



Within the Law

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PROMOTIONAL INCENTIVES

I. 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.

II. 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[®].¹ 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[®].

III. 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).² 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

¹ MCL 339.2512(1)(h).

² MCL 339.2511 (incorporating MCL 750.372a).

lottery, even though the patrons paid no additional amount beyond the cost of the theatre ticket.³ In that case, the Court stated:

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

The Michigan Supreme Court has likewise found consideration in a program whereby gas stations provided tickets for a drawing to their patrons and “to any one asking for tickets without making a purchase.”⁴ 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.⁵

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.⁶ 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.⁷ 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.”⁸) 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.

³ *Sproat-Temple Theatre Corp v Colonial Theatre Enterprise, Inc*, 276 Mich 127 (1936).

⁴ *Glover v Malloska*, 238 Mich 216 (1927).

⁵ *People v Brundage*, 381 Mich 399 (1968).

⁶ 1979-1980 Mich OAG No. 5692.

⁷ *ACF Wrigley Stores, Inc v Olsen*, 359 Mich 215 (1960).

⁸ *F.A.C.E. Trading, Inc v Dept of Consumer & Indus Servs*, 270 Mich App 653 (2006).

IV. 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 \$1,000.⁹

⁹ MCL 750.372(3).

SOCIAL MEDIA POLICY

SOCIAL MEDIA POLICY [BROKERAGE]

PURPOSE AND SCOPE

The scope of this policy applies to the use of social media in connection with the real estate business. This policy applies regardless of the social media platform being used and regardless of whether the technology used is a company or personal device. This policy shall be observed by all real estate licensees and unlicensed assistants (collectively referred to as “Agents”) affiliated with _____, (“the Brokerage”).

As used in this policy, “*engaging in social media*” means posting or uploading content to any type of interactive electronic communication including but not limited to websites, social networks, blogs, apps, discussion forums, and listservs.

This policy is not intended to cover activities which fall completely outside the scope of an Agent’s employment in the real estate business; however, any conduct which reflects adversely upon the Brokerage or the Realtor® organization generally may be reviewed under the terms of this policy.

GENERAL RULES

You are solely responsible for the content you make available on the web, and it remains your responsibility to stay compliant with local, state and federal law and the Code of Ethics of the National Association of REALTORS®. Agent will hold the Brokerage harmless for any loss or damages arising from any postings made by an Agent via social media in violation of this Social Media Policy.

The following sections of the policy provide general rules for using social media responsibly and safely, in the best interests of the Brokerage. These rules are intended to add to, not contradict, limit, or replace any legal prohibitions or contractual obligations.

Online Advertising

Any and all real estate advertising must comply with the applicable state licensing and advertising laws (MCL 339.2512e). All individual licensees and teams must clearly identify themselves as being affiliated with a licensed broker. All rules that apply to traditional print advertising also apply to online advertising.

- All advertising must disclose your status as a real estate licensee and include the Brokerage’s name and address or telephone number
- Agent is responsible for ensuring that any listing of qualifications, credentials or training contained on the site is correct, accurate and not misleading.

SOCIAL MEDIA POLICY [BROKERAGE]

- Agent shall not falsely claim association with any person or group.

Fair Housing Compliance

The law prohibits an Agent from discriminating in any activity related to the sale, rental, financing, insuring, advertising, or terms and conditions related to housing on the basis of race, color, religion, sex, disability, national origin, familial status, marital status, age, or any other protected classification under local ordinance.

- Agents shall not post any content which expresses or implies a preference based upon an individual's protected class.

Intellectual Property

Agents must respect laws regarding copyrights, trademarks, and other third-party rights. You are responsible for assuring that any material (listing photos, articles, artwork, music, etc.) posted to a webpage or MLS does not infringe on another individual's copyright or trademark.

- Wherever possible, link to other content elsewhere on the Web instead of republishing.
- Where appropriate, reference sources of particular information you post or upload and cite them accurately. Plagiarism applies online.
- Agents must obtain clear authority prior to posting any third party's content.
- Agents are responsible for ensuring that he/she is authorized to use photos/audios/videos posted to the site.
- Agents may not write regarding the listings of other licensees.
- If an image has been materially altered in any way, that fact must be disclosed.

Antitrust

Agents may not participate in any online activity that could be interpreted as an unreasonable restraint of trade. Comments about commission rates and/or commission splits may be viewed as an attempt to fix prices. Negative comments about a competitor or a vendor may be viewed as a group boycott. The bottom line is that if you could not say something in a room of competitors, you should not discuss it online.

SOCIAL MEDIA POLICY [BROKERAGE]

Safeguarding Confidential Information

Agents shall ensure that content posted online does not contain unauthorized disclosures of confidential information of either clients or the Brokerage. Agent shall secure permission to post the image of another person for marketing purposes.

Vendor Advertising

No vendor advertising may be posted to either an Agent's personal business page or the Brokerage business page. Agent shall not pay or receive anything of value in consideration for posting information. In both cases, this includes standalone posts as well as posts made in comment sections.

RPAC Solicitations/Political Advocacy

RPAC contributions shall not be solicited in any online public forum. When representing the Brokerage, refrain from expressing your own political views about individual politicians. In the business context, you should represent yourself as a member of the Realtor® party, which supports real property rights regardless of political affiliation.

ONLINE LANGUAGE

In General

Use appropriate business decorum in all online communications while acting in your capacity as a Realtor® and as an agent of the Brokerage. This means treating all coworkers, clients and competitors with respect and professionalism.

The Brokerage requires professionalism and honesty in social media and other communications. Always strive to be accurate in your communications and remember that your statements have the potential to result in liability for you and the Brokerage. You are responsible for assuring that your online content does not contain false, defamatory, demeaning or degrading statements.

You are personally responsible for what you communicate on social media. Remember that what you publish might be available to be read by the masses (including the Brokerage itself, future employers, and social acquaintances) for a long time. Keep this in mind before you post content.

SOCIAL MEDIA POLICY [BROKERAGE]

Protecting the Brokerage's Goodwill, Brand, and Business Reputation

When engaging in social media activity via a personal business account and speaking on an industry-related topic, make it clear that you are speaking on your own behalf.

Any statement regarding the Brokerage shall clearly disclose your affiliation with the Brokerage. It is important to specifically state that any personal opinions you express may not represent those of the Brokerage. For example, consider such language as "the views in this posting reflect my personal views and do not represent the views of my Brokerage." Use good judgment about what you post and remember that anything you say can reflect on the Brokerage, even if you do include such a disclaimer.

BROKERAGE BUSINESS PAGE

Page Administrator

The Brokerage maintains an official business page ("Brokerage Page") on multiple social media platforms, such as Facebook, so that the Brokerage has a recognizable presence and the ability to communicate with customers and other real estate professionals online. Only a designated representative ("Page Administrator") of the Brokerage is permitted to create and alter the Brokerage Page. If you are authorized to speak on behalf of the Brokerage, be sure that your posts reflect the Brokerage's position.

"Take Down" Policy

The designated Page Administrator shall monitor all Brokerage Pages and has the authority to remove third-party posts and comments which are deemed inappropriate by the Brokerage. This includes content that may be viewed as vulgar, discriminatory, harassing, or that violates state and/or federal law. Inappropriate posts/comments should be reported the Page Administrator so that the content may be reviewed.

PERSONAL BUSINESS PAGE

You are solely responsible for monitoring your personal business page(s) for inappropriate third-party posts and comments. This includes tracking and removing content that may be viewed as vulgar, discriminatory, harassing, or that violates state and/or federal law. Understand that if you fail to remove inappropriate posts and comments from your personal business page, you could face liability as a publisher of that content, even if the content was posted by a third party.

SOCIAL MEDIA POLICY [BROKERAGE]

TERMS OF USE

Agents shall be familiar and comply with the policies and requirements of any social media platform they use as part of their job duties or in the course of their business. Review the Terms of Use of all social media sites you visit and ensure your use complies with those terms. Do not expose yourself or the Brokerage to legal risk by using a social media site in violation of its terms of use.

NATIONAL ASSOCIATION OF REALTORS® CODE OF ETHICS

Agent is responsible for ensuring that all social media engagement conforms to the standards established in the National Association of REALTORS® Code of Ethics.

ACKNOWLEDGEMENT OF RECEIPT AND REVIEW

By signing below, I acknowledge that I have received a copy of the Brokerage's Social Media Policy and that I read, understood, and agree to comply with it. I understand that the Brokerage expressly reserves the discretion permitted by law to interpret, change, modify, update or delete provisions without immediate notice. I understand that any violation of this Policy can result in disciplinary action.

_____ Date: _____
Print Name

_____ Date: _____
Signature

SUPERVISION: NOT JUST AN OCCUPATIONAL CODE REQUIREMENT

We often talk about supervisory requirements under the Occupational Code. As Realtors® are well aware, the work of a real estate salesperson must be supervised by an associate broker.¹⁰ Under the Code, “supervision” of a salesperson requires:

- (a) Direct communication in person or by radio, telephone, or electronic communication, on a regular basis.
- (b) Review of the practice of the salesperson.
- (c) Review of the salesperson’s reports.
- (d) Analyses and guidance of the salesperson’s performance in regulated activities.
- (e) Providing written operating policies and procedures to the salesperson.

If the broker has a branch office more than 25 miles away from the nearest branch of the main office, that office must be under the “direct” supervision of an associate broker who must be physically present during ordinary business hours on “a regular basis.”¹¹ Remember that the direct supervision requirement is triggered by the existence of a branch office – that is, a physical location in addition to the main office which by advertisement or signs, is held out to the public as a place where clients and customers may do business. If there is a branch office, then that branch office requires the “physical presence” of an associate broker on a “regular basis” if the branch office is located more than 25 miles away from the main office. However, there is no requirement that agents work out of a branch office regardless of how far they may live from the broker’s main office. Brokers must supervise these “remote” agents, but they do not need to be “physically present” and may communicate with these “remote” agents “in person or by radio, telephone or electronic communication.”

While many of us have had numerous conversations over what level of accessibility and availability is required to satisfy the supervisory obligations under the Occupational Code, what is often overlooked in these conversations is just what a supervisory broker should be doing. Brokerage firms must remember that they should supervise their agents primarily because, in the end they are liable for the actions of their agents. For this reason, supervision should mean more than being available to answer the questions that the agents bring to you. Supervision means paying enough attention to know that the Realtors® who are out there passing out business cards with the firm’s name on it are ethical and know what they are doing. Perhaps the best way to understand the proper role of a supervisory broker is to consider the types of situations in which a salesperson’s actions can create liability on behalf of the firm. This article will discuss four such scenarios.

¹⁰ 339.2512f.

¹¹ 339.2505(3).

Scenario 1. *Realtor® Smith was the sole owner of a small brokerage firm that she started 20 years ago. The firm currently had five salespersons, and Smith was the only associate broker. Smith wanted to retire, and one of her salespersons was interested in purchasing the company. The salesperson did not have an associate broker's license and would not have enough experience to qualify for an associate broker's license for 16 months. Smith agreed to allow the salesperson to continue to name Realtor® Smith as the firm's sole associate broker after closing until such time that the buyer could qualify for an associate broker's license. The office manager was given a stamp with Realtor® Smith's signature that he could use to "sign" checks and documents. After closing, Realtor® Smith spent the next six months or so traveling around the country. When she returned to town, she learned that the buyer-salesperson had been "borrowing" funds from the firm's trust account. Of course, the checks that had been issued from the trust account were "signed" by Realtor® Smith (using the signature stamp she had left with the office manager).*

Obviously, Realtor® Smith should have never agreed to act as a supervisory broker in name only. Rule 313 provides that "checks drawn on a trust or escrow account must be signed by a broker or associate broker." The assumption behind this requirement is that a broker should be overseeing the trust account. The primary reason that a broker should be overseeing the trust account is not because the Department might find the firm in violation of the Code if this does not occur, but because if there are funds missing from the trust account, the company will be responsible. It does not matter that the firm did not have any knowledge of the theft and that it called the police as soon as it became aware of the theft. It is the company's trust account, and the company will be liable if money is missing. For this reason, if you handed someone a signature stamp five years ago, and that same person signs all checks, receives all bank statements and is solely responsible for balancing the books, you probably need to think about developing a new system of checks and balances.

Scenario 2. *Realtor® Jones is the supervisory broker for a midsize firm. Several of the salespersons licensed through the firm work solely as licensed personal assistants for the firm's largest producer, Salesperson Green. Realtor® Jones does not know the terms of employment between Salesperson Green and her licensed personal assistants. While he has attempted to broach this topic with Salesperson Green from time to time, Salesperson Green appeared to resent this intrusion, so Realtor® Jones has not pushed it. After Salesperson Green fired one of her licensed personal assistants, the assistant filed an unemployment claim with the State of Michigan. Realtor® Jones then discovered that Salesperson Green had been paying this assistant in cash on an hourly basis for years. Salesperson ® Green had not been doing any withholding, and the licensed assistant had not been paying federal or state income taxes.*

Licensed assistants who are paid on an hourly basis are employees for purposes of federal and state withholding, unemployment, workers compensation and all other purposes. In order to qualify as an independent contractor relationship, both of the following conditions must be satisfied:

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

- (ii) A least 75% of the annual compensation paid by the real estate broker to the real estate broker or real estate salesperson is from commissions from the sale of real estate.¹²

A licensed assistant who is paid on an hourly basis does not qualify as an independent contractor. It does not matter what release forms these assistants may have signed to the contrary; as a matter of law, they are employees. And when a disgruntled employee doesn't pay his or her taxes or seeks unemployment (and this will happen), there will be fines and penalties (and legal fees) incurred in order to sort all of this out. Admittedly, working through all of the various issues with teams is complicated, and often these teams do not welcome the firm's inquiries. For this reason, it appears that sorting out team operational and legal issues is on many firms' "do later" list. Now is the time to sit down and talk about these issues with your lawyer and accountant.

Scenario 3. *Main Street Realtors is a designated agency firm. One day they are contacted by a salesperson who specializes in representing buyers of expensive homes. The salesperson wants to leave the firm that he is at and join Main Street Realtors. The company is thrilled, and Salesperson White joins the firm. Salesperson White pretty much keeps to himself, and unfortunately, after only a few months, announces that he has decided to relocate out of state. After his departure, Main Street Realtors is approached by an attorney who insists that it return an \$89,000 commission it had received on an in-house transaction that Salesperson White had closed before he left the firm. It seems that Salesperson White did not "believe in" buyer's agency contracts or agency disclosure forms and felt that his elite clients would be insulted if he tried to get them to sign such forms. Since Salesperson White's buyers did not signed buyer's agency contracts, by default, they had an agency relationship with all the agents who worked at Main Street Realtors. Unbeknownst to the listing agent, the in-house transaction he had worked on with Salesperson White was a dual agency situation and, of course, a nonconsensual dual agency situation. The attorney for the seller on this transaction correctly points out that as a matter of law, a firm who participates in a nonconsensual dual agency situation forfeits its right to a commission.*

Clearly, the point here is that you need to make sure your agents understand agency and are following the law. A supervisory broker should have access to an agent's files. At a minimum, procedures should be set up so that files are spot checked. Does the agent use buyer's agency forms? This is important for all firms and is absolutely critical for designated agency firms. Are dual agency relationships handled correctly? Many firms have a policy whereas commissions are not paid until a signed agency disclosure form is produced. This is a good policy. A better policy would be to also provide for a detailed review of a file from time to time. An agency disclosure form may have been provided – but was it completed correctly and timely provided?

Scenario 4. *Salesperson Brown, who is new in the business, obtains her first listing. It is a small home. Salesperson Brown advertises her new listing on her personal business page as "perfect for newly marrieds or other empty nesters." Main Street Brokerage receives a complaint in which it is asserted that Salesperson Brown has violated both the Fair Housing Act*

¹² MCL 339.2501(h).

and the Michigan Elliott-Larsen Civil Rights Act by discriminating on the basis of familial status. Realtor® Jones, the supervisory broker at Main Street Brokerage, argues that the Company should not be liable because Salesperson Brown's comments were not posted on the Company's website or included in any of the Company's advertising. Realtor® Jones also produces evidence that Main Street Brokerage conducts Fair Housing Act seminars annually that its agents are all required to attend. For these reasons, Realtor® Jones argues that Main Street Brokerage should not be liable for the actions of one rogue (inexperienced) agent.

Unfortunately, Realtor® Jones is simply wrong. The law is clear – the United States Supreme Court has spoken. If an agent violates the Fair Housing Act, the agent's firm is liable for that action.¹³ This is true regardless of how much effort the firm has put in trying to train its agents. For this reason, firms are strongly encouraged to monitor their agents' advertising.

CONCLUSION

Supervision means more than answering questions that your agents bring to you. A firm should adopt a policy to help agents understand and identify potential problems and to seek help when those situations first arise. Firms should implement policies and procedures to protect the firm. A few suggestions:

1. Do not put any one person solely in charge of the trust account. The same person who issues the checks should not balance the account at the end of the month.
2. Implement a policy whereby if an earnest money deposit check bounces, someone in addition to the salesperson who is involved in the transaction is told.
3. Consider a policy whereby salespersons are required to disclose dual agency transactions when they first happen and provide for ongoing supervision of such transactions by an associate broker who understands dual agency issues.
4. Consider a policy whereby any agent who is buying or selling property from a client or customer of the firm is required to work through a supervisory broker.
5. Encourage agents to consult with supervisory brokers at the beginning of any dispute between the buyer and the seller over whether or not there is a binding contract. This is particularly important whenever a seller is trying to terminate one purchase contract to accept a better offer.
6. Do not think of file review as simply a mechanism for making sure the Occupational Code requirements are being met. You should also be looking at whether your agent knows what he or she is doing.
7. When spot checking a file, look at the purchase agreement and the addendums. Are they clearly and consistently written? Are all the blanks filled in? If a file has more than one signed purchase agreement and/or contradictory addendums and "side agreements," this should be a red flag.

¹³ *Meyer v Holley*, 537 US 280 (2003).

8. When reviewing a file, don't just check to make sure that it contains signed agency disclosure forms. Were the agency forms correctly completed? Are the agency disclosure forms consistent with one another and with any agency disclosure made in the purchase contract or other documents?
9. Review every agent's advertising from time to time. Set aside a time during the week when you look to see how your firm is being presented on social media.
10. Make sure that every agent in your office understands wire fraud. Adopt a policy whereby every buyer is provided with a copy of the Wire Fraud Notice form. Adapt a policy prohibiting agents from receiving or forwarding wire instructions – clients and customers should always be told to deal with the title company/lender directly.

DATA PRIVACY AND SECURITY

Business are collecting and holding more and more personal data, from customers, employees, and others. Managing and protecting that information is partly an issue of security but should be built on a clear of idea of what to collect, what to use, and what to keep. With increasing threats to privacy through hacking, malware, and simple mistakes, looking carefully at the reasons for collecting and keeping data – and the reasons not to -- can help to minimize risks and reduce the damage if something goes wrong.

Realtors®, like all other individuals and small businesses, are vulnerable to hacking, often for the theft of information. Either alone or with other information the hacker already has, the stolen information is used to gain access to accounts or commit identity theft, posing as a person or business to get money or merchandise. Personally-identifiable information that is useful to these criminals includes addresses, email addresses, phone numbers, social security numbers, employment details, and credit card and bank account information. These bits of information are scattered throughout the devices we all use and the information we all keep, now in conveniently-available digital form.

A data breach has serious consequences for a Realtor®, as for any other business. These include the immediate financial harm, the expense to fix and block future breaches, and in some cases, payment to regain your information if held for ransom. There is a great risk that clients and others whose information has been taken will bring claims for any losses they may suffer. Those claims may include expenses they incur protecting their accounts and their credit, or responding to false uses of their identity. The reputation of the company suffers, although as these attacks become more common, that effect may be diminishing. Hacking and theft can also provide control of the computers that control automated or remote building control systems, including locks, security systems, HVAC systems, video, audio, and lighting systems, introducing a new level of risk.

The technical support needed to prevent or respond to such attacks is often difficult for a small business that cannot afford full-time employees trained in these specialties. A technical guide is beyond the scope of this article but is available online from reliable sources such as the Federal Trade Commission. Guidance is also available to create a plan to respond to a data

breach or at least to guide you when it occurs, as it often does, with no plan in place. (An online search for “federal trade commission data security” provides links to publications, including several that are written for non-experts.)

There are basic things that can be done that are not highly technical. This article will discuss these “low tech” steps that can be taken.

Basic blocks of a data security plan

Putting aside the technical issues, there are some basic steps that should be taken to limit the data that is available to be lost or stolen. It is too easy to collect large quantities of information that could be valuable to a hacker and all too cheap and easy to keep it all in digital files. That makes it easy for you to find but obviously makes it easy for someone who does not have your good intentions.

Inventory

First, find out what you have. Go through your forms, introductory letters, email and correspondence files, and every other place that you can think of that you collect and store information. Include not just the standard storage places, whether that is a filing cabinet or a computer, but all of the places where it may have been received or sent, whether received in digital form at the start or scanned and sent later. Those can include digital storage on copiers and scanners, phones, tablets, laptops, and flash drives.

Account information may be forward through you in connection with financing. Is there any reason to keep it? Likewise, credit card information is often taken for payments, but kept without thinking whether or not it might really be used some time in the future. Many forms traditionally ask for date of birth or a driver’s license number when there is no reason whatever to have it.

Determine how those bits of information are moved from one place to another, through the office, to salespeople to respond to questions, and to your title agency to order title work. Within the company, consider how it moves for accounting and tax reporting and for banking. Consider the source, be it your customers, title companies, lenders, job applicants, and online searches and use of databases, as well as vendors who supply information. Does it come through email, courier deliveries, or a website? When customers supply credit card or bank account information, how many places is that information stored?

Do you need it? If you do, do you need to keep it?

Review what you have to determine why the information is either requested or received and who has access to it and for what use. If it is a one-time use, and there is no reason to keep it, make it a practice to delete it. Forwarding copies to someone who will actually use the information may create multiple places where the same information is kept, with emails or other correspondence, even though those copies are not needed. Credit card information can be directed to accounting, but there is no need to keep the email sending it.

Credit cards, social security numbers, and financial information are the most attractive to hackers and thieves, and particular attention should be paid to whether it is needed in a particular case and whether and where it is kept. Social security numbers supplied for a limited purpose can be removed from many forms after they are used. Access should be limited to those who actually need the information to perform their jobs. Keep in mind that limiting access can be accomplished sometimes in the most mundane ways, like shredding and disposing of copies or deleting emails from phones, computers, and email servers.

For those documents that must be kept for legal compliance or long-term business use, create a retention policy to discard the information in any form when it is no longer needed. That plan can include removing correspondence that includes redundant copies, and later, the original when it is no longer needed for an backup or compliance reporting. A data retention policy to go with a document retention policy is essential.

Protecting what you keep

How to protect information you keep depends on the way in which it is stored. Computer storage – from flash drives to back-up servers – can be locked up. Paper documents and files should be out of open view and kept in locked storage when access is not needed. Offsite storage is often forgotten and may be in out-of-the-way places that are unattended where access may be easy; employees or others would never need access or have access to the documents and data can look at it or remove it, and its absence may never be noticed.

For network access to computers, consult experts to advise you on segmenting or separating computers, storage, and online access where crossing those lines is not needed. They can also advise you on likely attacks and how best to prevent access from the outside or across your network by anyone who does not need access for the right reason.

Even when these systems are secure and well-protected, the same information is often shared on devices that have no such protection. Many salespeople effectively work through their phones. It is their primary source of data and communications. A typical transaction may go from a buyer's phone to salesperson's tablet to the office computer and then back through a similar chain of devices on the seller's side. Copies are kept on each of these devices to allow each person to feel sure he or she has a clear record. That multiplies the number of places where the information can be lost or stolen. Using unsecured Wi-Fi at coffee shops and hotels can provide an open door to the devices using them. Encryption systems are widely available to provide security. Combined with a system for email backup, a secure record of communications can be preserved, eliminating much of the risk and ensuring a secure, central database where all those communications can be preserved.

Laptops, tablets, and phones with large amounts of storage are a particular problem. Laptops can be securely stored, but in many cases, as with phones and tablets, there is no need for the data to be stored on them in the first place. Rather than transferring all of the information to multiple locations, the data can be made available on a secure computer without transferring it.

Unauthorized programs and downloads by employees, even when not part of phishing by an outsider, are perhaps the most common source of major data breaches. Entire address and contact lists are uploaded to Facebook and LinkedIn as a regular practice, often without the employee even knowing it has happened.

Regulation

Michigan law sets basic rules for databases with personal information. “Personal information” for these purposes means a person’s name with his or her social security number, driver license number, or a financial account number, credit card, or debit card number, and any code needed for account access. That data must be destroyed by “shredding, erasing, or otherwise modifying the data so that they cannot be read, deciphered, or reconstructed through generally available means.” If the database is breached by any unauthorized access, unless the business can establish that the loss of data is not likely to cause any loss or result in identity theft, notice of the security breach must be provided to anyone whose personal information was taken.

Michigan’s “Social Security Number Privacy Act” requires anyone who obtains social security numbers in the ordinary course of business to create a privacy policy with measures to ensure that they are kept confidential by limiting access and properly disposing of documents and files that include social security numbers. A business cannot require someone to transmit a social security number over the internet or a computer network unless the connection is secure or the information is encrypted.

As both statutes make clear, the easiest way to avoid the issue is not to have such a database. While Realtors® may often be part of transmitting such information, the need to collect and keep is extremely limited.

There are currently no federal laws on data privacy that specifically apply to real estate associations or brokerages. The Federal Trade Commission has taken action, however, against businesses that fail to maintain reasonable and appropriate data security. Those actions underline the need to have and enforce fairly basic rules on collecting and keeping information that is not strictly needed.

The FTC, for example, took action against *BJ’s Wholesale Club* because it collected customer’s credit and debit card information and kept it for up to 30 days, “long after the sale was complete,” according to the FTC. Hackers were able to gain access and use the data to make counterfeit credit and debit cards. The company could have limited risk by properly disposing of the information once it no longer had a legitimate need for it.

In *foru International*, the FTC acted because the company gave network and database access to service providers developing applications for the company. Another company used personal information in employee training sessions and also failed to remove the information from employees’ computers after the sessions were over. Many small business owners may see themselves in the FTC’s case against a business owner who kept sensitive consumer information, collected by his businesses, in boxes in his garage. In another case, the company left faxed documents that included consumers’ personal information in an open and easily accessible area. In each case, the FTC has taken the position that failure to maintain reasonable and appropriate

data security constitutes an “unfair and deceptive trade practice” in violation of the Federal Trade Commission Act.

Implementing the plan

Once you have a basic plan, implement digital controls across all of the devices that you use in your business. These include:

1. Limit administrative access – the ability to make changes across your computer system. Many small companies simply install networks and give everyone unlimited access to everything on the network, allowing anyone to reset user accounts, view nonpublic files, and change files that may be sent out. Access can be tailored fairly simply, even on the smallest network.
2. Create rules for secure passwords and authentication and the regular use of changes.
3. Draw clear lines between personal and administrative accounts and functions.
4. Store information securely and protect it during transmission. Often, companies watch network security carefully and then open the same data up to loss or theft by using it in emails and leaving the same information available in emails or texts wherever they may be kept, on laptops, phones, and home computers. Consider how to limit that access or to regularly require that data be removed.
5. Make sure your service providers use the same reasonable security measures that you do. Companies hired to provide network and telecommunications services, for example, have access to your data.
6. Keep your software up-to-date.
7. Store sensitive files securely. When retaining paperwork, take steps to keep it secure.
8. Protect devices that have or process data, many of which are increasingly remote from the office and either store, or by saved passwords have access to enormous amounts of data.
9. Regularly train yourself and your employees to reinforce and update what you know.

CONCLUSION:

The greatest boon of the digital age, easy access to enormous amounts of information, encourages all of us gather more and more of it. Realtors® collect enormous amounts of personal information while marketing, selling, and managing real estate. Much of it is unnecessary, either to collect in the first place or to keep for long term use. The basic blocks for

a data security plan should start with an assessment of what information is needed and then, how to protect it.

HOME SURVEILLANCE – IS IT LEGAL FOR “BIG BROTHER” TO BE WATCHING AND/OR LISTENING?

In this day and age, many homeowners have surveillance equipment in their own homes – and, it is perfectly legal for them to do so. This equipment can be anything from high-tech motion detector video cameras with audio recording to relatively inexpensive Wi-Fi enabled cameras and mics, to a simple “nanny-cam.” The equipment may be visible or hidden. In whatever form, Realtors[®] need to know whether these security cameras and microphones can be used by home sellers to record, or observe in real time, potential buyers as they tour their homes. Many Realtors[®] would argue that sellers should have the right to monitor their own homes during showings in order to protect their property. Other Realtors[®] would argue that it is wrong to secretly monitor persons who believe that they are having a private conversation about a major life decision.

Surveillance laws vary from state to state. However, in general, video monitoring is prohibited in places where someone has a “reasonable expectation of privacy.” With audio surveillance, on the other hand, most states require the consent of all participants, or at least one participant, in the conversation that is being recorded. States vary whether this limitation applies without regard to whether the speaker had a reasonable expectation of privacy or not. In some states, the legality of surveilling potential buyers (video and audio) requires advance notice of the use of the surveillance equipment – such as the posting of a sign to the effect that “surveillance equipment is in use.” In other states, notice is not required to videotape, but notice is required to record.

In Michigan, one section of the penal code prohibits the installation, placement or use in any “private” place of any device for “recording, transmitting, photographing or eavesdropping upon the sounds or events in that place,” unless consented to by all persons entitled to privacy in that place.¹⁴ Michigan law defines “private place” as a place where one has a reasonable expectation of privacy. Many would argue that potential buyers would not have a reasonable expectation of privacy in someone else’s home. However, it would appear that we do not even need to reach this issue because the statute goes on to expressly provide that this particular statutory prohibition does not prohibit “security monitoring in a residence if conducted by or at the direction of the owners ... of that residence unless conducted for lewd or lascivious purposes.” Thus, it would appear clear that this section of the statute does not prohibit a seller from using an audio/video camera to monitor their home during showings.

However, this is not the end of the analysis. A separate section of the Michigan penal code prohibits using a device to eavesdrop on a private conversation unless the parties consent.¹⁵ Exactly what is a “private” conversation is still a matter for debate in the Michigan courts. However, “eavesdrop” is clearly defined by statute and means “to overhear, record, amplify or transmit any part of the private discourse of others without the permission of all persons engaged

¹⁴ MCL 750.539d.

¹⁵ MCL 750.539c.

in the discourse.” The Michigan courts have reviewed this definition and concluded that because the law speaks to the “private discourse of others,” it is not illegal to audio record a conversation if at least one of the parties to the conversation consents.¹⁶ Under this section of the penal code, it would appear that a seller cannot audio record a showing in their own home without the consent of the attendees. Keep in mind that this statutory provision requires consent and not just disclosure of the fact that the home has audio surveillance.

Violating Michigan’s surveillance laws can subject offenders to criminal prosecution, felony conviction, imprisonment of up to two (2) years and a fine of up to \$2,000.00. Violations of Michigan’s surveillance laws can also subject an offender to a civil lawsuit for actual and punitive money damages by the injured party.

How should Realtors® deal with this issue? Buyer’s agents should advise their buyer clients that they should always assume that their viewings may be being monitored with audio and/or video devices and that they should conduct themselves accordingly. Buyers should never make any statements that they would not want the sellers to hear while they are viewing a home.

Listing Realtors® should advise their seller clients that it is illegal to use any audio (eavesdropping) device during a showing. Sellers should be advised further that while Michigan law generally permits video surveillance of one’s own home for security purposes without disclosure, the safer course may be to disclose the existence of the video device either through posting or in the comments section of the MLS listing. While perhaps not legally required, disclosure appears to have no downside and it may, in fact, be a good idea for sellers to encourage buyers to act as if someone is watching when they tour their home.

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.

¹⁶ *Sullivan v Gray*, 117 Mich App 476 (1982).

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. So, for example, once the listing Realtor®’s agency contract expires, she would be permitted to tell a buyer-client that the seller previously accepted an offer at a price \$10,000 less than the list price.

Another situation in which it may be important to be able to accurately determine what is and what is not “confidential information” is in a dual agency situation. Dual agency contracts typically contain a provision whereby the clients both acknowledge that the dual agent will not disclose “confidential information” that they know about the other client. What Realtors® sometimes forget is that not everything they know about the property is “confidential.” A case out of Ohio is a good example of how confusing this can be.

The Ohio case involved a single-family home that had been listed for sale by Defendant Shanks, an agent with Defendant Realtec.¹⁷ The first purchase contract on the home had fallen through after the inspection showed numerous structural and foundational defects in the home. The sellers then performed “some” repair work and Shanks continued to list the home for sale. The second purchaser, an 86-year old California resident named Hubbard, put an offer on the home which was accepted by the sellers. Shanks and Realtec acted as a dual agent in this second transaction. Although the second purchase contract also called for an inspection, it never took place. After the transaction closed, Hubbard discovered numerous defects in the home and filed a lawsuit against the sellers, Shanks and Realtec, in which she alleged that these real estate licensees had breached their fiduciary duties by failing to disclose defects known to them.

The Ohio court found that as a dual agent representing both the buyer and the sellers, Shanks owed a duty to disclose to each of them “all non-confidential information material to the transaction.” The Court went on to find that since Shanks knew about the numerous structural and foundation concerns raised in the first inspection, she should have told Hubbard that a prior purchaser had raised “critical concerns regarding the structural and foundational integrity of the home.” The Court was particularly troubled by the fact that Shanks was aware of all of the defects outlined and still allowed her buyer client to sign an “as is” purchase agreement.

Critical to the holding in the Ohio case was the finding that the information from the earlier inspection was not “confidential information.” The fact that the sellers in this case may not have wanted Shanks to share this information with Hubbard did not mean that the information was “confidential.” While it was information learned in the course of an agency relationship, it was not information Shanks learned from her seller clients, but rather from the first purchaser. As a general rule, information is not “confidential” if learned from an outside source or even if available from an outside source. Remember that the issue of what is or

¹⁷ *Hubbard Family Trust v TNT Land Holdings, LLC*, 9 NE3d 411 (Ohio App, 2014).

is not “confidential information” arises in the dual agency context because there is a contradictory duty of disclosure.

In summary, information that is available publically is not “confidential.” Information known to both sides of a transaction is not confidential. Information available from another source is not “confidential.” However, even if information is not “confidential,” a real estate agent still owes a duty of loyalty to his or her client. The duty of loyalty may obligate the Realtor® not to disclose something that, while not technically “confidential,” is something that the other party may use to its advantage. The duty of confidentiality survives the termination of the agency relationship; the duty of loyalty does not.

Finally, as an aside, the Ohio case not only provides a good lesson as to what is and what is not “confidential information,” it also contains a good illustration as to just how difficult it can be to serve in the capacity of a dual agent. As this case illustrates, it is not the case that a Realtor® acting as a dual agent can always avoid potential liability simply by remaining silent and not telling either party anything.

ELECTRONIC TRANSACTIONS – IT IS ALL ABOUT INTENT

I. INTRODUCTION

Michigan, like almost all other states, has passed the Uniform Electronic Transaction Act (“UETA”).¹⁸ UETA provides that if the law requires an agreement to be in writing (such as with a real estate purchase agreement or commission agreement), an electronic record satisfies that law. Additionally, UETA provides that if the law requires signatures (again, as with a real estate purchase agreement or commission agreement), electronic signatures satisfy that law.

UETA allows parties to conduct real estate transactions using electronic signatures and electronic delivery if, and only if, all parties agree to conduct business electronically. Realtors® and other real estate professionals conduct business electronically every day without incident and, for the most part, without any confusion as to how electronic transactions are to be conducted. The lawsuits, of course, arise when one party does not want to honor what the other party believes is a binding contract. This article will discuss several of these cases.

II. DISCUSSION

A. Ignorance is No Excuse

When signing up for services on the internet, most of us have on at least one occasion clicked “I accept” without paying much attention to the terms of the agreement that we are agreeing to be bound by. For many of us, we pay far less attention to the “terms” that we are agreeing to in this situation than we would if someone had presented us with a paper version of the same contract for our written signature. It is important to remember that under UETA, by clicking “accept,” we are entering into an electronic contract which is wholly enforceable.

¹⁸ MCL 450.831 *et seq.*

Under contract law generally, a person cannot avoid responsibility on the basis that he/she did not actually read the contract that he/she signed. The same is true with electronic contracts.

A case decided by the Michigan Court of Appeals a few years ago provides a good illustration.¹⁹ This case involved buyers who sued the Big Moose Home Inspection Company alleging that the inspection company had failed to discover “significant structural defects that made the home [that they had purchased] unfit for habitation.” The buyers claimed that they would not have purchased the home had they known about the defects.

It turned out that, like other customers of this inspection company, these buyers had signed up for the inspection services electronically. The inspection company’s website provided buyer-customers with an electronic copy of the home inspection services contract. Buyers are then asked to click a button indicating that they have read the contract and agreed to be bound by the terms. A click of the button creates an e-signature on the home inspection contract.

The inspection company was able to establish that these particular buyers had, in fact, “signed” the inspection contract agreeing to the provisions contained in the contract according to these procedures. Since the contract contained a one-year statute of limitations – that is, a one-year deadline for filing suit – and the suit in this case had not been filed within that deadline, the Michigan Court of Appeals held that the buyers’ case was too late and should be thrown out. It did not matter that these buyers were not actually aware of the terms contained in the inspection contract. The contract, which had been electronically signed and delivered, was wholly enforceable under UETA.

B. Electronic Signatures

UETA provides that the term “electronic signature” includes any method by which an “electronic sound, symbol or process” is “logically associated” with a contract and adopted by a person “with an intent to sign.” An “electronic signature” would include, for example, a scanned copy of a handwritten signature. There is also software that can capture a person’s handwritten signature and embed it into a document. The term “electronic signature” also includes a digital signature which typically does not involve any type of replication of a person’s handwritten signature.

Questions have come up as to whether the typed name at the end of an email message qualifies as an “electronic signature.” One court in Texas has suggested that it may depend on whether the typed name was “typed purposefully” or “generated automatically.”²⁰ Another court in Texas expressly rejected this distinction finding that “a signature block at the bottom of an email has come to represent what a handwritten signature once represented: a means of identifying the sender, signaling that he or she adopts or stands behind the contents”²¹ A New York court found that the phrase “With kind regards, Michael” typed at the end of an email qualified as an electronic signature because “the sender’s act of typing his name at the bottom of

¹⁹ *Harpham v Big Moose Home Inspections, Inc.*, 2015 WL 5945842 (Mich App).

²⁰ *Cunningham v Zurich American Ins Co.*, 352 SW3d 519 (Tex App – Fort Worth, 2011).

²¹ *Williamson v Bank of New York Mellon*, 2013 WL 2359577 (Tex App – Dallas, 2013).

the e-mail manifested his intention to authenticate.”²² 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.

An Arizona case involved a buyer’s broker contract which had been signed by the buyers, scanned and emailed to the real estate agent.²³ The real estate agent had responded to the buyers’ email with her own email saying simply, “Thank you.” This “thank you” email message, like all other email messages from the real estate agent, ended with an electronic business card consisting of the agent’s name, business address, telephone numbers, website address and photograph.

In this case, the real estate agent had sued the client after the client had closed on a home without paying her a commission. The buyers pointed to the fact that under Arizona law, in order to have an enforceable right to a commission, there must be a written agreement signed by both parties. The buyers argued that because their commission agreement had never been signed by the real estate agent, there was no enforceable contract. The trial court agreed and threw out the real estate agent’s case.

On appeal, the appellate court said that the question of whether the real estate agent’s “thank you” email constituted an electronic signature was a factual question to be determined based on the context and surrounding circumstances. The appellate court found that the trial court should not have thrown out the case just because there was no “signature” by the real estate agent in the traditional sense and sent the case back to the trial court to determine whether the “thank you” email qualified as an electronic signature under UETA.

In a New York case, after some negotiation, the seller had sent the buyer’s broker a letter outlining the proposed terms for a sale of real estate.²⁴ The letter contained the seller’s typed name but not an actual signature. It was sent to the buyer’s broker as an attachment to an email. The buyer signed the letter and emailed it back to the seller the same day. The seller then advised the buyer that she was not willing to proceed with the sale.

The buyer sued to enforce the contract as outlined in the letter, and the New York Supreme Court threw out the buyer’s case. The Court noted first, that because it is not possible to place a handwritten signature on an email, under certain circumstances, a typed name at the end of an email will be considered a signature if that was the sender’s intent. However:

The same logic does not apply to ordinary typed documents that are scanned and attached to emails because a party could easily affix a handwritten signature to these documents.

²² *Rosenfeld v Zerneck*, 776 NYS2d 458 (2004).

²³ *Young v Rose*, 230 Ariz 433 (2013).

²⁴ *Solartech Renewable, LLC v Vitti*, 156 AD3d 995; 66 NYS3d 704 (2017).

C. Intent of the Parties

Once it has been established that the parties agreed to conduct business electronically, the next inquiry is whether the parties actually reached an agreement. While it is true that a typed name at the end of an email message has, under certain circumstances, been held to constitute an “electronic signature,” before reaching such a conclusion, courts will examine the substance of the email exchange in an effort to determine the intent of the parties. If it appears from the substance of the email exchange that the parties anticipated that there would be a separate signed agreement, a court is unlikely to conclude that the “electronic signature” at the end of the email created an enforceable agreement.

Consider the following email exchange from a Minnesota case.²⁵

- | | | |
|------|--|--|
| 7/18 | Buyer’s Attorney to Seller: | Attached please find [the purchase agreement that has been executed on behalf of the buyer]. |
| 7/18 | Seller to Buyer’s Attorney: | My attorney is making some changes to [your purchase agreement]. I will get that to you but I will need it signed in place of [the one you sent to me]. |
| 7/18 | Seller to Buyer’s Attorney: | Attached is the revised [purchase agreement]. |
| 7/26 | Seller’s Attorney to Buyer’s Attorney: | Attached are clean and blacklined copies of the [July 18 th form purchase agreement]. Can you confirm that this draft is acceptable to your client? |
| 7/28 | Buyer’s Attorney to Seller’s Attorney: | It is acceptable ... Is it possible that you can have [the seller] sign the agreement, scan and email to me and I will have [the buyer] sign when I see him? |
| 8/2 | Buyer’s Attorney to Seller’s Attorney: | Did you hear from your client regarding emailing me the signed agreement? |

The records showed that over the next couple of weeks, the buyer’s attorney continued to inquire as to when he would be receiving a signed purchase agreement from the seller, and the seller’s attorney continued to respond that this would happen “soon.” On August 16th, the buyer signed the July 18th version of purchase agreement. The seller never did sign the July 18th version of purchase agreement.

Two months later, the buyer’s attorney finally received, via email from the seller’s attorney, a purchase agreement that was signed by the seller. This new purchase agreement had a purchase price that was \$250,000 higher than the price in the July 18th version of the purchase agreement.

²⁵ *SN4, LLC v Anchor Bank*, 848 NW2d 559 (Mn App 2014).

The buyer then sued to enforce the contract allegedly entered into on August 16th. The buyer's position was that the seller electronically signed the July 18th version of the purchase agreement in two emails: the seller's July 18th email to the buyer's attorney and the seller's attorney's July 26th email to the buyer's attorney. The trial court rejected the buyer's argument, and the Minnesota appellate court agreed with that decision.

In Minnesota, as in Michigan, the statute of frauds requires that in order for an agreement for the sale of real estate to be enforceable, there must be a writing subscribed (*i.e.*, signed) by the party to be charged – in this case, the seller. Here, the buyer argued that the seller's email header and signature block in the July 18th and July 26th emails created an enforceable contract. The Minnesota Court disagreed, noting that an electronic signature in an email message does not necessarily evidence intent to electronically sign a document attached to the email. The Court noted that here, the version of purchase agreement attached to the July 18th and July 26th emails contained signature lines but no signatures. Emails sent after July 26th showed that neither party believed that there was a signed contract in place. The Court concluded that no reasonable fact-finder could determine that the sellers intended to sign the July 18th version of the purchase agreement by electronic means.

III. CONCLUSION

A few rules to keep in mind with regard to electronic transactions and UETA:

1. In order to comply with the statute, parties must agree to conduct business electronically. By including an express provision in your form contract, you can avoid late arguments over "intent."
2. An electronic signature can be any mark that is intended to be a signature. If you are not using a digital signature but instead, your typewritten name, you can avoid later disputes over "intent" by typing "signature" or "/s/" or using some other notation to make clear that you are intending to sign the document by typing your name.
3. A court is much less likely to conclude that a typed name is a sufficient "signature" if the form appears to have contemplated an actual handwritten signature or where the circumstances are such that the party could have easily affixed a handwritten signature had he/she wanted to do so.
4. Remember that a contract requires the signature of the parties. An email signed by a listing agent to a buyer's agent indicating that the client has accepted the buyer's offer is no more binding than if the listing agent called the buyer's agent and told him the same thing over the phone.
5. If you are conducting business electronically, do not agree to follow up later with original documents with handwritten signatures. If a dispute later arises, the court will be required to determine whether you intended to be bound by the electronic transaction. An agreement to follow up with an original writing suggests that you did not.

6. The parties should not only agree to electronic delivery, but also as to which specific email address will be used, and thereafter, the parties should use only the addresses so provided. UETA requires that electronic records be delivered to “the information processing system that the recipient uses for the purpose of receiving electronic records.” You do not want to open yourself up to a dispute as to whether the address where you sent the contract was, in fact, the address that a person typically uses “for the purpose of receiving electronic records.”

NEW DEVELOPMENTS IN RENTAL HOUSING

I. INTRODUCTION

The past year has seen significant developments in Michigan law for landlords, property managers, and their tenants. Each development points to the essential issue when dealing with any regulation of rental housing: how it is enforced. Detroit has adopted significant amendments to its rental property code focused on penalties for noncompliance. At the same time, however, Detroit announced a dramatic inspection and code compliance effort aimed at registering all of the nearly 40,000 rental property addresses in the city. How dramatic? Just a year ago, only 2,000 rental properties were registered and inspected, and Detroit aims to bringing all 40,000 rental properties into compliance within 18 months of the January 2018 kickoff. Detroit’s ability to make that happen is open to serious doubt, and the loss may fall to landlords, as explained below.

In the Legislature, with the support of Michigan Realtors®, the Michigan Housing Code has been amended with new protections for tenants that limit the ability of enforcement agencies to gain access to an occupied rental unit without the tenant’s consent or a warrant.

MR has also pressed statewide legislation addressing short-term rentals. While the Legislature considers the issue, the debate on regulating short-term rentals has continued in communities around the state. Those local debates are driven in large measure by the inability or unwillingness of local governments to enforce existing local laws to deal with nuisance type problems that are blamed on short-term renters in resort communities.

Rental Housing Registration and Inspection Background

Michigan has had a statewide housing code since 1917 (the “State Housing Code”).²⁶ Like other housing codes adopted in the early 20th Century, as cities like Detroit grew crowded, the State Housing Code mandated basic standards for minimum toilet facilities, bedroom space, light, and air. Then, as now, these codes are applied almost exclusively to rental housing, not owner-occupied houses. In fact, in communities with fewer than 100,000 residents, the State Housing Code does not apply to one and two-family dwellings. In plain language, what that means is that the code is not applied to homeowners. Homeowners are, of course, the greatest number of regular voters.

²⁶ 1917 PA 167, MCL 125.401 et seq.

Local governments have broad discretion in the enforcement of State Housing Code.²⁷ In many places, that means it is simply not enforced, often because the local government lacks the staff. In others, the inspections are perfunctory, leading rental property owners to suspect that the inspections are conducted more to raise revenue through inspection fees. Of course, there are local governments whose inspections are far from perfunctory, and follow-up inspections and penalties are enforced.

Many communities have chosen to adopt the International Property Maintenance Code (IPMC) over the State Housing Code. The IPMC is a more detailed and comprehensive set of rules, updated at regular intervals. Often, the move to adopt the IPMC heralds a community's drive to "crack down" on rental housing. Although the Michigan Housing Code provides detailed enforcement and appeal provisions, many of its maintenance standards are basic compared to the IPMC. The IPMC, for example, specifies heating standards ["68°F (20°C) in all habitable rooms, bathrooms and toilet rooms based on the winter outdoor design temperature for the locality indicated in Appendix D of the International Plumbing Code"], as well as in what rooms, for what uses, and where and how heat is to be measured.²⁸ The State Housing Code has no such provisions.

Michigan Realtors®, local Realtor® associations, and organizations directly representing landlords have been active in seeking to ensure basic fairness when cities and township enact new codes. In Battle Creek, for example, the city had codes in place, which, if enforced, could have addressed substandard housing, whether rented or owner-occupied. Still, the city council adopted new rental registration and repeat inspection requirements, increasing landlord costs at a time when vacancies ran as high as 30 per cent. In the heart of the housing crisis of the Great Recession, Port Huron and East Lansing took measures to reduce or prohibit rentals, effectively increasing the number of vacant and abandoned homes.

Following the wave of foreclosures and vacancies in the Great Recession, the IPMC was adopted and applied selectively to one- and two-family houses that were vacant. While on its face the effort may be good for the community, in actuality, it may prevent vacant houses from going back on the market. Lenders, having already been forced to write off the value of the loans and the foreclosed homes, do not want to put more money into them to meet code before putting them back on the market. Many local governments were active in enforcing registration as well as regular inspections, all at substantial cost to the owners of the properties. The extent to which those provisions were effective, as opposed to raising revenue for local government before the rising market brought housing back, is not clear.

As Realtors®, landlords, and property managers know, regardless of the code employed, it is enforcement that matters. As noted, at the start of the Duggan administration only 2000 of the 40,000 rental properties in the city were registered and in compliance with the existing code. Many addresses have multiple units, and the U.S. Census estimates that at those 40,000 addresses, there are 140,000 total rental units in the city.

²⁷ MCL 125.408.

²⁸ Int'l Prop Maint Code, Section 602.

As the Detroit City Council debated the proposed amendments, attention was focused on the compliance provisions. As adopted in October 2017, the amendments dramatically increase civil fines for renting without a certificate of compliance. Without a certificate, an owner may not rent an unoccupied unit, and tenants may pay rent into an escrow account. When a certificate is obtained, the escrowed rent is paid to the landlord. Otherwise, the rent is paid to the tenant.²⁹

Plainly, the real issue for Detroit is enforcement. Because of the large number of unregistered units and the need for so many inspections to issue certificates, the city announced a rollout in five zones. After the first zone announced in January 2018, a new zone is added every 90 days. Landlords have six months from the start of the compliance period to get their building up to code. At the end of that six months, the city can enforce the rent escrow provisions and penalties. That puts a premium on fast action by inspectors and by the city to ensure prompt inspection, re-inspection if needed, and a timely certificate of compliance when all requirements have been met. Detroit will rely to a great extent on private inspectors, and the timeliness of the rollout is not clear at the time of this writing.

Two rental property companies are challenging the amendments in federal court, based on the failure to require a warrant for inspections,³⁰ but Michigan precedent suggests that it may be a long shot. The Court of Appeals examined the constitutionality of the 1991 version of this very ordinance and rejected a similar challenge.³¹

New Statewide Inspection Law

An interesting coalition supported by Michigan Realtors® convinced the Legislature to amend the State Housing Code to bar overreaching by local government inspectors.³² Before the amendment, a local enforcing agency could require a landlord to provide access to any rental unit if the lease gave the landlord a right of entry, a fairly common provision in residential leases.

Similar laws have been challenged around the country. For example, under Portsmouth, Ohio's rental property code, landlords could face misdemeanor citations if they failed to schedule inspections, leaving the landlords and tenants with a choice of consenting to warrantless inspections or facing criminal charges. A federal court concluded the law authorized warrantless searches in violation of Fourth Amendment constitutional guarantees³³ and blocked enforcement. In another federal court action, the City of Flint has been enjoined from enforcing the warrantless inspection provision of its ordinance.³⁴

²⁹ A tenant in Battle Creek tried to use an ordinance that is much like the Detroit's to recover rent already paid to a landlord who had violated the ordinance. The Court of Appeals denied the claim. The Battle Creek ordinance requires landlords to have a valid rental permit on pain of penalties including an order to abate rent. It does not provide, however, for a tenant to recoup rent already paid, only to stop current and future rent. Under the ordinance, the court held the tenant could not sue to recover rent already paid. *McMillan v Douglas*, ___ Mich App ___; 2017 WL 6389966 (December 14, 2017).

³⁰ *MS Rentals, LLC v City of Detroit*, Docket No. 2:18-cv-10165-DML-MKM

³¹ *Ewing v Detroit*, unpublished Opinion of the Court of Appeals, June 12, 2003 (Docket No. 239896). The *Ewing* court found it sufficient that Michigan's State Housing Code requires the City to request and receive permission before entering "at a reasonable hour" and to obtain a warrant when requested.

³² 2017 PA 169.

³³ *Baker v City of Portsmouth* (No. 1:2014CV512) (S.D. Ohio 2015).

³⁴ *Landon v City of Flint* (No. 16-11061) (ED Mich 2017).

The amendment to the State Housing Code was promoted by landlords and renters concerned with property rights. Local governments joined to address their concern with liability after a number of cases challenging similar laws included claims for damages.³⁵

Now, the landlord must give the agency access for an inspection, during reasonable hours, if the lease *expressly authorizes an enforcing agency's inspector* to enter the unit for an inspection. Of course, the landlord is under no obligation to include that provision in a lease. Otherwise, the inspector may only gain entry to the unit if the tenant has made a complaint to the agency, the unit is vacant, the agency obtains an administrative warrant ordering the landlords to provide access, or the tenant consents to an inspection. If the tenant is not present during the inspection, the agency may rely on the landlord's representation that the tenant has consented to the inspection.

The amendment still requires the landlord to notify the tenant of an agency's inspection request and make a good faith effort to obtain the tenant's consent and if it is given, arrange for inspection by the agency (a provision that is a classic sign of an amendment supported by a coalition that includes local government).

Short-Term Rentals

Many local governments around the state are considering whether to regulate short-term rentals and how to go about it. While property owners who rent might prefer to avoid any regulation at all, arguing that they take care of their property and their renters in a responsible manner, local government officials are also hearing from neighboring residents who believe that short-term rentals should simply be prohibited altogether, at least in single-family neighborhoods. At base, the debate involves local governments' willingness or ability to enforce other regulations, unrelated to short-term rentals.

Cities and townships have ordinances that prohibit a broad range of nuisances, including noise, parking in yards, open burning, and other problems blamed on short-term rentals. Zoning ordinances in place in almost all communities limit occupancy in single-family zoning districts to a single family, which does not include, for example, a group of eight fraternity brothers. Rather than enforce each of those existing laws, many local governments find it easier to simply prohibit short-term rentals altogether. As the Michigan Supreme Court said, invalidating a similar zoning provision 50 years ago:

We agree that it would be easier for the plaintiff, with one broad stroke of its legislative brush, to sweep out of its residential neighborhoods a whole class of persons desiring residential accommodations than to have to legislate and enforce against the specific behavior it finds offensive . . . But protecting the

³⁵ As explained in the *Ewing* case above, the State Housing Code sets the base for local housing codes in Michigan and a court will look at its provisions, not just the local code.

constitutional rights of citizens comes before making life easy for government.³⁶

Work by Realtors® in a number of resort communities also makes clear that owners, not renters, are often the source of these problems. Banning rentals will not do away with the problems created by people on vacation, many of whom are at a second home or are a guest of the owner. Neighbors tend to forgive full-time, year round neighbors to a greater degree.

A bill to prevent local governments from using their zoning ordinances to prohibit short-term rentals is still pending in the Legislature.³⁷ At least some of the move to regulate may have been prompted by the debate over that legislation. The amendments proposed by the Michigan Realtors® would reverse local zoning decisions that say the rental of any home, whether for two days or two years, is a commercial use. For years, in these communities, rentals were permitted in all residential zoning districts. Then, under political pressure, local zoning administrators and zoning appeal boards – without any amendment to the ordinance – simply ruled that because rentals were “for profit,” they were a “commercial use” and prohibited in any residential zone. Under that rule, the only way to live in such a community is to own your own home. (Under that rule, apartments are also prohibited; the landlord makes a profit.) The bill is intended as a check on this kind of overreaching but has been attacked as taking away all local control.

The legislation, if it passes, leaves in place most zoning controls and does not prevent local governments from adopting rental regulation. A number of local governments have come up with a fairly simple model to register rentals, require local agents or management for distant owners, and encourage responsible owners and renters by using enforcement that does not overwhelm local governments that have limited resources.

Ordinances like the one passed in 2016 by the City of South Haven appear, for the most part, to strike a reasonable compromise between those interests. It requires registration for one- and two-family homes rented for between 2 and 29 days, sets maximum occupancy limits, and ensures that nuisance ordinances are enforced. Over the last winter, however, even before the effects of the ordinance could fairly be known, opponents of short-term rentals continued to press local officials to restrict them further. New amendments, not yet passed as of this writing, would increase registration fees from \$20 to \$250, with no specific justification for that number except that a neighboring township charges that amount. No numbers have been provided to show specific expenses related to short-term rentals. Of course, homes used for short-term rental also pay property taxes and if they are second homes, use far less in services during much of the year. The amendment would also add regulation of attached condominiums despite the lack of any enforcement issues for short-term rentals in condominiums, suggesting the addition is simply an effort to raise revenue. The amendments would also move to restrict the areas in which short-term rentals are permitted and deprive owners of basic property rights for existing nonconforming uses.

The move is striking in light of surveys that the City of South Haven undertook over the last year showing strong support for the current regulations allowing short-term rentals in all

³⁶ *Charter Twp of Delta v Dinolfo*, 419 Mich 253, 275; 351 NW2d 831, 842 (1984).

³⁷ SB 329.

areas. The move to add new restrictions certainly suggests that property owners, managers, and Realtors® must remain vigilant and active and that statewide regulation may be necessary to the extent “local control” means control by a determined minority.

CONCLUSION: Increased regulation of landlords and rental homes, or outright prohibition, is often politically easy. It is also, in most cases, cheaper for the local government than uniform enforcement of existing laws and codes. Careful appraisal of the proposed regulation and whether it is likely to achieve the announced goals is important. Even if the new regulation is adopted, in many cases, substantial changes have been made to address the concerns raised by Realtors®, property managers, and landlords.

WHAT MICHIGAN REALTORS® SHOULD KNOW ABOUT MARIHUANA

I. INTRODUCTION

Currently, Michigan and a majority of the other states allow the use and cultivation of medical marihuana. Michigan also has an initiative on the November 6, 2018 ballot which would decriminalize the recreational use of marihuana by individuals 21 years and older.

On the other hand, the federal government treats marihuana as a schedule 1 controlled substance under the federal Controlled Substances Act.³⁸ This schedule 1 designation is important as it does not acknowledge any medical use for marihuana and classifies it as a drug with a high probability of abuse – placing it in the same category as heroin and LSD. As such, the federal law on all marihuana is diametrically opposed to Michigan’s allowance for regulated medical marihuana. This conflict between state and federal law has caused a fair amount of confusion and understandable apprehension within the real estate industry.

Realtors® should take great care when offering advice or working on a transaction where the real property’s past, current, or intended use involves marihuana sale or cultivation. Based on the current trends, these types of real estate transactions may get more complicated for landlords, buyers, sellers, and others involved in the transaction.

II. REPRESENTING LANDLORDS

Since the Michigan Medical Marihuana Act (“MMA”)³⁹ took effect, many Realtors® have inquired as to whether or not residential landlords are required to allow registered patients to use and/or grow marihuana in their apartments. In January of 2017, the MMA was amended to specifically provide that a landlord is NOT required to lease residential property to a person who smokes or cultivates marihuana on the premises, so long as there is a specific written provision in the lease prohibiting that conduct.⁴⁰ One example of such a clause is:

Drug-Free Housing: (a) Tenant, any member of the Tenant’s household, or a guest or other person under the Tenant’s control shall not engage in or facilitate

³⁸21 USC § 812.

³⁹MCL 333.26421.

⁴⁰MCL 333.26427(c)(3).

criminal activity on or near the premises, including, but not limited to, violent criminal activity or drug-related criminal activity; (b) Tenant or members of the Tenant's household shall not permit the premises to be used for, or to facilitate, criminal activity; (c) "Violent criminal activity" means any felonious criminal activity that has as one of its elements the use, or threatened use, of physical force against the person or property of another; (d) "Drug-related criminal activity" means the illegal manufacture, sale, distribution, or use or possession with intent to manufacture, sell, distribute or use of a controlled substance (as defined in Section 102 of the Controlled Substances Act (21 U.S.C. 802)). The possession, sale or use of any illegal drug in the premises or anywhere on the property is prohibited. **The smoking of marihuana and the growing of marihuana plants anywhere on the premises is prohibited even if the possessor is a registered patient or caregiver under the Michigan Medical Marihuana Act, MCL 333.26421, et seq.**

While a tenant can be evicted for violating this provision of the lease, the accelerated eviction process for drug use (with just 24-hour notice)⁴¹ would not be available, if his or her use is permitted under the MMA.

Another commonly asked question concerns the MMA and civil forfeiture laws. As many Realtors® may be aware, civil forfeiture laws allow law enforcement agencies to seize both real and personal property linked to a crime – even if the actual owner of the seized property is never charged or convicted of the crime. This, of course, poses the question of whether or not commercial landlords who choose to lease to individuals who operate "marihuana facilities" on the leased premises run the risk of finding themselves in a civil forfeiture situation. There are two sides to this answer, bringing both good and bad news for landlords.

The good news is that if you are a landlord in this situation, you are protected from civil forfeiture at the state level. Michigan law specifically provides that a person who owns or leases real property upon which a "marihuana facility" is located and who has no knowledge that the licensee violated the Medical Marihuana Licensing Act **is not subject to seizure of any real or personal property or anything of value based on the marihuana-related offense.**⁴²

At the federal level, however, landlords might not be so lucky when it comes to criminal prosecution and civil forfeiture. The sale and possession of marihuana is still a federal crime under the Controlled Substances Act.⁴³ This means that the federal government is free to criminally prosecute Michigan citizens who violate that Act, regardless of whether or not they're registered patients or caregivers under the MMA. As a result, landlords who allow marihuana facilities to operate on their property could be viewed as aiding and abetting an illegal activity or facilitating an illegal transaction. That would subject them to federal civil forfeiture of the property or other penalties under the Controlled Substances Act, including criminal prosecution.

⁴¹ MCL 600.5714(1)(b). The accelerated procedure would not apply as the use is not "unlawful."

⁴² MCL 333.27201(3). The landlord is also not subject to criminal or civil penalties under state or local laws regulating marihuana.

⁴³ 21 USC § 801, *et seq.*

Federal legislation was introduced last year to exempt real property from federal civil forfeiture laws in situations of medical marijuana-related conduct in states that permit the medical use of marijuana. The draft bill has been referred to various committees for further study. The current political climate suggests that it is highly unlikely this bill will be enacted into law in the foreseeable future. This means that landlords who allow marijuana facilities to operate on their properties are technically still on the hook when it comes to federal civil forfeiture laws – even if the property is in a state that allows marijuana to be used and cultivated for medical and/or recreational purposes.

Finally, in deciding whether or not to lease property to a marijuana facility, commercial landlords need to be aware that banks and credit unions will not knowingly accept deposits from these types of businesses. In addition, a landlord with this type of tenant will find it difficult, if not impossible, to refinance a loan on its property.

III. REPRESENTING BUYERS AND SELLERS

Over the last year or so, we have seen many title and financial institutions, along with their respective underwriters, issue notices indicating an unwillingness to perform closing, title insurance or lending services for property used or intended to be used to cultivate or sell marijuana. The decision by title insurance underwriters not to provide insurance on property used to cultivate or sell marijuana does not appear to be triggered by concerns over coverage. Standard title insurance policies already exclude claims that arise by reason of operation of “any law, ordinance, permit or government regulation.” Even if a marijuana grower had obtained title insurance on his building, if he lost that building through a civil forfeiture proceeding, it is likely his title insurance company would decline coverage based on this standard exception to his title policy.

Rather than coverage concerns, the decision by underwriters not to provide service in connection with property used to cultivate or sell marijuana appears to have been triggered in large part by a U.S. Treasury Department advisory bulletin that came out in August of 2017.⁴⁴ In that bulletin, the government made clear that financial institutions are required to file a suspicious activity report if they suspect that one of their transactions involved funds derived from illegal activity. Some title companies are regulated as financial institutions and while be required file reports. While other title companies and real estate brokers are not similarly required to file such reports, in this same bulletin, the federal government indicated that they are “encouraged” to do so.

There is also a concern on the part of many title companies and financial institutions that any involvement in the closing of a transaction of real property used for the cultivation or sale of marijuana may be viewed as aiding and abetting a criminal drug enterprise and/or money laundering. This concern related to aiding and abetting is compounded by the fact that in January of 2018, there was a significant pronouncement from the United States Justice Department that the previous federal policy of relative non-interference with state marijuana law enforcement has been reversed. As a result, there will likely be a period of increased uncertainty

⁴⁴ United States Department of Treasury Financial Crimes Enforcement Network, “Advisory to Financial Institutions and Real Estate Firms and Professionals,” August 22, 2017.

as to how federal prosecutors will direct enforcement efforts in those states with some form of legalized marihuana use and cultivation. Understandably, this potential sea change in federal enforcement has triggered conservative and risk-averse positions by title companies and financial institutions.

As an aside, at the time of the writing of this article, most underwriters are not routinely inquiring as to whether the property involved in a transaction will be used for the cultivation or sale of marihuana. Remember that the title companies' primary concern is that if they knowingly become involved in a transaction involving a marihuana facility, they may be viewed as aiding and abetting what is considered to be criminal activity under federal law. If the title company does not know of the planned use of the property (and has no reason to know), then it is unlikely that the federal government would be able to establish that it had knowingly "aided and abetted" a criminal drug enterprise. Most title companies will ask about the planned use of the property only if the name of the buyer entity suggests that the property will be used in the marihuana business (or there is some other evidence that the property will be used for the cultivation or sale of marihuana). If the title company does ask about the planned use, then neither the seller nor the Realtor® should misrepresent the nature of the business. However, if no inquiry is made, there is ordinarily no legal duty to volunteer the fact that the buyer intends to operate a marihuana business in the property after closing.

Putting aside the title coverage issues, can a real estate licensee safely work on a transaction that involves property intended to be used for the cultivation or sale of medical marihuana? As previously stated, the answer remains a murky one. While the federal government does not require real estate licensees to file suspicious activity reports, they are specifically "encouraged" to do so. Taking the legitimate concerns raised above to their logical conclusion, a real estate licensee representing a buyer or seller of real property used for the cultivation or sale of regulated marihuana could arguably be subject to the same type of federal scrutiny. As it stands, the scope of enforcement efforts remains a large unknown.

Even if a Realtor® could confidently represent a client in these types of transactions without risk of federal prosecution, there are still significant issues to consider. A Realtor® representing a buyer or seller of real property used for the cultivation or sale of regulated marihuana must fully appreciate the burdens of a real estate transaction that may not include the ordinary checks and balances of the title and mortgage process. While there might be a title search conducted, there most certainly will not be title insurance or escrowing of funds. The deal will likely be a cash deal or some form of land contract. Persons in the medical marihuana business must comply with numerous State and local regulatory requirements. In short, in transactions involving marihuana facilities, you will likely be relied upon for areas of expertise outside of the scope of your license. For these reasons, not only should a Realtor® encourage his clients to seek legal counsel, a Realtor® should consider declining to represent any client who will not agree to use counsel for this type of transaction.

Finally, what if a seller is selling a vacant building that was used in the cultivation or sale of marihuana at one time in the past? Does the seller have an obligation to disclose that fact? Should Realtors® be routinely asking sellers whether or not their property has ever been used in the cultivation or sale of marihuana? As it currently stands, the answer to these questions appears to be "no." Unlike with methamphetamine, the fact that a property was used for the

production and/or cultivation of marihuana in the past does not generally pose an environmental health threat for future inhabitants. The Michigan Department of Environmental Quality has created a workgroup to look at any issues that might arise if an industry develops to extract the essential oils. For the time being, however, the environmental concerns are limited to heavy water use and the big carbon footprint created by the electricity used for grow lamps. Thus, as a general rule, Realtors® do not need to know (and probably do not wish to know) whether a property was at one time used for the production or sale of marihuana. Moreover, a buyer who is unaware that a property was used as a marihuana facility at one time in the past should be protected as an “innocent purchaser” should the federal government try and initiate civil forfeiture proceedings based upon the prior criminal activity.

IV. CONCLUSION

The fact that the federal law with regard to marihuana is not consistent with Michigan law makes it very difficult for landlords and property owners. As a general matter, when it comes to use of property for cultivation or selling marihuana, the current status of the law may perhaps be best summarized by “don’t ask, don’t tell.” If a Realtor® is specifically asked to assist a buyer or seller who is involved in the marihuana business (or becomes aware of the fact that the property will be used in the marihuana business), he or she is well advised to insist that the client work with an attorney who is knowledgeable in the area and can assist the client in minimizing his or her risks.

REALTOR® LIABILITY FOR ERRORS IN SQUARE FOOTAGE

I. INTRODUCTION

The following fact pattern, or variations thereof, may be familiar to Realtors® – buyer of house sues seller and seller’s real estate agent for fraud and/or negligence, alleging that the seller and agent overstated the square footage of the house. The alleged misrepresentation may have been made in the MLS, a print advertisement or verbally. The information relied upon by the agent in making the square footage representation most likely came from information provided by the seller in the form of architectural plans, an appraisal or tax records. Can the agent be found liable for the alleged misrepresentation? This article explores how courts across the country have answered this question.

II. DISCUSSION

In the majority of those cases, the question of Realtor® liability turns of whether the buyer can show reasonable reliance. That is, can the plaintiff-buyer prove to the judge or jury that it was fair and sensible for him/her to rely on the square footage information provided by the seller and/or seller’s agent?

A. Qualifiers Held to Shift Burden to Buyers to Investigate

In a recent case in Ohio, the buyers sued the sellers and the listing agent for negligently or fraudulently misrepresenting the square footage of the house they had purchased.⁴⁵ The actual square footage of the home was 1,445 square feet but had been misstated in the MLS printout as 1,991 square feet. (The MLS figure had come from the tax records, but no one had noticed that the tax records clearly included a 400-square foot garage in the total square footage figure.) The Ohio court determined that the buyers' reliance on the accuracy of the MLS information was unjustified because the buyers had inspected the house three times before closing and could have measured the total square footage themselves or hired someone else to measure it for them. In addition, the Court relied on the fact that the MLS printout contained the following disclaimer:

All information herein is from sources deemed reliable. No representation is made as to its accuracy. It is provided subject to error and omissions and to change of price or terms, prior sale or lease, or withdrawal, all without notice.

Finally, the Court noted that the defendant real estate agents were agents of the sellers, not the buyers, and that the purchase agreement had clearly provided that the buyers were purchasing the home in its "present as is" condition, subject to the buyers' right to inspect. Based on these facts, the Ohio court held in favor of the listing broker and listing agent.

In a similar case from Tennessee, the buyer sued the listing broker and listing agent after learning, post-closing, that the square footage figure of 3,534 square feet listed in the MLS was over by about 500 feet.⁴⁶ The Tennessee case went to trial during which the listing agent testified that he derived the square footage from tax records but had made a mistake when transmitting this information to the MLS. The listing agent further testified that the buyer had unlimited access to the home but chose not to measure the house himself or have an inspection done. The buyer testified that he bought the house for the purpose of renovating it and reselling it at a profit and that square footage was a primary factor he used in deciding to invest in the home. After hearing all of the testimony, the Court ruled in favor of the listing broker. Several facts were key to the Court's decision. First, the square footage as expressed in the MLS was designated as an "estimate." Second, the bottom of the MLS listing contained the following statement:

"Information is Believed To Be Accurate But Not Guaranteed."

Third, the purchase agreement contained the following provision:

Buyer and Seller acknowledge that they have not relied upon any advice, representations, or statements of Brokers and waive and shall not assert any claims against Brokers involving the same.

⁴⁵ *Abbott v Loss Realty Group*, 2005 WL 2933757 (Ohio App).

⁴⁶ *The Cadco, LLC v Barry*, 2006 WL 140412 (Tenn App).

And, finally, the Court noted, the buyer was given “ample opportunity” to inspect and measure the premises but chose not to do so. For these reasons, the Court dismissed the buyer’s misrepresentation claims against the listing broker.

B. Buyers Held to Be Entitled to Rely on Listing Agent’s Representations as to Size

By contrast, an Oklahoma court found that the buyer was entitled to rely on a listing broker’s statements about the size of the home because such “statements of fact” actually discourage buyers from conducting their own investigations.⁴⁷ In this case, the buyers sued the seller, the listing broker and the listing agent for fraudulent misrepresentation in the MLS as to the square footage of the home. The home was represented as containing 2,890 square feet. However, the mortgage appraisal, received by the buyers after closing, gave the actual size of the house as 2,187 square feet. The listing broker and listing agent filed a motion to have the case dismissed, arguing that the buyers did not reasonably rely on the representation of square footage because the home was open for inspection, allowing the buyers to investigate, measure or otherwise confirm the home’s square footage before closing. The Oklahoma Supreme Court did not agree with the listing broker’s position, stating instead that a licensee’s statutory obligation under Oklahoma law to deal honestly with all parties to the transaction and to exercise reasonable skill and care, obligated the listing broker and listing agent to determine the truth or falsity of any facts they represented. The Court concluded that the real question was not whether the buyer was entitled to rely on the broker’s representation as to the size of the home, but whether the buyer was, in fact, deceived and if so, suffered actual damages as a result of the deception. The Oklahoma Supreme Court sent the case back to the jury to make such a determination.

C. Was Buyer Actually Harmed?

In some cases, courts have focused on whether a buyer has actually been harmed as a result of an error in presenting the square footage of a home. For example, a Texas Court of Appeals considered the issue of whether a buyer could recover damages as a result of a misrepresentation of a home’s square footage.⁴⁸ In that case, the listing broker and listing salesperson, through a mathematical error, incorrectly listed the square footage of the home in the MLS as 4,218 square feet. The actual square footage of the home was 3,593 square feet. After closing, the buyer learned of the error from an appraisal report and filed his lawsuit. The buyer claimed damages of \$50,856.25, which he calculated by multiplying the square footage purchase price of \$81.37/square foot by the “missing” 625 square feet. The case went to trial. At the conclusion of the buyer’s evidence, the listing broker and listing salesperson requested that a verdict be issued in their favor, which the Court granted. The buyers appealed and the appellate court agreed with the trial court. The Court’s rationale hinged on the fair market value of the home. Specifically, the Court found that the buyer’s method of calculating damages was incorrect, and that because the purchase price was less than the appraised fair market value of the home, the buyer was not damaged.

⁴⁷ *Bowman v Presley*, 212 P3d 1210 (Okla, 2009).

⁴⁸ *Matheus v Sasser*, 164 SW3d 453 (Tx App).

D. Is the Analysis Different Where the Representations Were Made By the Buyer's Agent?

In a North Carolina case, the home buyer sued his own broker for fraud and breach of fiduciary duty relating to false square footage information conveyed by the buyer's broker to the buyer.⁴⁹ The Court first noted that because the broker represented the buyer, the broker owed a fiduciary obligation to make a full and truthful disclosure of all material facts known by it or discoverable with reasonable diligence. The Court went on to find that the square footage of the house was a material fact that was discoverable by the buyer's broker. The buyer's broker did not challenge the conclusion that the square footage number was a material fact that was discoverable, but claimed that it had satisfied that fiduciary duty by relying on the square footage computation contained in the sellers' appraisal and communicating that number to the buyer. Whether that was true, the Court ruled, was a question for the jury.

E. Michigan Cases

In Michigan, the Court of Appeals has looked at the issue of square footage misrepresentation claims on two reported occasions. In the first instance, the broker was found liable and the jury awarded the plaintiff buyer a \$19,250 judgment against it.⁵⁰ The broker had misrepresented the square footage of the home at 4,000 square feet in an advertisement. According to subsequent measurements, the home was only 3,000 square feet. The jury determined that this mistake was made recklessly and the appellate court refused to set aside this conclusion. The Court, unfortunately, did not elaborate on the "facts" which supported the jury's conclusion that the mistake was made "recklessly."

In a later Michigan case, the listing broker and agent were found not liable.⁵¹ In this case, the buyer sued defendants listing broker and agent, claiming fraud based on alleged misrepresentations about, among other things, the square footage of the home. The trial court dismissed the claim against the listing broker and agent. The Court of Appeals agreed and, like some of the cases discussed earlier, concluded that the buyer could not have reasonably relied on the square footage representation because the listing advertisement, which contained the square footage statement, expressly stated that it was "not guaranteed and should be independently verified." The Court also found noteworthy that the purchase agreement contained similar language and that the buyer had made several visits to the home, had an independent inspection performed and received an appraisal report all before buying the home. On these facts, the Michigan Court of Appeals threw out the buyer's claims against the listing broker and listing agent.

III. CONCLUSION

So, what can Realtors[®] do to protect themselves against square footage misrepresentation claims? First, Realtors[®] should be aware that, in many instances, square footage calculations for the same property may differ as between an appraisal, a building permit, architectural drawings

⁴⁹ *Brown v Roth*, 514 SE2d 294 (NC App, 1999).

⁵⁰ *Barbier v Piku*, 1997 WL 33347942 (Mich App).

⁵¹ *Seit-Olson v Reliance Appraisals, LLC*, 2006 WL 1113936 (Mich App).

and tax records. While many times the variance in the square footage calculations is due to human error, in other instances it is attributable to different methodologies or purposes for which the calculation was made. For example, assessors may round up or down, creating up to a 10% differential in larger homes. Architectural drawings can include garages and porches in their square footage calculations. Square footage calculations for bungalows and other homes with sloped ceilings can create square footage issues based on whether there is five feet of headroom in the areas with sloped ceilings – if not, technically, the square footage should not be included. Similarly, tri-level homes and other homes with living space below grade lend themselves to discrepancies in square footage since, although true “living space” should be above-grade, many times the sub-ground level is included. And, finally, an obvious disparity will occur based on whether the square footage measurements are taken on the outside walls or from the “drywall in.” When transmitting square footage information, Realtors® should identify the source of that information. Buyers should be encouraged to independently verify square footage calculations.

Second, Realtors® should use limiting language and/or releases contained in the MLS, the purchase contract and other forms. Language in the MLS stating that the information is not guaranteed and should be independently verified and/or language in a purchase contract disclaiming any reliance on representations made by any Realtor® involved in the transaction, while not foolproof, are useful tools in limiting liability. Finally, Realtors® should describe the square footage as an estimate, using the word “approximately” to convey that the information is not intended to be 100% accurate. Realtors® should also be careful not to imply that the value of the home can be conclusively established by multiplying the square footage of the home times a particular dollar per square foot amount. If, for example, a buyer sets his offer price with mathematical precision at 3,610 square feet times \$100.00 per square foot, he is likely to believe that he has been taken advantage of if it turns out that the home he has purchased has only 3,100 square feet.

TREASURY’S CHALLENGES TO PRINCIPAL RESIDENCE EXEMPTIONS

I. INTRODUCTION

In 2006, the Michigan Department of Treasury, with the aid of a private contractor, dramatically expanded its audits of the principal residence exemption (PRE) for property taxes. The PRE exempts homes from the 18-mill school operating tax, representing more than a quarter of the total property tax bill in many communities. A denial can cover the current and the three preceding tax years. Taxpayers who receive these denials are often required to repay three years of the PRE exemption amount. With interest, given the value of the exemption, those repayments typically run to thousands of dollars. Several recent cases suggest that while these efforts catch many parcels that truly do not qualify for a PRE, the process does not appear open and fair to many homeowners who do not know why their PRE has been denied and do not have the knowledge or ability to know how to respond or the money to hire an attorney to pursue their claim.

As Realtors® know, in order to qualify for a PRE, a person must own and occupy the property as his or her principal residence on June 1 to claim the exemption for that year, or by November 1, for the winter tax bill. By law, Treasury is required to conduct audits of PREs in

any county which elects not to do so. In 2006, Treasury contracted with a private company, Tax Management Associates, Inc., to develop an audit program and conduct audits for the counties for which Treasury had responsibility. The number of counties covered has varied, but this same private company has been regularly rehired and will continue the work at least through 2019. Last year, the contractor audited 60 of Michigan's 83 counties. The data analysis by the contractor pulls out records for individuals who claim PREs on more than one parcel, for parcels owned by an entity other than an individual, and parcels classified as non-residential or otherwise not qualified for exemption. Treasury then sends a letter informing the owner of the audit and requesting a response to a questionnaire that asks if the owner lives at the property and if there are any other uses of the property.

The number of denials issued by Treasury in recent years has been substantial – 6,854 in 2017, 8,234 in 2016, 10,294 in 2015, and 6,317 in 2014. The greatest number by far of the denials is based on a failure to respond to requests for information, representing half to two-thirds of the denials in each of the last three years.

II. DISCUSSION

A notice of PRE denial comes in the form of a letter stating that the property does not qualify for the PRE, typically for the current tax year and three preceding years, for which Treasury can require repayment by law. The notice of denial simply states, without more, that to qualify for a PRE, a person must own and occupy the property as his or her principal residence on May 1 to claim the exemption for that year. It generally recites no factual basis for the denial and includes a questionnaire asking basic information as to ownership and occupancy. A homeowner who receives this notice is left to guess as to why Treasury believes that they do not qualify for a PRE.

Michigan law defines “principal residence” as *the one place* where a person has his or her true, fixed, and permanent home to which, whenever absent, he or she intends to return and that shall continue as principal residence until another is established. In other words, an individual can have only one principal residence; the same is true for most married couples. Treasury accepts certain documents which it provides as examples: driver's license, voter registration card, cancelled checks listing the property address, statements such as medical, bank, or charge accounts, income tax records indicating the mailing address, and insurance policies. The difficulty is that without these signal documents, it has proved extraordinarily difficult to overcome a denial of the PRE. This may prove particularly difficult for people who, for various reasons, use another address for mail or whose affairs are taken care of by a son, daughter or other person.

Moreover, a conflict between documents may well trigger a denial. For example, as reported in a Detroit News article, an Allegan physician retired and moved to the Lake Michigan shoreline where he lived year-round. He was not informed of the reason for the denial but believes he was targeted for failing to change his address on state income tax filings after retiring and moving from Allegan. After first paying \$11,000 in back taxes, interest, and penalties in order to protect his property rights, he appealed and at a formal hearing won after proving residency by showing utility bills and propane gas receipts for the beachfront home.

The difficulties created by not knowing the reason for the denial, as well as the problems caused by using a different mailing address, are illustrated by a recent Court of Appeals decision overturning a PRE denial.⁵² The case involved a couple, Ann Breakey and her husband, Bill Breakey, who had lived in their home near Lansing for over 40 years. Bill Breakey died in 2012, and Ann Breakey continued to live in the home.

In October of 2015, Treasury notified Mrs. Breakey that she did not qualify for the PRE for that year or 2012, 2013, and 2014 without any statement of the reason. She guessed it was triggered by her use of her stepson's office as her mailing address. In her written response and at the informal hearing conference, Mrs. Breakey explained she had decided to have all of her mail sent to her stepson's business after difficulty with her rural mail service. She produced her voter registration card showing her home address, along with documents showing that the address her mail was sent to was an office building. At the informal hearing conference, Mrs. Breakey became aware that Treasury's primary basis for its denial of Mrs. Breakey's PRE was based on the fact that, years earlier, Mrs. Breakey and her husband had conveyed the home to themselves as trustees. When her husband died in 2012, her stepson became successor trustee, and she continued to live in the house. Under the terms of the trust, she had the right to live there rent-free for her lifetime and had the power to remove and replace the trustee.

Treasury's position that ownership of the property by a trust disqualified it for PRE eligibility was surprising given the fact that the PRE statute itself expressly addresses trusts,⁵³ and provides that "a person who owns property as a result of being a beneficiary of a will or trust" qualifies for the PRE exemption. Moreover, Treasury's own published guidelines directly address such trusts:

3. As the beneficiary of a trust, when are you considered eligible for a principal residence exemption?

Upon the death of the grantor of the trust, provided you occupy the property as your principal residence.

* * *

6. The owner of the principal residence died. Before his/her death, the owner placed the property in a revocable trust that specified that the surviving spouse was a life beneficiary. The surviving spouse occupies the home as a principal residence. Can he/she claim the exemption?

Yes. Upon the death of the grantor of the trust, the life beneficiary is considered the owner of the home and may claim a principal residence exemption on the property.⁵⁴

⁵² *Breakey v Dep't of Treasury*, ___ Mich App ___ (Docket No. 339345) (2018).

⁵³ MCL 211.7dd(a).

⁵⁴ Guidelines, Chapter 7, *Estates and Trusts*, p 9.

Treasury nonetheless denied Mrs. Breakey's PRE exemption, and the Michigan Tax Tribunal affirmed that decision.

The Michigan Court of Appeals reversed, holding that Mrs. Breakey's interest in "residential property held in an irrevocable trust for her lifetime benefit renders her an 'owner' for purposes of the PRE," and that she qualified as an "owner" under the plain language of the PRE statute. The Michigan Court of Appeals sent the case back to the Tax Tribunal for a decision on whether Ann Breakey occupied her home as her principal residence, even though her mail goes to her stepson's office.

In another recent case, the Michigan Court of Appeals rejected Treasury's position that a person who rents his or her home on a temporary basis does not qualify for a PRE exemption.⁵⁵ Treasury takes the position that renting one's home to others is inconsistent with maintaining a principal residence there, and rental will result in a denial of the PRE. In its published guidelines, Treasury created a small safe harbor, renting for fourteen days or less a year, but also applied it to deny a PRE for any rental beyond that. In defending the guideline, Treasury explained that there is no provision in the law for a partial principal residence exemption but federal tax law allows an owner to rent a principal residence for less than 15 days during a calendar year without declaring it as a rental property on his or her tax return. The published guideline therefore ruled out a PRE for any property rented for more than 14 days.

In the case heard by the Court of Appeals, Melrose Township had denied a PRE exemption for David Rentschler for his home in Boyne City with the general statement that the property was "not the owner's principal residence," that his employment was out of state, and the property was "possibly rented during part of year," for the four years in question. The owner signed an affidavit to say the property had been his principal residence for the tax years in question, presented proofs that each year he had been registered to vote at that address; it was listed on his driver's license and on his income tax returns. He had not claimed any similar exemption in any other state. The Michigan Tax Tribunal accepted his factual claims and found that he had, in fact, occupied the property for the majority of each year. Nonetheless, because he had rented out his home for more than 14 days, the guidelines precluded a PRE.

On appeal, the Court of Appeals rejected both the validity of the guideline and the practice of denying a PRE to anyone who rents their principal residence for more than 14 days a year, even though they qualify in all other respects. The Court of Appeals found that Mr. Rentschler met each of the statutory requirements: that the property is owned and occupied as a principal residence by that owner on the date the PRE affidavit is signed, and the owner had no similar exemption for property in another state. No disqualifying provisions covering partial use of a property for business or full-time rental to others applied. Nor was the rental of a resort area home a commercial purpose. Given that Rentschler met all the statutory qualifications for the PRE, the court concluded that the published guideline does not properly state the law. It is contrary to the tax statute which does not disqualify a property for a PRE simply because it has been rented for 15 days or more. Federal tax law does not rule out treatment of property as a principal residence when it is rented for 15 days or more, either for deduction of expenses or for tax treatment for a sale.

⁵⁵ *Rentschler v Melrose Twp*, 322 Mich App 113 (2017).

In another recent example, Treasury acted to deny a PRE where the statute allows the exemption, and the taxpayer had long complied with the statute and Treasury's own guidelines. The case involved a co-op housing unit. In a cooperative, a corporation owns the property and the occupants own stock in the corporation and lease their apartment or house from the corporation. Shares of stock in the corporation are issued to and owned by its members who become tenants of the cooperative property through leases between the members and the corporation. The rent is generally tied to the anticipated expenses of the cooperative.

The Michigan Legislature recognized this form of ownership as deserving of the same treatment for the PRE as any other home ownership and prescribed a form of affidavit from the cooperative housing corporation (defined by statute as an owner entitled to the PRE) and from the individual tenant-stockholder as well. Both are needed to claim a PRE for a coop unit. Treasury's published guidelines recite these provisions, along with reference to the forms to be used.⁵⁶

Leah Sherman has occupied Unit 2 of the Pier Pointe Homeowners Association as her principal residence since 1998, and has claimed and was permitted a PRE for years until the Treasury denied the PRE in 2017. In classic form, she held a certificate for stock in Pier Pointe and a 99-year lease for Unit 2. Both she and her cooperative housing corporation completed and filed the correct affidavits. In informal conference and the formal hearing, Treasury ignored both the statute and its own guidelines and simply took the position that because Ms. Sherman occupied under a lease, she was not an owner and no PRE could apply. Ms. Sherman did not give up. With the assistance of an attorney, she filed an extensive brief outlining those facts, as well as the law on cooperative housing, which the hearing referee incorporated in an extensive opinion, reviewing the structure of cooperative housing, how it qualifies for a PRE, and reinstated the PRE. Treasury issued its decision incorporating that opinion and overturning the initial denial of the PRE.⁵⁷

As is illustrated by the cases discussed in this article, Treasury is currently taking a very aggressive approach in interpreting the PRE statute. Each of these cases also illustrate the time and expense involved in fighting the denial of a PRE. If the taxpayer does not have the means to hire a lawyer or have a lawyer/neighbor who volunteers to help, as was the case in these appeals, or the time and ability to know the correct defense to the blanket claim that the home they live in is now not their principal residence, they may well simply not respond and accept the denial.

Treasury's approach has also spawned a kind of cottage industry of amendments to address very specific factual situations:

⁵⁶ MCL 211.7cc; Treasury Guidelines, Chapter 6.

⁵⁷ *Leah Sherman*, Docket No. 20172075, *In Re: Parcel No. 0747300013001* (April 18, 2018).

- 2012 PA 324 allows a homeowner to continue to claim a PRE after moving into a nursing home or assisted living facility so long as he or she still intends to return as evidenced by maintaining the property.⁵⁸
- In 2016 PA 144, allows an individual to continue to claim a PRE if he or she is deployed or stationed elsewhere for active duty as a member of the United States Armed Forces.
- 2018 PA 133 allows an individual to continue to claim a PRE if he/she lives in another location for the purposes of convalescence but intends to return to his/her home.
- HB 5454, still pending in the Legislature as of this writing, would allow an owner to continue to claim a PRE while rebuilding a home that was damaged or destroyed by fire or other casualty.

Arguably, none of these amendments should have been required. An application of the statute as originally drafted – using reasonable judgment – should have allowed a homeowner in any of these circumstances to continue to claim a PRE. In each of these circumstances, there is no reason to assume that the owners’ temporary absence home means that their home is not the “true, fixed, and permanent home to which, whenever absent, he or she intends to return and that shall continue as principal residence until another is established.”

The argument against these amendments is that it is not possible (and should not be necessary) to amend the PRE statute to cover every conceivable factual scenario. Each specific carveout then suggests that others somehow do not qualify, as if renting for 15 days instead of 14 days negates Rentschler’s intent to return there as his permanent home. Other bills have been drafted but not introduced, in part, because Michigan Realtors® has counseled against them for those reasons – recently, for example, a state senator whose PRE was denied when he moved out temporarily while his home was being renovated. The basic terms of the statute should be applied using reasonable judgment, instead of multiplying exceptions for the particular set of facts for which Treasury has most recently denied the PRE.

III. CONCLUSION

While taxpayers might agree that the state’s fiscal burden should be shared fairly and the law observed, the audit system is organized and applied in a way that does not always get that result. Many would also agree that there are any number of taxpayers who are knowingly claiming a PRE exemption to which they are not entitled. Treasury should continue to aggressively seek out these violators. That being said, it is also true that this should be done in a manner that makes certain that Michigan taxpayers are afforded a fair opportunity to respond and keep the benefit to which they are entitled. The system of notifying taxpayers that their PRE has been denied, often for three or four years, without disclosing the reason for denial and forcing the

⁵⁸ Originally, in order to qualify for the PRE in these circumstances, the home could not be occupied or listed for sale. These limitations were subsequently lifted.

homeowner to guess at the reason makes the system seem unfair and stacked against the taxpayer.

Moreover, the system should provide for a full and fair adjudication at the informal conference. While the denial of the PRE typically costs the homeowner thousands of dollars, the amount is seldom enough to justify the expense of appealing Treasury's decision first to the Michigan Tax Tribunal and then to the Court of Appeals. Michigan taxpayers who clearly qualify for the exemption should not be denied the exemption because they do not have the financial wherewithal to hire an attorney to appeal an erroneous decision of the Treasury Department and, in some instances, the Michigan Tax Tribunal. Treasury's focus in its informal conferences should not be to come up with any conceivable basis to deny the taxpayer's PRE, but to determine the actual facts and to apply the PRE statute as written and as intended.