MICHIGAN REALTORS®

THE CONVENTION

Amway Grand Plaza Hotel & DeVos Place, Grand Rapids | Sept. 21-23, 2022

Within the Law 2022

RECENT AGENCY RESPONSIBILITY CASES

This article will discuss several recent cases involving the creation and fulfillment of agency responsibilities. It is often fairly easy to determine how a lawsuit could have been avoided once it occurs. It is less painful to learn these lessons from lawsuits that happen to other people.

Case No. 1:

> A New Jersey Agent was working as a buyer's agent with buyers who became interested in a home that was not listed. Agent contacted the owner of the home. Agent had the owner sign a listing agreement and then immediately had both the seller and her buyers sign a dual agency agreement. As the transaction progressed, the buyers and the seller had a number of disputes which the Agent attempted to navigate. Eventually the deal fell apart.
>
> After the transaction fell apart, the seller sued the Agent claiming that while she had agreed to act as a dual agent, "she was . . . acting 99% in favor of the buyers." While the Agent won the case, she was required to hire an attorney to defend her against the pro se (unrepresented) seller who appealed the case after he lost at the trial court level.[1]

Serving in a dual agent capacity is <u>always</u> difficult. The role of a dual agent is not that of a mediator; the role is simply to facilitate the transaction. This role becomes nearly impossible if the relationship between the sellers and the buyers becomes toxic. Outside of a dual agency situation, if a dispute arises between sellers and buyers, a listing agent can often walk her sellers through their options. If the listing agent is acting as a dual agent, this becomes much more difficult. Any comment by the Agent that is not wholly aligned with the sellers' view of the situation may be interpreted as the Agent "taking the buyer's side."

This lawsuit could have been avoided had the Agent not created an agency relationship with the seller. Dual agency should be avoided if at all possible. If an agent already represents

[1] *Ardiles v D'Agostino*, unpublished opinion per curiam of the Superior Court of New Jersey, Appellate Division, issued December 24, 2020 (Docket No. A-3399-18T1); 2020 WL 4932791.

the buyer, there is no reason for that agent to enter into a listing agreement with the seller of a home that those buyers want to purchase. A one-party commission agreement (as opposed to a one-party listing agreement) allows an agent to continue to represent only the buyer but requires the seller to pay the buyer's agent's commission. (Michigan Realtor® Form N can be used as either a one-party listing agreement or a one-party commission agreement.)

* * *

Case No. 2:

> Hall and Shields, who were represented by Agent, entered into a purchase agreement to buy vacant land. At the time the purchase agreement was signed, the seller provided a Seller's Disclosure Statement which disclosed the existence of two oil wells. Payne stepped in for Shields, and the purchase agreement was amended to provide that the buyers would be Hall and Payne (rather than Hall and Shields). Agent continued to represent the buyers in the transaction.
>
> After closing, Hall and Payne discovered significant environmental and safety issues relating to the oil wells. Payne sued Hall for failing to provide him with a copy of the Seller's Disclosure Statement which had disclosed the existence of the oil wells.
>
> The court threw out Payne's claim against Hall because the Agent – who was Payne's real estate agent – had known about the Seller's Disclosure Statement. The court held that under the law, Payne was deemed to have known everything Agent knew.[2]

It is a generally held principle of law that knowledge of an agent is imputed to the principal (for example, a buyer or seller). In other words, a buyer-client is deemed to know what the buyer's agent knows. If a seller/listing agent discloses something to a buyer's agent, the buyer is deemed to know that information whether or not the buyer's agent actually passes it on to the buyer.

Realtors® should keep in mind, however, that the fact that this knowledge is imputed to the buyer means only that the buyer has no claim against the seller/listing agent for nondisclosure.

[2] *Payne v Hall*, 399 Mont 91; 458 P3d 1001 (2020 MT 46).

The reasoning is simply that the seller/listing agent did their part by passing on the information to the buyer's agent. If the buyer's agent does not pass on this information to the buyer, the buyer certainly could have a breach of fiduciary claim against his buyer's agent.

Finally, as an aside, in this current case, Payne had argued that the Agent was not actually his agent because he had not signed a buyer's agency contract. (Recall that Payne had entered the transaction after the initial purchase agreement was signed.) This, however, is not a correct statement of the law in Montana (or in Michigan). A Realtor® can become someone's agent with all of the attendant responsibilities and potential liabilities even if there is no agency contract. Without an agency contract, the Realtor® may not be able to get paid (and, of course, will not have all of the protections typically provided in an agency contract) but may still be legally responsible. An agent without an agency contract has all of the risks and none of the benefits that come with an agency relationship.

* * *

Case No. 3:

> A recent North Carolina case involved a real estate agent who had known about a leaky roof but had not disclosed that information to the buyer. When, after closing, the buyer sued the agent for failing to disclose the existence of the leaky roof, the agent's defense was that he had hired someone to fix the problem and that it was reasonable for him to believe it had been fixed and therefore that he had nothing to disclose.
>
> The court rejected the agent's defense, first because the person that the agent had hired to fix the leak (Mr. Cribb) was a painter and pressure washer and not a licensed contractor. The court also pointed out that after the work had been done, Mr. Cribb had sent a text to the agent stating that he "may have located the leak" and that he "hope[d] that was it."

> Based on these facts, the court concluded that the agent had acted unreasonably in relying on the adequacy of Mr. Cribb's performance in fixing the water problems.[3]

While admittedly this case was chosen in part for its entertainment value, it does nonetheless raise some important concerns.

It is, of course, true that Realtors® should never choose the person or company that will handle repair items. But it is equally true that a Realtor® should not insert themselves in the middle of what should be a conversation directly between a contractor (or inspector) and the seller-client or buyer-client. If a contractor is reporting back on what they have found, the repair that was made and/or the likelihood of future problems, that report should be made directly to the client. A Realtor® who allows themselves to be the one to relay such information to their client is opening themselves up to a future claim that their rendition of the discussion was inaccurate – either intentionally or negligently.

To recap:

1. A buyer's agent can work with (and get paid by) a FSBO seller without creating an agency relationship with that seller.

2. As a matter of law, a buyer-client is deemed to know everything his or her agent knows.

3. A licensee can be responsible for breach of fiduciary duty even in the absence of a written agency contract.

4. A buyer's agent should always require that the contractor or inspector communicate directly with the buyer (rather than communicating through the buyer's agent).

[3] *Cummings v Carroll*, 379 NC 347; 866 SE2d 675 (2021).

SIMULTANEOUS COMPLIANCE WITH BOTH CODE OF ETHICS AND THE LAW – IN HARMONY

The NAR Code of Ethics and Arbitration Manual provides that:

> The Code, in its application or implementation, must always be construed harmoniously and consistently with the law.
>
> * * *
>
> The relation of the Code to the law is two-fold. First, the Code defines those duties and obligations required in the public interest which are beyond the capacity or power of the law to mandate, and second, the Code supports the law by requiring a higher sensitivity to the duties and obligations which it imposes.
>
> * * *
>
> While the Code of Ethics establishes obligations that may be higher than those mandated by law, in any instance where the Code of Ethics and the law conflict, the obligations of the law must take precedence.

It is usually the case that obligations of the Code of Ethics are above and beyond what is required under the law. As a general matter, if the Code of Ethics and the law are not in conflict, a Realtor® must comply with both. If there is a conflict, meaning that a Realtor® cannot comply with one without violating the other, then the Realtor® must follow the law. To the extent possible, the Code of Ethics should be read to be in harmony with the law.

Keep in mind that not all wrongful conduct constitutes a violation of the Code of Ethics. A violation of the Occupational Code may or may not be a violation of the Code of Ethics. For example, a Realtor® who "borrows" his client's EMD has violated both the Occupational Code and the Code of Ethics. A Realtor® who fails to deposit the EMD within two banking days has only violated the Occupational Code (the Code of Ethics says nothing about the timing of the deposit of the EMD). A violation of the law is not automatically a violation of the Code of Ethics. This article will discuss four areas in which the Code of Ethics and the law are not totally aligned.

1. Presentation of Offers:

   Michigan law: Listing agent must promptly deliver all written offers to their seller upon receipt. A listing agent is **not required to deliver additional offers** to the seller after there is a binding purchase agreement in place unless the listing agreement expressly requires him/her to do so. (Rule 307)

   Code of Ethics: Listing Realtors® **must submit all offers** to their sellers "objectively and as quickly as possible" **until closing** unless the seller has waived that obligation in writing. (SOP 1-6; SOP 1-7)

   Compliance: A Realtor® should be in compliance with Michigan law if he/she complies with the Code of Ethics. Unless there is an express waiver in the listing agreement, a Realtor® should continue to present their seller client with all offers received until the transaction is actually closed.

2. Acquisition of Property by Licensee:

   Michigan law: Licensee who buys property **directly or indirectly** must disclose that status to the seller before seller is asked to sign a purchase agreement (MCL 339.2516(1), (2)). "Indirectly" is generally interpreted to mean an entity in which the licensee has an ownership interest.

   Code of Ethics: Realtors® cannot buy property on behalf of themselves, any member of their **immediate family**, their firm, any member of their firm, or any entity in which they have an ownership interest without making "their true position known" to the seller in writing. ("Immediate family" includes spouse, siblings, parents, grandparents and children.) (Article 4, SOP 4-1).

   Compliance: A Realtor® should be in compliance with Michigan law if they comply with the Code of Ethics. When a Realtor® is buying property in their own name or through an entity in which they have an interest, the Realtor® must disclose to the seller the fact that they are a real estate licensee. A Realtor® must also disclose to the seller if the buyer is a member of the Realtor®'s immediate family (*i.e.*, parents, sibling, spouse, children) or a member of the Realtor®'s firm.

   The rules are different on the selling side. Both the Occupational Code and the Code of Ethics say when selling property that they own or have an interest, a licensee must disclose that fact in writing before the purchase agreement is signed. Neither say anything about a listing agent being required to disclose the fact that the property being sold is owned by a relative.

3. Affiliated Businesses/Referrals of Business:

Code of Ethics: Realtors® may not refer a customer to a business in which they have an ownership interest without **disclosing that interest** at the time of the referral. A Realtor® cannot collect a referral fee without the client's consent. (Article 6, SOP 6-1)

Michigan Law: A licensee cannot accept referral fees from settlement service providers without the prior **written consent** of his or her client. (Rule 321)

Federal Law: A licensee cannot refer anyone to an affiliated business without using a **RESPA-compliant affiliated business disclosure form** at the time of the referral. The licensee cannot receive anything of value for that referral other than the ordinary return based upon her/her ownership interest in the affiliated company. (RESPA)

Compliance: A Realtor® should be in compliance with the Code of Ethics and Michigan law if he/she complies with federal law. A Realtor® cannot refer business to an affiliated entity (or any settlement service provider) and receive a referral fee from that entity. A Realtor® can only receive compensation commensurate with the work actually performed. Even if the Realtor® does not receive a referral fee, they cannot refer business to an affiliated entity without a RESPA-compliant affiliated business disclosure form.

4. Discrimination:

Code of Ethics: Realtors® shall not be parties to any plan or agreement to discriminate against a person or persons on the basis of race, color, religion, sex, handicap, familial status, national origin, **sexual orientation**, or **gender identity**. (Article 10)

Michigan Law: A listing agreement entered into between the broker and seller or lessor of property shall contain language that discrimination because of religion, race, color, national origin, **age**, sex, disability, familial status, or **marital status** on the part of the real estate broker, real estate salesperson, seller, or lessor is prohibited (but NOT **sexual orientation** or **gender identity**). (MCL 339.2515)

Federal Law: It shall be unlawful to discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin … or to discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap (Fair Housing Act). The Fair Housing Act is consistent with the Code of Ethics except that it does NOT INCLUDE **sexual orientation** or **gender identity**.

Compliance: A Realtor® will be in compliance if they recognize the following protected classes – whether covered by the Code of Ethics, Michigan or federal law: race, color, religion, national origin, age, sex, disability/handicap, familial status, marital status, sexual orientation and/or gender identity.

CONFIDENTIAL INFORMATION

Many Realtors® and their clients have mistaken ideas about what is and is not "confidential information." Not everything learned during an agency relationship is confidential. If, for example, a Realtor® represents the seller, information he learns from or about a potential buyer is not confidential information. For example, the terms of a buyer's offer are not confidential and may be shared with other buyers in an attempt to negotiate a better deal for your seller-client. Likewise, information available publically is not "confidential." For example, the fact that the sellers are in the middle of a divorce is not confidential because it is a matter of public record at the courthouse. As a general rule, information a listing Realtor® knows about his own seller is not confidential if learned from an outside source or even if available from an outside source.

That being said, even if information is not "confidential" in the legal sense, if the seller does not want the listing Realtor® to disclose the information, then the listing Realtor®'s duty of loyalty obligates him to remain quiet. So, for example, if the sellers are in the middle of a divorce, while the fact of the divorce is not confidential, if the sellers do not want this information disclosed, or if disclosure would not be in the sellers' best interest, then the listing Realtor®'s duty of loyalty obligates him to remain silent. The same would be true about the fact that the sellers accepted $10,000 less than the current list price on a prior deal that fell through. This information is not confidential – because it is known to the other agent and the agent's buyer-client – but the listing Realtor®'s duty of loyalty requires him to remain silent on the issue.

Why do we care if the listing Realtor®'s obligation to remain silent arises from her duty of loyalty rather than her duty of confidentiality? Primarily, because the duty of confidentiality survives termination of the agency relationship, while the duty of loyalty does not.

An agency relationship can be terminated a number of different ways. If the contract has an expiration date – which listing agreements are required to have – then the agency relationship terminates on the stated date. Likewise, if the sale closes, then the purpose of an agency relationship has been achieved, and the agency relationship terminates.

Once the listing contract expires or the closing occurs, the listing agent's duty to remain silent depends on whether or not the information is in fact confidential or is something that the sellers simply did not want disclosed. If the information was in fact confidential, the listing agent cannot disclose that information or use that information for their own benefit (or to the detriment of their former client) even after the agency relationship terminates. Information that was not confidential but was simply information that the seller did not want disclosed can be disclosed once the agency contract terminates.

Consider the following hypothetical:

> *Realtor® A lists Seller Jones' home for $200,000. At the time the listing is signed, Seller advises that their bottom line price is $180,000. Seller Jones receives and accepts an offer of $190,000. That transaction fails when the buyer cannot get financing. The house does not sell, and at the end of the listing, Seller Jones lists with another company. Realtor® A now has a buyer-client who is interested in Seller Jones' home. What can Realtor® A tell her buyer-client?*

Realtor® A can tell her buyer-client that Seller previously accepted an offer of $190,000. Realtor® A cannot tell her buyer-client that the Seller's bottom line price is $180,000, as that information is confidential. So long as the agency relationship continued, Realtor® A's duty of loyalty prevented her from disclosing the fact that Seller Jones had accepted an offer of $190,000. The duty of loyalty did not survive the termination of the listing agreement, so Realtor® A is free to tell her new buyer about the prior contract.

Disclosures Regarding Condition of Property

What if a listing agent knows that the Seller's Disclosure Statement contains false information? Based on the calls we receive on the MR Hotline, some Realtors® have the mistaken idea that anything they learn about the condition of the seller's home is confidential information and, therefore, they will be protected if a buyer sues them for fraud or misrepresentation. This is simply not true.

Information received by a prior buyer in the course of inspection is clearly not confidential information because anything learned from the other side of the transaction is not confidential. But what if the seller tells the listing agent about a defect that is not disclosed in the Seller's Disclosure Statement? Is that confidential information? Even if it is not confidential information, does the listing agent's duty of loyalty require the listing agent to keep the seller's secret? Listing agents who find themselves in this situation should remember that the Seller Disclosure Act protects real estate licensees from liability only so long as they do not "act in concert" with the seller to violate the act. A Realtor® who distributes what they know to be a false disclosure statement is arguably "acting in concert" with the seller.

Many national legal commentators take the position that a listing broker's duty of confidentiality does not include an obligation to withhold information about the condition of the property or to misrepresent the property's condition.[4] The Realtors® Code of Ethics provides that information concerning latent (*i.e.*, concealed or hidden) material defects is not considered "confidential information" (SOP 1-9).

[4] National Association of Realtors®, Real Estate Brokerage Essentials: Navigating Legal Risks and Managing a Successful Brokerage, 4th Edition, 2016, p. 97.

A rule promulgated pursuant to the Michigan Occupational Code does not address the confidentiality question directly but simply says:

> A licensee's full disclosure to a buyer or seller of material facts within his or her knowledge about the condition of the real estate offered shall not be grounds for disciplinary action, despite a claim by the buyer or seller that the disclosure constituted disloyalty to the buyer or seller in violation of an agency relationship.[5]

Whether or not the existence of a defect is "confidential" or not, it appears clear that a listing broker's fiduciary duties do not require that they stand by while their client commits fraud. It does not mean that it is the listing agent's responsibility to confirm that the information in the Seller's Disclosure Statement is correct. On the other hand, a listing agent should not knowingly pass on false information under the mistaken belief that the fiduciary duties they owe their seller will insulate them from liability.

Conclusion

In concluding our discussion on confidentiality, we have put together a few hypotheticals for discussion purposes:

1. Buyer's agent's Buyer No. 1 enters into a contract for $150,000 on a home listed at $175,000. The deal falls through when Buyer No. 1 cannot get financing. Same buyer's agent represents Buyer No. 2 who is interested in the same house. Can the buyer's agent tell Buyer No. 2 that the seller accepted a prior offer of $150,000?

2. Listing agent lists home for a couple who is in the middle of a divorce and anxious to sell.

    - Can listing agent tell buyer's agent that her clients are getting divorced if it is a matter of public record?

    - The listing expires and the divorcing couple then lists home with someone else. The former listing agent now has a buyer-client who

[5] R 339.22333.

becomes interested in the divorced couple's home. Can the former listing agent tell now buyer-client that the sellers are getting a divorce?

- Does it make a difference if divorce proceedings have not been filed and the former listing agent had simply been told by the sellers that they plan to file for divorce after the home was sold?

3. Buyer's agent's Buyer No. 1 terminates purchase agreement after "poor" inspection. Can buyer's agent share information she learned from that inspection with another buyer-client?

4. Listing agent receives 2 offers on the same home. Can she share the details of Buyer No. 1's offer with Buyer No. 2's agent?

    - Does she need the consent of Buyer No. 1? Does she need the consent of her seller?

FREQUENTLY ASKED QUESTIONS ABOUT EARNEST MONEY DEPOSITS

1. **QUESTION:** I received an offer that did not require the buyer to provide an EMD. Is this offer valid?

   ANSWER: YES. A purchase agreement without an EMD is enforceable (although rare).

2. **QUESTION:** I am a Realtor® representing a buyer who is making an offer on a property that a bank has taken back through the foreclosure process. The bank, through its listing agent, has countered my buyer's offer stating that the EMD will be held by the listing office. I told the listing agent that this is illegal. Am I correct?

   ANSWER: NO. There is no prohibition against a listing office holding the EMD in its trust account. The amount of the deposit and where it is held is negotiable between the buyer and the seller.

3. **QUESTION:** Can a seller and buyer agree that the EMD will not be deposited until after the inspection is waived?

   ANSWER: YES, but then the buyer may not deliver the check until after the inspection is waived. (Once an agent has the check in hand, it must be deposited.)

4. **QUESTION:** What if an EMD check bounces?

   ANSWER: A Realtor's® role as an escrow agent is a neutral role and, therefore, the Realtor® should notify both parties if the buyer's earnest money check bounces.

5. **QUESTION:** The purchase agreement says that if my buyer clients are turned down for a mortgage, my buyers are entitled to their EMD back.

That is exactly what happened but the seller objected so my broker won't release the EMD. Why isn't the contract enforced as written?

ANSWER: The purchase agreement is to be enforced as written, but the law says that in the event of a dispute, a court, not a real estate licensee, is responsible for interpreting the purchase agreement. This is true even if the correct interpretation seems obvious.

6. **QUESTION:** Once a transaction falls through, does a broker need to get a written release from both parties before releasing the EMD?

ANSWER: The law only requires that a written release be signed <u>if</u> there is a dispute. Once a broker is aware that both sides claim a deposit, the law requires that the broker not disburse the funds until he has a written agreement signed by both parties or a court order. (Some purchase agreements, and many office policies, require a release in all instances.)

7. **QUESTION:** I represented the buyer in a transaction that fell through. The seller will not sign my firm's standard release form which releases my firm (and me) from any liability arising in connection with this transaction. Am I required to release the EMD without a release?

ANSWER: You may require a release as to responsibility for the disbursement of the EMD, but you may not require a release from any liability whatsoever in connection with the transaction.

8. **QUESTION:** I am the listing agent. One week after a purchase agreement was signed, the buyer sent an email stating that he was backing out of the purchase contract. The buyer is demanding that the sellers authorize the release of the buyer's EMD and claims that the sellers cannot sell their home to anyone else until the parties sign a mutual release. Is this true?

ANSWER: NO. If the first buyer has terminated the purchase agreement, the sellers are free to sell their home to someone else. The sellers' dispute with the first buyer over the mutual release and the EMD does not need to be resolved before the home is sold.

9. **QUESTION:** Eight months ago, both the buyer and the seller claimed the earnest money in connection with a failed transaction. I did not hear anything on this until the buyer called recently and requested the money. Can I release the earnest money to the buyer without contacting the seller?

ANSWER: Once a dispute has occurred, the law requires a Realtor® to keep the EMD until the parties reach an agreement or until there is a court order directing the release of the funds. After a dispute arises, there is no provision that allows a Realtor® to release the deposit after a stated time period has elapsed.

10. **QUESTION:** I am representing the sellers in the sale of their house. There have been some delays and the buyer is asking for yet another extension. My sellers will only give the buyer another extension if the buyer agrees to a $2,000 non-refundable deposit. I have heard that non-refundable deposits are illegal. Is this true?

ANSWER: NO. A buyer and seller can certainly agree that a deposit will be non-refundable. You will want to make certain that this is explicitly stated in the contract so that there can be no argument about the parties' intent.

11. **QUESTION:** My buyers are having second thoughts about going ahead with the purchase of a home. Can they just walk away from the transaction and forfeit their earnest money or are there other potential risks?

ANSWER: Some purchase contracts provide that in the event of a default by the buyers, the sellers' only remedy is to keep the buyers' EMD as "liquidated damages." However, many, perhaps most, purchase agreements provide that in the event the buyers default, the sellers can keep the EMD and sue the buyers for damages. Your buyers should be encouraged to consult with an attorney.

12. **QUESTION:** I have money in my trust account from a failed transaction that happened several years ago. I cannot locate either party to the transaction. What should I do with this money?

ANSWER: Unclaimed EMDs become the property of the State of Michigan after 3 years (*i.e.*, it "escheats" to the State). There is a process that must be followed for surrendering these funds. Details can be found at: https://unclaimedproperty.michigan.gov/

RECENT COPYRIGHT CASES INVOLVING MLS PHOTOGRAPHS

This article will discuss several actual lawsuits involving listing photographs and copyright law. Realtors® should keep in mind that a photograph has copyright protection even if it is not registered. (Although a copyright registration may result in an increased damage award in the case of an infringement.)

Case No. 1:

> A Florida photographer specialized in photographing very expensive real estate listings in South Florida. On more than one occasion, a real estate agent who was the second listing agent for a couple of these homes used this photographer's photographs from prior listings. When the photographer contacted the real estate agent to object, she did not respond. The issue to be decided by the court was the amount of money the agent owed the photographer and whether her real estate company was also liable.[6]

The law and MLS rules are very clear – if a seller relists their property with a new broker, that new listing broker cannot use the prior listing broker's photographs. Some sellers believe that they have the legal right to use any photograph of their own home. That is simply not true. The copyright belongs to the person who took the photograph – not the owner of the subject of the photograph. This, of course, is subject to any rights the photographer may have expressly given to the seller. Unless the photographer gave the seller rights in the photograph, the seller has no right to give anyone the right to use a photograph of the seller's home. If, as is more typically the case, the photographer gave the first listing office rights to use the photographs, the second listing office may not use the photographs for their listing, even with the "consent" of the seller.

In this particular case, the federal court awarded the photographer damages in excess of $100,000, a significant part of which were punitive because the salesperson had repeatedly ignored

[6] *Affordable Aerial Photography, Inc. v Villa Valentina Realty LLC*, unpublished order of the United States District Court for the Southern District of Florida, issued June 7, 2018 (Case No. 17-81307-CV-Middlebrooks/Brannon); 2018 WL 8129826.

the claim and refused to cooperate in the lawsuit. The salesperson's brokerage firm was found to be liable for the acts of its salesperson.

* * *

Case No. 2:

> A salesperson always took his own photographs of the homes he listed for sale. After photographs were taken by the salesperson, he submitted them to his broker's office where they were uploaded onto the MLS. At some point, the salesperson's relationship with his broker was terminated. The listings stayed with the broker who continued to use the former salesperson's photographs. The issue to be decided by the court was whether the photographs belonged to the brokerage firm or the salesperson.[7]

Unless there is a contract that says otherwise, photographs taken by a salesperson belong to the salesperson. Although, under the law, the listings themselves belong to the broker in the event of a termination of the independent contractor relationship, that does not necessarily mean that the broker can use the salesperson's photographs. There would need to be a contract in place whereby the salesperson had given the broker rights to the photograph. Many independent contractor agreements (including the Michigan Realtors® form) include a provision whereby the salesperson agrees that all photographs (and other copyrightable elements of a listing) submitted by the salesperson belong to the broker. If, instead of taking their own photograph, a salesperson hires a photographer, the salesperson must make certain that the photographer gives the salesperson not only the right to use the photograph, but also the right to assign those rights to his/her broker.

* * *

[7] *Valdez v Laffey Associates*, unpublished memorandum decision and order of the United States District Court for the Eastern District of New York, issued March 26, 2010 (Docket No. 07-cv-4566 (BMC)(LB); 2010 WL 1221404.

Case No. 3:

> A Texas home builder hired an architectural photographer to take photographs of several of its homes. The photographer was to get $1,000 per home to be paid if and when a home was sold. There was no written agreement, and a dispute later arose as to what the builder was allowed to do with the photographs. The photographer took the position that the photographs were only to be uploaded to the MLS. The home builder's position was that the parties had agreed that the photos could be used in all marketing efforts – *i.e.*, flyers, online sales brochures and other marketing materials. Because there was no written agreement, the issue to be decided by the court was whether the home builder's use of the photographs had exceeded the scope of its "implied license."[8]

A photographer can agree that all of his rights in a particular photograph to the Realtor® who hired him. This can be done pursuant to a "Work Made For Hire Agreement" or an "Assignment Agreement." Alternatively, a photographer can give someone a "License" to use a photograph for a particular purpose and/or for a particular time. In the case of a license, obviously it is very important that the license clearly spell out exactly what can be done with the photograph. MLS rules require that, at a minimum, the broker must obtain the right to give the MLS a license to use the photograph in its MLS compilation and also in any statistical reports on comparables. Under MLS rules, if a broker submits a photograph without appropriate authority from the photographer, the broker must indemnify the MLS (as well as any other MLS participant) against any liability as a result of its "inadequacy of ownership."

To recap:

1. Photographs are protected even if there is no registration or copyright symbol on the photograph.

2. A photographer can assign the copyright for a photograph or simply give someone a non-exclusive license to use the photograph for a particular purpose.

[8] *Stross v Centerra Homes of Texas, LLC,* ___ F Supp ___ (WD Tex, Austin Div, 2021); 2021 WL 5190877.

3. Where a Realtor® only has a license, the Realtor® must use great care to make certain that his/her use of the photograph does not exceed the scope of the license – or, looking at it another way, the Realtor® should make certain that the license is sufficiently broad to meet the Realtor's® marketing plans.

4. A person who receives only a license cannot assign those rights to a third party unless he/she is authorized to do so by the person holding the copyright.

5. MLS rules provide that by submitting a photograph to the MLS, the broker is warranting that it has the authority to do so (and that it will indemnify the MLS in the case of "inadequate ownership").

6. If a salesperson is responsible for obtaining his/her own photographs, the broker's independent contractor agreement needs to cover copyright issues. In order to comply with MLS rules, the broker must obtain rights in these photographs from its salespersons.

7. Sample forms of a "Work Made For Hire Agreement," an "Assignment Agreement" and an "Exclusive License Agreement" are available at https://www.nar.realtor/copyright/listing-photo-sample-agreements.

THE ANATOMY OF A PURCHASE AGREEMENT – THE RULES OF OFFER AND ACCEPTANCE

1. A seller who receives an offer can accept, reject, counter or do nothing.

2. A seller with multiple offers is not required to consider them in any particular order, or treat all of the offers "fairly." This is true even in a "highest and best" situation. The terms of an offer are not confidential and may be disclosed to another buyer.

3. An offer to purchase real estate cannot be accepted orally. A buyer does not have an enforceable contract when the listing agent calls the buyer's agent to report that the seller has signed the buyer's offer. Acceptance requires a signature and delivery of the signed acceptance.

4. Likewise, a buyer does not have an enforceable contract when the listing agent emails or texts the buyer's agent to report that the seller has signed the buyer's offer. Again, acceptance requires a signature and delivery of the acceptance.

5. An offer can be revoked orally at any time before it is accepted. This is true even if the offer contains a stated expiration date and time. MR's Buy and Sell Agreement says that the offer will expire on the particular date stated or upon seller's receipt of revocation from the buyer, whichever comes first. This language is intended to make clear that the offer can be revoked before the stated expiration date.

6. A buyer cannot simultaneously accept and materially change a seller's counteroffer. Any alteration which changes the obligations of a party in any respect is "material."

7. Once an offer is countered, it has been rejected. A seller who has countered a buyer's offer cannot go back and "accept" the buyer's offer as originally proposed.

8. In the event of a conflict between the preprinted form and specifically added language, the specifically added language controls. In the event of a conflict between two specifically added provisions, the provision that is later in time controls. It is much easier to apply these rules if the parties use addendums rather than making handwritten initialed changes to the preprinted form.

9. A "bottom line" signature is not required in order for there to be an enforceable contract (unless the contract specifically says so). The "bottom line" signature serves only as verification that the signed purchase agreement has, in fact, been provided to the buyer as required under the Occupational Code. Even if the buyer

refuses to sign the "bottom line" of the purchase agreement, it is nonetheless binding and in full force and effect.

10. Once there is a binding purchase agreement in place, thereafter, either party may propose a change to that purchase agreement via a proposed amendment. If a proposed amendment is rejected, then the original contract stands as is. A party cannot get out of a purchase agreement just because the other party has proposed an unacceptable amendment.

11. There are no standard rules for back-up offers. For this reason, it is not enough to simply say "this is a back-up offer." The contract needs to spell out exactly how the back-up offer will work. For example, the seller is going to want to make clear that the seller is free to negotiate changes to the first place contract. Both parties will want to spell out exactly how the time deadlines will work and when and if the back-up offer moves to first position. Realtors® should include a written back-up offer provision in their form file – and should never write one on the run. Sample language is attached.

BACK-UP OFFER ADDENDUM

Seller: _____

_____

Buyer: _____

_____

Property: _____

_____

Buyer and Seller acknowledge that there is a previously accepted offer on the property ("Primary Contract") and that this is a Back-Up Offer which shall be effective only in the event that the closing on the Primary Contract does not take place for any reason.

Buyer acknowledges that nothing in this Agreement shall in any way restrict the right of the Seller to modify the terms of the Primary Contract as Seller shall, in their sole discretion, deem advisable.

In the event Seller shall notify Buyer in writing that the Primary Contract has been terminated, this Agreement shall become primary and the date of such notification shall be the effective date for purposes of calculating all deadlines contained herein.

Buyer may, at any time prior to this Back-Up Offer becoming primary, declare this Agreement null and void by providing written notice to Seller, in which case the earnest money deposit shall be refunded to Buyer and neither party shall have any further rights or obligations hereunder.

SELLER: BUYER:

_____ _____

_____ _____

WEBSITE ACCESSIBILITY

There are a number of different software products available to assist persons with disabilities in navigating websites. For example, users with visual disabilities may use screen readers or screen magnifiers to navigate websites. Screen readers are software programs that analyze the content of a website and convert text and other content on a website into synthesized speech. Some of the most common products are Android TalkBack, Kindle Text-to-Speech and Apple's iOS VoiceOver. Screen readers can be configured in terms of speed and other adjustments allowing the user to skip from heading to heading or read everything from top to bottom.

However, assistive technology does not work well in all instances. Sometimes a website is set up in such a way that even with the use of assistive technology, visually impaired web users still experience access limitations. Some of the most common impediments on websites include:

1. Low contrast text;
2. Missing alternative text for images (screen readers cannot analyze images to extract meanings);
3. Empty or broken links;
4. Headings without structure (screen readers which can search websites for specific information using a function that lists the headings are useless if the headings are not in a logical and ordered sequence);
5. Content that is not accessible by keyboards (most screen readers use a keyboard, as opposed to touchscreen or mouse, as the primary access tool); and
6. Pop-ups.

Currently, whether or not you are legally required to have an accessible website depends upon which court you ask. The applicable federal statute, the Americans with Disabilities Act ("ADA"), requires that "places of public accommodation," such as offices open to the public, provide full and equal enjoyment of their goods, services, facilities, privileges, advantages and

accommodations to people with disabilities. It is the Department of Justice ("DOJ") that administers and enforces the ADA. While the federal courts are split on the issue of whether websites are "places of public accommodation" that must comply with the ADA, the DOJ is not. The DOJ is, and has been, unwavering in its position that the ADA's requirements apply to all the goods, services, privileges or activities offered by public accommodations, including those offered on the web. In fact, the DOJ has actively prosecuted, and continues to prosecute, numerous cases against companies whose websites are not accessible by persons with disabilities.

For example, in November of 2021, following a failed compliance review conducted by the DOJ, Rite Aid was required to modify its COVID-19 vaccine registration portal within 30 days to conform to certain website accessibility guidelines; specifically, Web Content Accessibility Guidelines ("WCAG").[9] Among other things, Rite Aid was required to provide website accessibility training to all of its employees involved with the vaccine content on the website.

As indicated, the federal courts are fairly evenly split on whether to follow the position of the DOJ. In those instances where the courts have not followed the DOJ, they have ruled that the ADA "public accommodations" laws apply only to concrete, physical places and not services offered virtually via the internet. By contrast, those courts which have followed the DOJ's position do so most often for the stated reason that: in a society in which business is increasingly conducted online, excluding businesses that sell services through the Internet from the ADA would run afoul of the purposes of the ADA that individuals with disabilities fully enjoy the goods, services, privileges and advantages available to other members of the general public.

[9] WCAG is a set of voluntary industry guidelines for making information on a website accessible to users with disabilities and, in general, the standard used by the DOJ to judge compliance with the ADA. The WCAG has also been routinely cited by the Courts as the applicable standard for website compliance with the ADA.

If a website's content includes graphic images, photos and/or charts/tables, then it must include alternative text in order to be accessible with screen-reading software. Alternative text or "alt-text" is written copy that appears in place of an image that conveys the meaning and context of the image.

A lack of alternative text was the main issue in a federal case in New York brought by a visually impaired customer who had attempted to buy groceries online from the defendant, 88 Acres Foods, Inc. The plaintiff had been unable to do so using screen-reading software due to several accessibility barriers, one of which was the lack of alternative text. Other barriers involved broken links and links that were improperly labeled. Without proper labels, screen-reading software was unable to properly interpret the link. There were also links that did not contain any text, redundant links, and linked images that lacked alt-text. Plaintiff alleged that because these features were lacking, the website was inaccessible to visually impaired customers, including Plaintiff, who needed to use screen-reading software.

88 Acres Foods argued that the ADA "public accommodations" statute applies only to brick and mortar, actual physical establishments. The federal court in New York disagreed, stating:

> This Court holds that websites qualify as places of "public accommodation" [under the ADA], albeit electronic ones, and, as such, are required to provide equal services to visually impaired and sighted people.
>
> * * *
>
> [A contrary finding] would lead to the absurd result that people with disabilities are protected if they shop in-store at Whole Foods, but not if they shop online at Whole Foods.
>
> * * *

> The ADA's legislative history also supports interpreting the statute to apply to websites. In passing the ADA, Congress expressed the view that there was a "compelling need" for a "clear and comprehensive national mandate" to eliminate discrimination against disabled individuals, and to integrate them "into the economic and social mainstream of American life."[10]

However, a federal court in Florida reached the exact opposite when a visually impaired customer sued Winn-Dixie Stores, Inc. after being unable to access its website using screen-reading software. Winn-Dixie's website allowed sighted customers to refill prescriptions for in-store pick-up and link manufacturer's coupons to customers' rewards cards so that the coupons were automatically applied at check-out. These services were denied to visually impaired persons because the website was not compatible with screen readers. The trial court ruled in favor of the plaintiff customer. However, the appellate court reversed, finding that a website is <u>not</u> a place of public accommodation under the ADA. The Court reasoned that the ADA contains an "expansive" list of physical locations which are "public accommodations," including grocery stores. The list, however, does not include websites. The Court disagreed with the DOJ's position for a similar reason – that the official rules for implementing the ADA, issued by the DOJ, also failed to discuss websites.[11]

The federal Sixth Circuit Court of Appeals, which covers the State of Michigan, has not addressed the precise issue of whether a website is a place of public accommodation under the ADA. However, in other contexts, the Sixth Circuit has ruled that a place of public accommodation within the meaning of the ADA means a physical place. One of these cases involved the NFL's "blackout rule," which prohibited local broadcasters from televising home

[10] *Romero v 88 Acres Foods, Inc*, ____ F Supp 3d _____ (SD NY, 2022); 2022 WL 158686.
[11] *Gil v Winn-Dixie Stores, Inc*, 993 F 3d 1266 (11th Cir, 2021).

games that had not sold out, did not discriminate against hearing impaired plaintiffs (who were left without access to the game because they could not listen to it on the radio). One reason given by the Court for its ruling was that the "service" plaintiffs sought (the television broadcast) "does not involve a place of public accommodation."[12]

The United States Supreme Court has not weighed in on the issue. In fact, the Supreme Court expressly declined to review a federal Ninth Circuit Court of Appeals decision holding that Domino's Pizza's website violated the ADA. In that case, the plaintiff, Guillermo Robles, a blind man, accessed the internet using a screen reader. He could not, however, order pizza online because Domino's website was not designed to accommodate the use of screen readers. Robles sued Domino's and the Court of Appeals, Ninth Circuit, found in his favor. Domino's appealed to the United States Supreme Court which declined to review the case.[13]

NAR recommends that all Realtors® – wherever they are located – work with their website vendors to conduct accessibility audits of their business websites to identify and address accessibility deficiencies. By doing so, Michigan Realtors® not only will be prepared in the event the Sixth Circuit (or the United States Supreme Court) weighs in, but also will be doing their part to promote the very worthy goal of equal accessibility for all within the housing industry.

[12] *Stoutenborough v National Football League, Inc*, 59 F 3d 560 (6th Cir, 1995).
[13] *Robles v Domino's Pizza, LLC*, 913 F 3d 898 (9th Cir, 2019), cert den 140 S Ct 122 (2019).

ALL INSPECTION CLAUSES ARE NOT EQUAL

If we compared the various Realtors® buy and sell forms used throughout the State, it is likely the case that no two inspection clauses are exactly the same. Every agent in your office must understand this and, if they receive an offer on a form other than the one they typically use, they must be very careful to follow the inspection process outlined in that particular form. There are no rules of thumb as to how inspection clauses must work.

Differences between inspection clauses include:

1. Some forms allow a buyer to conduct whatever inspections they choose; others require the buyer to agree in advance as to what inspections will take place.

2. Some forms allow the seller to terminate the purchase agreement if the buyer submits any request for concessions; other forms say that if the seller does not agree, the buyer then has an opportunity to withdraw their objection(s) and close.

3. Sometimes the buyer's right to withdraw their objections depends on whether the inspection period has expired.

4. Sometimes if a party does not respond within an allotted time period, the transaction proceeds forward; other times, silence can result in a termination of the purchase agreement.

5. Some forms allow a buyer to terminate by simply providing a notification that the inspection is unacceptable; other forms require the buyer to be specific as to their objections and/or provide written evidence as to the defect(s).

6. Some forms provide that the buyer may only terminate the purchase agreement if a particular defect is material and/or the combination of defects is material.

7. Some forms try to limit the buyer's options. For example, there are forms that say if the buyer finds the inspection to be unsatisfactory, the buyer can either terminate the purchase agreement contract or request that the seller correct the defect (but presumably cannot request a price adjustment).

What is Sufficient Notice?

Most, perhaps all, inspection clauses require a buyer to provide notice "in writing." We have received a number of questions as to what type of writing is required. Must the writing be a

formal addendum to the purchase agreement, or will an email or text suffice? What about an email or text from the buyers' agent rather than the buyers themselves?

It seems unlikely that a court would hold that "notice" requires an actual proposed addendum signed by the buyer. That is certainly a best practice, but that does not mean that anything short of that will be deemed insufficient. It would seem to be the case that most judges would find any writing – on paper or electronic –from the buyers to be sufficient. Obviously, if the contract contains a specific provision discussing how notices will be handled, that process should be followed.

What about an email from the buyers' agent to the listing agent? Suppose, for example, the buyers' agent sends an email to the listing agent stating that "my client is waiving the inspection contingency?" Since the buyers themselves did not provide the notice, can the buyers later change their minds? Similarly, what if the inspection clause allows the seller to terminate the contract if the buyers make a concession request? If the request comes from the buyers' agent rather than the buyers, does the seller still have the right to terminate the purchase contract?

Again, best practices dictate that the buyers' agent should always have the buyers themselves sign any required written notice. But buyers' agents should not assume that they can provide informal notice on behalf of their buyer-client without committing their client in any way. There is a legal doctrine – the doctrine of "apparent authority" – where under some circumstances, a buyer will be deemed bound by the acts of the buyer's agent. Under this doctrine, the question is whether a person familiar with the nature of a particular business would believe that the agent had such authority. Obviously, this is a very subjective test.

Suppose that the purchase contract gives the seller the right to terminate if the buyer requests concessions. Under the apparent authority doctrine, if the buyer's agent, rather than the buyer, provides written notice asking for concessions, one could argue that it was reasonable for the seller to believe that the buyer's agent was speaking on behalf of her client and therefore the seller had the right to terminate the contract. At a minimum, it is a viable legal argument that could result in a costly lawsuit.

A Note on "For Informational Only" Inspections

"Informational only" inspections have become more and more common. Buyers agreeing to an "informational only" inspection often say something like, "that just means I won't ask the seller to make any repairs. If it is a big ticket item, I will walk away from the deal."

Legally, that is simply incorrect. By agreeing to an "informational only" inspection, the buyer is agreeing to buy the property regardless of what the inspection uncovers. If the buyer "walks" based on the discovery of a major defect, the buyer will be in breach of contract and be liable to pay the seller damages. Damages are typically the difference between what the buyer agreed to pay for the home and what it is worth. Obviously, the bigger the defect, the more likely it is that the buyer agreed to pay more for the home than what it is worth.

Buyer's agents should make sure that their buyer-clients clearly understand the ramifications of an "informational only" inspection. We have revised the Acknowledgment and Release that we provided last year to cover "informational only" inspections. If what the buyer really wants is the right to walk away in the case of a "big ticket" defect, then the clause needs to be written that way. For example:

> Buyer's offer is contingent upon a satisfactory inspection at Buyer's expense within ____ days; provided, however, that Buyer may not

terminate this Agreement based on the results of the inspection unless it reveals a single defect the estimated repair cost for which is in excess of $_____. Termination requires written notice of termination from Buyer to Seller, together with a copy of the inspection upon which Buyer relies.

RESPA REFRESHER

RESPA was enacted in 1974. Despite what some of you may have heard, it is not the case that RESPA is a thing of the past. Illegal kickbacks continue to be the most common RESPA violation. There are people in the real estate industry who continue to violate the statute, and there are plaintiffs' attorneys who continue to file class action lawsuits. Facts in a number of recent class action lawsuits make clear that there are still licensees who do not understand, or who have forgotten about, RESPA kickback prohibitions.

In a 2021 case, an Ohio attorney filed a class action lawsuit against the Wengerd Group, a real estate broker who allegedly paid bonuses to its agents if they placed orders with an affiliated title company. The lawsuit alleged that this arrangement violated Section 8 of RESPA which prohibits "settlement service" providers from giving or accepting compensation in exchange for referring business to one another. "Settlement services" are defined as services provided in connection with a residential loan and include title services, appraisals, inspections, home warranties and real estate brokerage services.

According to the complaint filed in this case, the broker's form contract with its agents had included the following provision:

> **Title Company Incentives**
> For every Buyer that you're able to close with Ohio Real Title, you will receive an additional $50 paid at the end of the year.
> For Example:
> Ohio Real Title 24 Closings
> Total 24 X $50 = $1,200
> For the 2019 Payout – we will count from January – November and then payouts will be made at the Team Christmas Party in December.

The complaint also referenced a company-wide Facebook message that had been sent out mid-year from the owner of the company:

> I'm excited to see the bonuses our agents will be getting at our Christmas party this year for their title payouts. **That's great extra income for no additional work**. Let's keep it going the second half!

Given this record, it was obviously difficult for the broker to claim that there had been no agreement to pay referral fees. Instead, the broker argued that these particular plaintiffs had no standing to challenge the referral fees because they were not actually referred to the title company. The plaintiff-buyers in the case had not worked with a Wengerd Group agent but had purchased a home listed by a Wengerd Group agent. Since the plaintiff-buyers had their own agent, the broker argued, they had not been referred by the seller's agent and, therefore, did not incur damages as a result of a "referral." The Court rejected this argument. The Court said that even though the plaintiff-buyers had their own buyer's agent, they may still have been referred to the title company by the seller's agent. Therefore, the plaintiff-buyers did have standing to bring a RESPA claim against the seller's broker.

Affiliated Business Arrangement Disclosure Forms

RESPA does not prohibit referrals, but only payments for referrals. However, if, for example, a real estate licensee owns an interest in a title company, they cannot refer business to that title company unless they get an Affiliated Business Arrangement ("AfBA") Disclosure form signed. An AfBA Disclosure form discloses the nature of the relationship and the estimated charges for the referred business while making clear that the use of this particular title company is not required.

Some Realtors® appear to be under the mistaken impression that referral fees are permissible if the client signs an AfBA Disclosure form. That is simply not the case. Rather, the form only authorizes distributions of profit (*i.e.*, returns on equity) based on the licensee's percentage ownership interest in the title company.

It is also the case that a licensee's ownership interest in the title company must be based upon the value of the various owners' investment in the company. The percentage ownership interest in the title company may not be calculated based upon expected referrals or adjusted later based upon actual referrals. Otherwise, the "return on equity" will be viewed as a disguised referral fee prohibited by RESPA and both the payor and the recipient will be subject to criminal and civil penalties.

Thing of Value

A Section 8 violation does not require that there be a direct cash payment in exchange for the referral. Section 8 prohibits providing any "thing of value" in exchange for a referral. As the United States Supreme Court once explained, even an exchange of valuable tickets to a sporting event in return for the referral of business is a violation of Section 8.

It is also an exchange of a "thing of value" if a settlement service provider assumes a financial obligation of the party making the referrals. For example, 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. According to the plaintiff-borrowers in that class action suit:

> Using third party marketing companies . . . created the false impression that [the title company] was purchasing marketing services for itself rather than on behalf of the mortgage company. Moreover, to further conceal the kickbacks . . . the title company

> and the mortgage company hoped to be able to use claims of "co-marketing" as a sham.

The defendants responded that they, in fact, had had a joint marketing arrangement and that the payments had been bona fide compensation for services actually performed. The Court refused the defendant's request that it throw out the case, holding that the plaintiffs should be given the opportunity to prove their case.

An Agreement or "Understanding"

An illegal referral arrangement need not involve an agreed-upon quid pro quo calculation based upon actual referrals. For example, payment of a monthly fee – or providing free services – as part of an unspoken "understanding" that the recipient will refer any business that comes his way is also prohibited by RESPA.

A plaintiff in a recent class action alleged that: (1) a title company had provided various payments and free services to loan officers who worked for a particular mortgage company; and (2) those loan officers had referred customers to the title company. The Court held that it was not necessary for the plaintiff-borrower to show that any particular "thing of value" had been tied in any way to any particular consumer and that an illegal referral arrangement may be established through a pattern or course of conduct.

Conclusion

Many real estate professionals believe that the Government is not currently focused on RESPA. Even if this is true, that does not mean that the RESPA rules can be ignored. First of all, the Government's focus can change without warning. Additionally, as these cases illustrate, class actions are still being filed regularly. Realtors® should continue to take the RESPA prohibitions very seriously. Violations of RESPA can result in civil lawsuits,

including class actions, in which licensees can be required to pay treble damages as well as attorneys' fees and costs. They can also result in criminal fines of up to $10,000 and imprisonment of up to one year for each occurrence.