sign an Affiliated Business Arrangement Disclosure form which **discloses the nature of the relationship relationship** with the joint venture company and the estimated charges for the referred business.

4. The joint venture company must be a bona fide, stand-alone business with sufficient capital, employees, and separate office space, and must perform core services associated with that industry.

I am a real estate broker. I have an arrangement set up with a local title company where I will be gifted a fractional interest in the title company if I do a certain volume of business with that title company.

Can I obtain ownership interest in the title company in that way?

Obtaining Ownership Interest in Joint Ventures

- Real estate licensees are not prohibited from obtaining an ownership interest in a joint venture company (like a title company or mortgage brokerage).

- **But, that ownership interest must be based on the agent's actual investment in the business.**

- The ownership interest cannot be a gift in exchange for past referrals or expected future business.

I am a real estate broker, and I’m interested in going into a joint advertising venture with a local title company.

Does joint advertising create a Section 8 problem under RESPA?

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Joint Advertising

- RESPA does not prohibit joint advertising.

- **However, if one party is paying less than its <u>pro-rata share</u> of the cost of the advertisement, there may be a RESPA violation.**
    - For example, if the title company's advertisement covers ¼ of a one-page joint advertisement, then it should not be paying more than ¼ of the cost of the advertisement.

- **NOTE: Be wary of faux marketing schemes designed to disguise kickbacks.**
    - In a recent case out of Maryland, in exchange for referrals from a mortgage company, a title company made payments to a marketing company (which the marketing company applied to the mortgage company's account).
    - The court called this arrangement a "sham" and viewed it as an attempt to conceal illegal kickbacks as "co-marketing."

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Fair Housing

My office prioritizes Realtor® safety and uses identity verification and other screening tools to vet clients before meeting in person. For example, we use an identity verification app and require a pre-approval letter before touring any properties with a buyer.

Is that allowed under Fair Housing law?

Equal, Consistent Treatment

- If a screening tool or identity verification is used for **<u>one client</u>**, it should be used for **<u>all clients.</u>**

- Ensuring Realtor® safety through effective protocols is paramount. However, all policies regarding identity verification and screening should also consider fair housing. **<u>The information collected should considered equally and consistently.</u>**

- The same is true in providing financial information and general customer service.
  - How is a client received upon entering the brokerage office?
  - What is their experience like by phone? How quickly are calls returned? Does every call/message get a response?
  - What is their experience like online? Is the website accessible?
  - Do you provide consistent financial information and resources (loan products, first time homebuyer programs)?

- **Always think about providing equal, consistent customer service. (Fair Housing Checklist)**

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Fair Housing Best Practice Checklist

In conjunction with the Fair Housing Center of West Michigan, MR offers this resource with best practices and helpful tips to assist with risk management and compliance with fair housing laws.

Courtesy and Service

Real estate is all about relationships so being courteous and providing good service is critical to success. Think through the prospect's experience from their perspective as if you are a new client yourself. Ask yourself:

- What is their experience like in person? How are they treated? What information is made available to them? How are cold call/walk-in referrals to agents made?
  - ☐ Review your processes and ensure that no protected characteristics are taken into account.
- What is their experience like by phone? How quickly are return calls made? Does every message get a response?
  - ☐ It's a good idea to have an established communication plan, such as calls (and other inquiries) are returned within 2 business days.
- What is their experience like online? How quickly are email or web form inquiries addressed? Is your website user friendly and accessible? Is your social media up to date?
  - ☐ Note: see website section below!

Interviewing and Qualifying

Getting a solid understanding of the particular interests and market that the prospect is interested in is a particularly important part of fair housing compliance.

- Avoid making assumptions on likes or dislikes and qualifications of prospects.
  - ☐ Use open-ended questions to avoid any assumptions being made.
- Allow the prospect to define the type of housing, location, and amenities of their choice.
  - ☐ Document their specifications and follow them as closely as possible.
  - ☐ Check in as the search progresses. If it changes/narrows, update documentation with any changes.
  - ☐ Establish a process that works best for you to ask appropriate questions consistently (price range, housing preference, desired features, initial investment, preapproval, financing, etc.).
  - ☐ Review these processes regularly to ensure no one receives less favorable service based on a protected class.

Financial Information

It is essential that accurate information on the different types of financing available and current rates is given to all prospective clients.

- Fair housing laws apply.
  - ☐ Have updated mortgage information on hand that can be shown consistently to prospects.
- Avoid comments about financing, such as that it may be difficult to obtain.
  - ☐ Allow the lender to make the assessment.
- Think about providing consistent information, resources, and referrals.
  - ☐ If financial information is provided to some prospects, it should be provided to all prospects.
  - ☐ If you are sharing any resources such as first-time homebuyer incentives, be sure to offer them to all first-time homebuyers.
  - ☐ If referrals are made to lenders or others, make them consistently and ensure that they are familiar with and utilizing best practices under fair lending and fair housing laws.

Housing Availability

It is important to be aware of the number of available housing choices that are ready for immediate inspection. For many agents, this comes down to entering criteria and receiving a detailed and sometimes extensive list of options.

- Do not assume that the client understands the way in which the search may be altered by the slightest change in a variable.
  - ☐ Be careful to suggest a similar number and types of homes across protected classes - or take care to explain the reasons why the given criteria may have created limitations in possible listings.
  - ☐ If a home meets the buyer's preference, do not omit showing it.
- The content, quality, and quantity of the information provided as well as the level of service provided to all prospects should be equal.
  - ☐ Be certain to include all homes that fit within the criteria given to you by the client.
  - ☐ Do not suggest that one prospect drive through a neighborhood and, at the same time, show another prospect through the interiors of homes.

Location

Fair housing laws are about choice, including where someone wants to live.

- Allow the prospect's choices to inform the location of properties they are shown.
  - ☐ Show all homes that fit the buyer's specified preferences in order to give them as many choices as possible.
  - ☐ Be certain that it is the buyers' request and not your suggestion that determines the areas in which housing is sought.
  - ☐ Document their requests and preferences, including where they specifically requested to be shown homes; keep it updated if they change.
  - ☐ Document any incidences of statements that you feel may have a fair housing implication and follow your policies for next steps if needed.
- Requests for information and comments related to area schools should be objective, and prospects should be referred to neutral sources to do their own inquiry. Generally, best practice is not to offer advice on schools. However, if you are, you would be wise to have a comprehensive amount of fact-based information to present to the prospect regarding all the schools in the area.
  - ☐ Make sure that the prospect leads the narrowing of the search, and make note of the way that the search was conducted.
- Answering any questions on demographics can also raise potential fair housing issues.
  - ☐ Direct prospects to neutral sources that they can access on their own. If you are asked or pushed to answer, you can rely on fair housing laws to state that you cannot provide information on any protected classes.

Follow-up Plan

Communication is key to good business and good fair housing practices. People who do not receive any follow up may wonder why they are not being contacted or taken seriously. You also may lose an excellent prospect.

- Make sure your communication plan ensures consistency in communication with regard to all prospects.
  - ☐ Be sure to evaluate your plan on an ongoing basis. If your level of treatment is unequal, you should take a hard look at your internal policy for making follow-up contact.
  - ☐ If you request contact information for a callback, ensure that it actually happens. If it doesn't, why? Review and update the internal policy.
  - ☐ If the prospect declines follow up, it should be noted that they did so.

I am representing a buyer who wants to see homes in a neighborhood that I consider to be a “bad area” of town. I don’t think the buyer would be happy there, and I plan to encourage the buyer to consider other neighborhoods where I think they would be more comfortable.

Is that legal?

Steering

- **Real estate professionals cannot <u>STEER</u> buyers to or away from unavailable housing based on their protected class status.**

- Be certain it is the **<u>buyer's request</u>** and not **<u>your suggestion</u>** that determines the areas in which housing is sought.

- If a home meets a buyer's preference, do not omit showing it.

- ***Home v Avant Realty* (2025),** Buffalo steering case.

- If a buyer requests information about **<u>schools</u>** or neighborhood **<u>demographics</u>**, they should be referred to a **<u>neutral source</u>** to do their own inquiry.

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We had a buyer come to our office looking for an agent to work with. The buyer plainly stated that he did not want a woman representing him.

Should the brokerage honor that request?

Agent Training and Preventing Fair Housing Violations

- You should explain to the buyer that the Fair Housing Act prohibits brokers from matching clients with agents based on gender (or any other protected class).

- **Brokers should have a plan in place for how to address and prevent these situations with clients.**

- Are your agents trained on how to respond to such requests?

- Use the Fair Housing Checklist!

Seller Disclosure

A widow put her home in a trust and named her two adult children as successor trustees. After her death, one of the children moved into the home temporarily until it could be sold.

Is the trustee who is residing in the home required to complete the statutory seller disclosure form?

Non-Occupant Fiduciaries

- A trustee who is residing in the home must complete the statutory Seller Disclosure Statement.

- Only **NON-OCCUPANT** fiduciaries are exempt under the Seller Disclosure Act.

- **Full list of exemptions under the Michigan Seller Disclosure Act:**
  1. Court-ordered transfers
  2. Foreclosure sales/deeds in lieu and subsequent sale from lender
  3. Transfers from non-occupant fiduciaries
  4. Transfers to a spouse, parent, grandparent, child, or grandchild
  5. Transfers from one co-tenant to another co-tenant
  6. Divorce proceeding transfers
  7. Transfers to or from a government entity
  8. Builder's sale of newly constructed never-been-inhabited home.

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The owner of the home I am listing inherited the home from her father. She does not currently live in the home. In fact, she has never lived in the home. But, legal title is now in her name.

When she sells the home, does she need to complete a seller disclosure statement?

Non-occupants and disclosure

- While property owned by an estate is exempt under the Seller Disclosure Act (so long as personal representative does not live in the home), **once the property has been distributed from the estate to the heir, it is no longer exempt.**

- Remember, never having lived in the home is NOT an exemption under the Michigan Seller Disclosure Act. This is an important consideration when working with landlords, investors, individuals who recently inherited a home, etc.

I am a buyer's agent representing a buyer in sale of vacant land. The seller will not fill out a vacant land disclosure form even though my buyer has requested that the seller do.

Can my buyer back out of the deal if the seller does not provide a vacant land disclosure form?

Vacant Land Disclosures

- In general, the MI Seller Disclosure Act permits a buyer to walk away from the deal at any time, up until closing, if the seller does not provide a completed seller disclosure statement.

- However, the MI Seller Disclosure Act does **<u>not apply</u>** to:
    1. Commercial transactions; or
    2. Sales of vacant land.

- There are vacant land disclosure forms available. However, their use is discouraged because, unlike under the SDA, a seller will be liable for an innocent misrepresentation in a vacant land disclosure form (because there is no statutory protection like there is with the SDA).

Brokerage Operational and Licensing Issues

I have my broker’s license in both Michigan and Indiana. Currently, I have offices in both states. I want to close my office in Michigan but still operate in both states.

Can I do that?

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Maintaining a "Place of Business"

- **The MI Occupational Code requires a real estate broker to maintain a "place of business" in Michigan.**

- A "**place of business**" is defined as a **physical location** that a real estate broker, by advertisement, signage or otherwise, **represents to the public** as a place where clients and customers may **consult or do business** with a real estate licensee. **(MCL 339.2501(m)).**

I am an associate broker and have my own firm. I do not have any salespersons who work for me. I plan to operate out of my home as opposed to maintaining a separate office space.

Can I do that?

Maintaining a “Place of Business”

- This depends on your local ordinances!

- While there is nothing in the MI Occupational Code that prohibits a broker from using their home as a “place of business,” there may be a local ordinance or condominium/subdivision restriction that prohibits them from doing so.

I am a licensed agent, and I will be out of town for 1 week on vacation. One of my buyers wants to see a home while I'm out of town. I plan to have my UNLICENSED assistant accompany my buyer-client on a tour of the home. My assistant would not write an offer or even attempt to answer any questions about the home during the showing.

Is that permitted?

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Licensed Activities

- Historically, LARA has taken the position that only **LICENSED** agents can show property.

- While an unlicensed assistant cannot independently show a home or host an open house, they can accompany a licensee (so long as they are not performing licensed activities).

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Can I treat my personal assistant as an independent contractor rather than an employee?

Employees v Independent Contractors

- It depends on 1) Whether they are licensed or unlicensed; 2) Whether they have an independent contractor agreement, and 3) how they're paid.

- **Unlicensed** assistants are always employees.

- A **licensed assistant** will only qualify as an independent contractor if:
    1. The sign a **written independent contractor agreement** agreeing that they are not an employee for state and federal income tax purposes; and
    2. **At least 75%** of their annual compensation is from **commissions**.

- If they are paid on an hourly basis, they are an employee (regardless of their licensing status).

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A **SALESPERSON** has formed a corporation for tax purposes. They want their broker to make all future commission checks payable in the name of the company.

Is that legal?

Paying Salespersons

- Salespersons cannot receive commission checks in the name of a corporation (or other legal entity).

- A salespersons' license can only be issued to an INDIVIDUAL – not a legal entity.

- Brokers can only pay commissions to real estate licensees.

An **ASSOCIATE BROKER** has formed a corporation for tax purposes. They want their broker to make all future commission checks payable in the name of the company.

Is that legal?

Paying Associate Brokers

- Remember, brokers can only pay commissions to real estate licensees.
- A broker's license can be issued to a legal entity (unlike a salesperson's license which can only be issued to an individual).
- If an associate broker forms a corporation (or other legal entity) and obtains a broker's license for that entity, then commission checks could be issued in the name of that entity.