

Know The Code

One of the primary benefits and obligations of being a REALTOR® is the National Association of REALTORS® Code of Ethics (the “Code”). In order to abide by the Code, it is necessary that the members be familiar with it and, more specifically, the Standards of Practice that provide guidance in understanding the Code. Based on questions and inquiries received by this office from various sources, it would appear that there are a few provisions of the Code that are worthy of review.

Changing Firms

In the first hypothetical, REALTOR® White has been with Firm A for a number of years. Unfortunately, due to a change in management practices which are unacceptable to REALTOR® White, he is making arrangements to move to Firm B in a couple of weeks. REALTOR® White has worked very hard to obtain his current listings and wishes to notify his present sellers of his imminent departure and move to Firm B. In order to make certain that his listings move with him, REALTOR® White plans to contact all sellers to advise them of the move and provide them with the forms necessary to terminate their existing listings with Firm A and move those listings to Firm B. The Broker at Firm A becomes aware of REALTOR® White’s imminent departure and objects to his contacting sellers prior to his departure from Firm A in order to induce them to move their listings to Firm B. Does the Broker of Firm A have a leg to stand on under the Code?

This is not a grey area. If, under these circumstances, REALTOR® White, contacts “his” sellers to induce them to prematurely terminate their listings with Firm A and move to Firm B, he would be in violation of Article 16 of the Code. Standard of Practice 16-20 provides:

REALTORS®, prior to or after their relationship with their current firm is terminated, shall not induce clients of their current firm to cancel exclusive contractual agreements between the client and that firm.

In other words, REALTOR® White can do nothing to induce clients of Firm A to terminate their current listings with Firm A either before or after he leaves Firm A.

Standard of Practice 16-20 goes on to provide:

This does not preclude REALTORS® (principals) from establishing agreements with their associated licensees governing assignability of exclusive agreements.

Obviously, if Firm A has an independent contractor agreement with REALTOR® White that sets forth the terms under which REALTOR® White can contact “his” listings prior to his departure from Firm A,

and if REALTOR® White complies with those provisions, then there would be no violation of the Code.

Contacting the Seller Directly

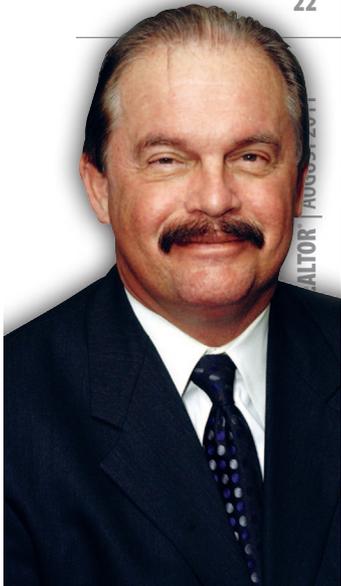
In the next hypothetical, assume REALTOR® Green is the agent for a very aggressive Buyer who routinely buys bank-owned properties for rehab and rental. REALTOR® Green has submitted an offer to the Listing REALTOR® for the bank-owned property at 123 Elm Street and is being hounded by his client to obtain a response from the Seller Bank. REALTOR® Green has contacted the Listing REALTOR® numerous times. Each time she is contacted, Listing REALTOR® indicates that she will get back to REALTOR® Green just as soon as she has a response from her client. REALTOR® Green’s Buyer-client demands that REALTOR® Green contact the Seller Bank directly in order to move things along. Can REALTOR® Green contact the Listing REALTOR’S® client, Seller Bank, directly?

Except under limited circumstances, REALTOR® Green is prohibited under Article 16 of the Code from contacting Listing REALTOR’S® client directly. Standard of Practice 16-13 provides:

All dealings concerning property exclusively listed, or with buyer/tenants who are subject to an exclusive agreement shall be carried on with the client’s representative or broker, and not with the client, except with the consent of the client’s representative or broker or except where such dealings are initiated by the client.

Again, there is little grey area on this issue. While REALTOR® Green’s client on his own initiative could contact the Seller Bank, REALTOR® Green cannot do so under these circumstances. It should be noted that the Code does NOT contain an exception to this Standard of Practice for situations where the seller is not a human being.

There are a few limited circumstances under which a REALTOR® may contact the client of another REALTOR®. Before initiating any such direct communication, a REALTOR® should make certain that he or she falls within one of these limited exceptions. For example, Standard of Practice 16-3 provides that Article 16 of the Code does not prohibit REALTORS® from contacting the client of another broker for the purpose of offering to provide or entering into a contract to provide a type of real estate service unrelated to the service currently being provided. As another example, Standard of Practice 16-4 permits a REALTOR® to contact the client of another REALTOR® if the listing REALTOR® refuses to disclose the expiration date and nature of a specific listing. Again, REALTORS® are advised to make certain they fall within one of the exceptions



in the Code before they initiate direct communication with a client of another REALTOR®.

Advertising Other REALTORS'® Listings

In the next hypothetical, REALTOR® Smith regularly visits the websites of other REALTORS® to see what her competitors are doing with their marketing. In viewing the website of REALTOR® Jones, she sees one of her listings. There is no mention of her firm in her listing on REALTOR® Jones' website. REALTOR® Smith contends REALTOR® Jones has violated the Code. Is she correct?

REALTORS® must be careful to distinguish between requirements imposed under Michigan law and the provisions of the Code. Rule 329(1) of the Administrative Rules governing real estate licensees provides:

...all advertisements to buy, sell, exchange, rent, lease or mortgage real estate or business opportunities by a broker shall include the broker's name as licensed and telephone number or street address...

An argument can be made that there has been a violation of this Rule when REALTOR® Smith's name and telephone number or street address were not included in the listing on REALTOR® Jones' website. However, a possible violation of this Rule does not necessarily mean it is a violation of the Code.

Article 12, Standard of Practice 12-5 generally prohibits REALTORS® from advertising real estate services or listed properties in any medium (e.g., electronic or print) without disclosing the name of that REALTOR'S® firm in a reasonable and readily apparent manner. It is not clear whether Standard of Practice 12-5 is referring to the name of the listing REALTOR® or the name of the REALTOR® who is doing the actual advertising. If REALTOR® Jones, when advertising REALTOR® Smith's listing, discloses its own name, i.e., "Jones Realty," arguably REALTOR® Jones has complied with Article 12 as interpreted in Standard of Practice 12-5. However, even if this is the case, it would appear that there may still be a violation of Article 12 under a different Standard of Practice.

Standard of Practice 12-4 provides, "REALTORS® shall not offer for sale/lease or advertise property without authority." If REALTOR® Jones does not have the authority of the owner of 123 Elm Street, either directly from the owner or through REALTOR® Smith, then it would appear that REALTOR® Jones has violated Article 12 as interpreted by Standard of Practice 12-4. If REALTORS® are going to advertise other REALTORS'® listings, they are required to obtain the necessary authority to do so.

Demands for Additional Compensation from a Buyer by a Listing REALTOR®

In the final hypothetical, REALTOR® Brown represents a Buyer who is interested in purchasing 123

Elm Street. This property is listed by REALTOR® Black who is offering 3% of the purchase price to any cooperating REALTOR® who procures a buyer. REALTOR® Brown prepares a full-price offer on behalf of her Buyer for 123 Elm Street and presents it to REALTOR® Black. She is then advised by REALTOR® Black that the Buyer will need to agree to pay an additional \$500 at closing as a condition for REALTOR® Black submitting the offer to the Seller. REALTOR® Brown objects and advises REALTOR® Black that his demand for additional compensation from the Buyer violates Article 16 of the Code.

If the shoe was on the other foot – i.e., if it was REALTOR® Brown who was trying to condition the submission of her Buyer's offer on an agreement from REALTOR® Black or the Seller to pay her additional compensation above that offered in the MLS – such conduct would appear to be in direct violation of the Code. Standard of Practice 16-16 provides:

REALTORS®, acting as subagents or buyer/tenant representatives or brokers, shall not use the terms of an offer to purchase/lease to attempt to modify the listing broker's offer of compensation to subagents or buyer/tenant representatives or brokers nor make the submission of an executed offer to purchase/lease contingent on the listing broker's agreement to modify the offer of compensation.

Under this Standard of Practice, REALTOR® Brown would be prohibited from demanding an additional \$500 from REALTOR® Black or his Seller under Article 16 of the Code.

However, there is no similar provision in the Code which appears to prohibit REALTOR® Black or any other listing REALTOR® from demanding additional compensation from the Buyer as a condition of submitting an offer to the seller. Obviously, if REALTOR® Black did not have the authority from his Seller to demand this additional compensation as a condition of submitting an offer to the Seller, there may be a claim by the Seller of breach of fiduciary duty by REALTOR® Black and, in addition, REALTOR® Black may be subjected to other legal or Code challenges. That being said, if, on the other hand, REALTOR® Black has the Seller's authority to demand the additional compensation, there appears to be nothing in the Code which prohibits him from doing so.

NAR's Code of Ethics may only be formally interpreted by the Professional Standards Committee of NAR. The conclusions set forth in this article are simply the opinions of the author. However, it is hoped that the article will at least put REALTORS® on notice that they need to be aware of the Code's requirements when they become involved in any of the hypothetical factual situations described in this article. **MAR**

Michigan REALTORS® can stay informed of legal issues with updates through our Legal Lines.