

# MICHIGAN REALTORS®

## 2016 Legal Review

1. Seven Things Realtors® Should Know About  
The Seller Disclosure Act (2-6)
2. CFPB: An Update (7-8)
3. Antitrust Primer and Reminder (9-13)
4. Designated Agency and Teams (14-16)
5. What is Included in The Deal (17-19)
6. Role of a Transaction Coordinator (20-23)
7. Status of Dower and Entireties After U.S. Supreme  
Court Case on Same Sex Marriage (24-27)
8. Principal Residence Exemption Requirements  
How To Use It Or Lose It (28-30)
9. Offer and Acceptance – A Refresher (31-32)
10. Private Roads and Land Division Act Refresher (33-35)

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## **(1) Seven Things Realtors® Should Know About The Seller Disclosure Law**

### **1. I Know Nothing – I Never Lived There.**

When the Seller Disclosure Act (the “SDA”) became effective in January 1994, Realtors® were told that sellers were only required to fill out the statutory seller disclosure form (“SD Form”) honestly based on personal knowledge they had learned from living in their home. This advice was based on several provisions in the SDA.

The SDA indicates that a seller is not liable for any error, inaccuracy or omission in any information if the error, inaccuracy or omission was not within the personal knowledge of the seller. Further, in the SD Form, a buyer is specifically advised that the seller does not possess any expertise related to construction or condition of the house or the land and that the seller has not conducted any inspection of generally inaccessible areas such as the foundation or the roof.

One of the first questions was what to do in a situation where the seller has never lived in the home and knows absolutely nothing about the property. This situation generally arises when a Michigan resident passes away and the home is inherited by an out-of-state relative who never visited the property. The out-of-state relative, now the titleholder to the property, must fill out a SD Form. The issue was whether the out-of-state relative could simply write across the front of the SD Form “I have never lived at the property and know nothing (or some similar statement)” or whether the out-of-state resident had to go through the SD Form and mark all questions as unknown. Ultimately, the Michigan Court of Appeals determined that a broad statement on the SD Form by a seller that he had never lived at the property was sufficient to satisfy the disclosure requirements imposed by the SDA.

It would appear that this practice is sometimes misused. Realtors® in all parts of Michigan are seeing more and more SD Forms showing a first page bearing a legend to the effect “the seller has never lived in the property and has no knowledge.” It is not necessarily the case that a seller who has never lived in the home knows nothing about the condition of the home. In many instances, for example, the property has been owned by the seller as a rental or was purchased by the seller for the purpose of resale. The SD Form specifically provides: “. . . the seller specifically makes the following representations based on the seller’s knowledge at the signing of this document.” Thus, the real issue is whether the seller actually has “no knowledge” with respect to the home. In most instances, this statement will not be true.

If, for example, a seller has owned a property as a rental for any significant period of time, it is highly likely that the seller will have had some involvement with routine maintenance of the property. If the seller had to pay a plumber to fix a problem at the property, the seller knows about that problem. If the seller had to put in a new oven in the rental property for use by tenants, the seller knows something about the oven. If there was water in the basement in the property, it seems highly likely that the tenant would have told the seller and/or the seller would taken steps to address the problem with water in the basement. The same would be the case with a leaky roof or a troublesome septic system.

If, for example, a seller buys a home for purposes of flipping it, in many instances the seller will contract with third parties to make at least cosmetic improvements to the property prior to marketing the property. If the seller had new appliances placed in the kitchen, he can certainly address the condition of those appliances in the SD Form. If the seller hired contractors to address heating, plumbing and electrical issues, he certainly knows something about those

subjects for purposes of filling out the SD Form.

Sellers should only use the general statement of “no knowledge” on the SD Form if they truly know nothing about any of the specific disclosure requirements in the SD Form. If the seller uses a broad statement of “no knowledge,” he or she runs at least two (2) risks. First, a remorseful buyer may claim the seller had some knowledge and failed to properly fill out the SD Form. The buyer will then use the provisions of the SDA to terminate the transaction. Second, a buyer who occupies the property after closing and has a significant problem with water in the basement may well discover the seller had previously dealt with a water problem in the basement through a third-party contractor. The SD Form could become a primary exhibit for a fraud claim against the seller, *i.e.*, evidence that the seller intentionally lied when he said he knew nothing about any evidence of water in the basement.

## **2. An Inspection has Revealed Conditions Different from those Disclosed by the Seller in SD Form**

We are often asked whether and when a seller has an obligation to update the SD Form. The SDA provides that if something occurs after the SD Form is completed but before closing that renders the statement inaccurate, and such inaccuracy relates to the structural/mechanical appliance systems, then the seller has a duty to amend. But what if the seller does not learn of the inaccuracy directly?

Variations of the following hypothetical are very common. Seller accepts an offer from Buyer 1 on 123 Elm Street. Upon inspection, Buyer 1 rejects the condition of the property and terminates the purchase agreement. The Seller receives a copy of the inspection and finds that the inspector noted what might be a structural problem in the attic. When the Seller had filled out the SD Form, he had indicated he was aware of no structural problems with the property. The question is whether the Seller needs to amend the SD Form based on the findings of Buyer 1’s inspector.

Assume Seller has lived at 123 Elm Street for 20 years and has never seen any evidence of a structural problem. The SDA only requires the Seller to provide his answers based on personal knowledge and ordinary care. The Seller is not required under the SDA to have the expertise of a contractor or an engineer in determining if there are structural problems which could potentially occur on a property but have never happened in the Seller’s experience. In the above hypothetical, the Seller may in good faith conclude that he is not required to amend his SDA Form to indicate the potential problem pointed out by Buyer 1’s inspector.

Obviously, if an inspector for a buyer detects a problem that was unknown to the Seller at the time he filled out the SD Form, but that the Seller now knows the problem actually exists, the Seller needs to amend his SD Form to reflect the problem. For example, if the structural problem in the attic discovered by Buyer 1’s inspector is observed by the Seller, the Seller should amend his SD Form. It is also the case that a Realtor® should never discourage a Seller from amending the SD Form to disclose a recently discovered defect. Disclosure is always the safest course of action, and a Realtor® does not want to put herself in the position of having her clients testify that they wanted to disclose a potential defect, but that the Realtor® talked them out of it.

### **3. I Found Out a Prior Tenant had been Manufacturing Meth in the Home**

The potential health hazards related to the production of methamphetamine in a residential property are well-known and well-documented. The question is what does a seller do in filling out the SD Form when he or she becomes aware that a prior occupant was engaged in these activities. In this situation, it may, in fact, be advisable for a seller to conduct an investigation. While, as a general matter, the SDA does not require a seller to investigate, as a practical matter, a seller who discloses the existence of a prior meth operation may need to provide additional information if he wants to sell his house.

First, the seller should take reasonable steps to confirm if someone had previously been manufacturing meth on the property. If the prior activities resulted in a law enforcement action, then information should be available from the policing agency. Information may also be available from the Michigan State Police. Obviously, a seller does not want to make a disclosure of the SD Form with respect to meth production on the property if the basis for that belief is simply a rumor floating around the neighborhood.

Second, the seller may wish to determine whether any remediation of the environmental hazards resulting from meth production occurred on the property. Under Michigan law, any property on which meth is being produced and is subject to a law enforcement action cannot be re-occupied until it is remediated and a certificate of remediation approved by the local public health agency. If a seller discovers that the “remediation” was limited to painting walls and installing new carpet, there has been no remediation.

In the end, if a seller confirms to his or her satisfaction that there was prior meth production on the property, it should be disclosed in the portion of the SD Form for environmental problems. If remediation was previously completed and certified, then that would also be indicated on the SD Form. If a seller was advised there was prior remediation but there is no certification or other substantial proof as to what was done, the seller should not represent that the problem has been remediated, as that could turn out to be false.

### **4. I Asked the Listing Agent for the SD Form for my Buyer and the Listing Agent told me the Seller was Exempt**

The SDA provides that certain types of transfers are exempt. The following is a generic list of exempt transfers:

- (1) Transfers pursuant to a court order, writ of execution, foreclosure sale, condemnation, order for specific performance or transfers by a trustee in bankruptcy;
- (2) Transfers through a deed in lieu of foreclosure;
- (3) Transfers under the power of sale for any foreclosure sale (*i.e.*, a foreclosure by advertisement) or a foreclosure ordered by a judge;
- (4) Transfers by non-occupant fiduciary as part of the administration of an estate, guardianship, conservatorship or trust;
- (5) Transfers between co-tenants;
- (6) Transfers made to a spouse, parent, grandparent, child or grandchild;
- (7) Transfers between divorcing spouses;
- (8) Transfers or exchanges to or from any governmental entity; and
- (9) Sales of new never-been-occupied homes by a licensed residential builder.

There are two (2) types of transfers which seem to cause recurring problems. First, many

people fail to distinguish between a transfer through an estate in probate and a transfer by a person who inherited the property through an estate that was in probate. If the property is in probate and the grantor is an executor or personal representative, then the transfer would be exempt. On the other hand, if the transfer will be by the person who inherited the property, the property is not being sold through probate and the seller must fill out and deliver an SD Form.

Second, a transfer by a trustee from property held in trust in most instances is not exemption from the SDA. A common estate planning tool is for persons to convey their owner occupied residential property into a revocable living trust. The owners become the trustees of the trust and legal title to the residence is held by a trust. However, a sale by the trustees would not be exempt from the SDA. The exemption for trusts only applies to “non-occupant” fiduciaries. If the trustees are living on the property, the transfer is not exempt. If the trustees have since moved to Florida, but previously occupied the property as their residence, it is more than highly likely that a court would determine that the trustees would be required to provide the SDA Form to a prospective buyer.

**5. The Sellers had the Basement Waterproofed by a Professional Company Five Years Ago and it has been Dry for Five Years. Do They have to Mention any Prior Problems on the SD Form?**

With one exception, the questions in the SD Form address the present condition of the property or items in the property. For example, a seller is only asked to indicate whether a refrigerator is or is not in working order. As another example, a seller is only asked to disclose whether the roof leaks. There is, however, one question that speaks to the past. The question posed with respect to the basement/crawlspace provides: “Has there been evidence of water?” The seller is required to enter “yes” or “no” and explain if the answer is “yes.”

The Michigan Court of Appeals has interpreted this requirement in the SD Form to require a seller to disclose any evidence of any water in a basement at any time. The fact that the seller fixed the problem and the basement has been dry for several years does not excuse the seller from disclosing the prior problem. A related issue is what does the seller say when the problem with water in the basement has been fixed. If the seller says “there was water in the basement seven years ago and the basement was waterproofed by Acme Water Proofing Company” the seller is probably on solid ground (assuming this statement is true). On the other hand, if a seller says “there was water in the basement seven years ago and we had it fixed so it is now perfect” the seller may be causing himself more problems than simply disclosing there was a problem, it was addressed and the basement has been dry for seven years.

**6. The Seller does not Know if her Property is in a Flood Zone. Does She Need to Find Out and Disclose it?**

The issue of a property’s location in a flood zone became a hot topic a few years ago when Congress amended the national flood insurance program so that premiums were going to increase dramatically on properties deemed by FEMA to be within certain flood zones. The concern in the real estate community was that a buyer would purchase a property which was subject to increasing flood insurance premiums and would sue the seller and the listing agent for failing to disclose the property was in a flood zone. It was ultimately determined that as a

practical matter there was no problem in 99% of the sales of residential property in a flood zone. If a buyer applies for financing to purchase a property in a flood zone, the lender will advise them that they must purchase flood insurance. Thus, the buyer will be aware that the property is in a flood zone prior to closing. The only time the issue could arise is potentially in a cash sale.

The SD Form currently poses the question “do you have flood insurance on the property?” At the time the SD Form was drafted, it was determined that most property owners would have no notion whether their property was in a flood zone or not. However, if it was, their lender would require them to pay for flood insurance.

As a practical matter, in the age of the internet, a seller or buyer can simply go to the FEMA website ([www.floodsmart.gov](http://www.floodsmart.gov)), put in the address of the property, and make a determination as to whether FEMA thinks the property is in a flood zone requiring flood insurance.

**7. Buyer Says There are Mistakes in the SD Form Provided by the Seller and is Going to Sue for a Violation of the SDA**

More than one Realtor® has received a call from a seller who is in a panic because he or she received a letter from the buyer or the buyer’s attorney indicating there was an error in the SD Form and the buyer is going to sue the seller for violation of the SDA unless seller pays to fix the problem. Michigan courts have consistently held that the SDA by its terms only provides one remedy for an SD Form with errors. The SDA permits a buyer to terminate a binding purchase agreement when the SDA is not timely delivered or is discovered to have errors. However, the sole remedy of termination of a purchase agreement ends upon closing. Then, the SDA provides no remedies (*i.e.*, a basis for a lawsuit) after closing.

As importantly, Michigan courts, including the Michigan Supreme Court have consistently held that a seller cannot be sued for innocent misrepresentations contained in the SD Form so long as the misrepresentations were made honestly in good faith based upon personal knowledge of the seller at the time she filled out the form. Obviously, if a seller intentionally makes a misrepresentation (*i.e.*, lies) on a SD Form and causes damage to a buyer, the SD Form may well become Exhibit A in the buyer’s lawsuit against the seller for fraud.

## (2)CFPB: An Update

When the CFPB took over RESPA enforcement from HUD, it literally re-adopted all prior rules and regulations passed by HUD relating to RESPA interpretation and enforcement. However, over the past five (5) years, the CFPB has substantially deviated from HUD's prior interpretation of certain key RESPA provisions.

Section 8(a) of RESPA provides as follows:

No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.

("Section 8(a)").

Section 8(c) begins with the preface "nothing in this section shall be construed as prohibiting" and then it lists a number of activities which are not prohibited by Section 8(a). These permissible activities (the "Safe Harbor") include both: (a) payments pursuant to cooperative brokerage and referral arrangements or agreements between real estate agents and brokers; and (b) the payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed.

HUD had consistently interpreted the Safe Harbor as permitting a referral in conjunction with a payment to a settlement service provider so long as the settlement service provider provided goods, facilities or services of roughly equal value to the payment amount. Further, every federal circuit court of appeals who interpreted the Safe Harbor had applied the same interpretation as HUD.

Based on HUD's and the Courts' interpretation of the Safe Harbor, thousands of real estate brokerage firms entered into marketing service agreements with lenders, mortgage brokerages and title companies. Thousands of real estate brokerage firms have rented their facilities to title companies and other settlement service providers. Further, thousands of real estate brokerage firms have entered into joint advertising agreements with title companies and other settlement service providers. All of these activities can be construed as involving referrals of business, but, would not be in violation of Section 8(a) because they were within the Safe Harbor.

In a recent case, the CFPB applied a new interpretation of the Safe Harbor. *PHH Corporation et al v. Consumer Finance Protection Bureau* (the "PHH Case") was not heard in federal district court, but instead, before an Administrative Law Judge employed by the CFPB. After an adverse decision by that Administrative Law Judge, PHH's next appeal was to the Director of the CFPB. In deciding PHH's appeal, the Director of the CFPB crystallized the CFPB's new interpretation of the Safe Harbor and the other exemptions set forth in Section 8(c).

PHH was a mortgage lender who referred its borrowers to mortgage insurance companies. PHH had agreements with the mortgage insurance companies whereby in consideration for PHH's referral of borrowers, the mortgage insurance companies bought reinsurance from Atrium Reinsurance Corp., a wholly-owned subsidiary of PHH. It does not appear to be disputed that the mortgage insurers paid market value for the reinsurance from PHH's subsidiary and that PHH's subsidiary provided actual reinsurance to the mortgage insurers.

PHH's defense before the Administrative Law Judge and before the Director of the CFPB was very straightforward – all of its activities fell within the Safe Harbor. Much of the evidence in the case was directed at demonstrating that PHH's subsidiary actually furnished reinsurance services to mortgage insurers and that the price paid by the mortgage insurers for the reinsurance equaled or exceeded the value of the services.

The prosecutors for the CFPB argued that it is a violation of Section 8(a) when a lender makes referrals to a real estate settlement service provider in exchange for the purchase of goods or services “at any price” *i.e.*, there is no Safe Harbor when a referral is part of the deal. The Director accepted this theory.

The Director determined that PHH violated Section 8(a) every time its subsidiary received a payment for reinsurance in the context of a referral of business to a mortgage insurer. In essence, the Director determined that Section 8(c) did not set forth exemptions to Section 8(a) but, instead, simply provided guidance in interpreting potential violations of Section 8(a). Ultimately, the Director of the CFPB directed PHH to disgorge premiums which had been paid to its subsidiary for actual reinsurance in the amount of \$109,188,618.

The PHH Case was argued before the United States Court of Appeals for the District of Columbia Circuit on April 10, 2016. As of the date of this article, a decision has not yet been released. NAR filed an effective amicus brief challenging the Director's interpretation of the Safe Harbor (or lack of a Safe Harbor). Again, the CFPB took the position that payment of any kind (including payments for less than the value of services provided) in the context of a referral violates of Section 8(a).

It is hoped that the federal appellate court will reject the CFPB's new interpretation of Section 8(c) and restore the previous interpretation of the Safe Harbor. Until that occurs, other than certain affiliated business arrangements, any settlement service provider relying on the Safe Harbor does so at its own risk.

### (3) Antitrust Primer and Reminder

#### I. INTRODUCTION

- A. It has been over 10 years since MR last addressed this topic.
- B. Nothing much has changed in the law – however, the dangers are probably greater due to the pace of change in the industry.
- C. Antitrust laws prohibit conspiracies to fix prices, such as real estate commissions, or to fix other terms or conditions of the broker-client relationship.
- D. Antitrust laws also prohibit group boycotts or concerted refusals to deal with a competitor, supplier or vendor.

#### II. ANTITRUST CONCERNS WITHIN REAL ESTATE FIRMS

- A. Traditional Concerns:
  - 1. Two or more brokerage firms agreeing on the commission rate to be charged sellers.
  - 2. Statements by agents suggesting that all competitors in the marketplace follow the same pricing practices. Firms should caution agents that when discussing listing commissions with potential clients, they should avoid any suggestion that commission rates are not set independently by each firm.
  - 3. Two or more firms agreeing on the split to be offered cooperating brokers. Firms must independently determine their cooperative compensation policies, just as they do with listing commissions.
- B. Additional Concerns:
  - 1. Statements by agents that suggest “no firms will deal with” a particular competitor who typically has a new business model or a non-traditional business model.
  - 2. Statements by agents suggesting that particular terms of a listing contract or other practice are followed by all competitors in the marketplace. Antitrust laws prohibit, for example, agreements among competitors as to the length of listings.
  - 3. An agreement between two firms that each will not deal with a third firm or that each will deal with a third firm in a particular manner, *e.g.*, with reduced offers of compensation through an MLS.
  - 4. Discussions between two or more firms about another firm’s business practices particularly if the other firm is using a non-traditional business model. A real estate firm is free to unilaterally choose not to offer compensation to a particular firm or to lower the compensation offered to that firm. But if the real estate firm takes this action after discussing his “problem” with that firm with members of other firms – even casually – an inference may be drawn that this action was done pursuant to a conspiracy to boycott that firm.
  - 5. An agreement between two firms that they will not deal with a particular service provider – *e.g.*, mortgage company, warranty company, title

company, syndicator, real estate information services company, marketing service company, etc. Many of the cases have involved vendors of real estate advertising. For example:

- a. An Iowa case involved a group of brokers who set up a real estate magazine. The shareholder-owners of this magazine all agreed not to advertise in a competitor's real estate magazine and instructed their sales associates to do the same. (This case was resolved by the parties through settlement; the terms of which are unknown.)
- b. A newspaper in Virginia brought suit against several brokers alleging that they had unlawfully agreed not to advertise in the newspaper. (The case was eventually dismissed for lack of evidence of concerted activity.)
- c. The Attorney General in Oregon brought an action against several real estate firms and the Salem-area Association of REALTORS® asserting that the local Association had facilitated an agreement by the firms to restrict their advertising to certain publications. (A settlement was reached which involved a fine and antitrust education programs.)

### **III. ANTITRUST CONCERNS WITHIN ASSOCIATIONS**

- A. Actions by an Association or officers within the Association aimed at stopping a particular firm from conducting its business in a particular manner which some of the Association's members find objectionable.
- B. Discussions at meetings of the Association about a particular firm or its practices.
  1. A case from Des Moines, Iowa, illustrates the pitfalls of Associations getting into the middle of disputes between competitor firms. In that case, a firm with approximately 75% market share decided not to offer cooperative compensation to a start-up firm that took many "office listings." At about the same time, the Association began enforcing a long-ignored policy that penalized firms for "office listings." The start-up firm sued both the large broker and the Association, alleging that the two had conspired against it. While the Association eventually prevailed – in large part because the start-up company had nonetheless prospered – the case was litigated all the way to the Iowa Supreme Court.
  2. At a recent continuing education class sponsored by a local Association, the following question was asked:  
"There is one member of our Association – a solo practitioner whose office is over on Elm Street and who recently got divorced. Anyway, I know he lost his law license and I don't trust him – can I refuse to let him show my listing?"

This is exactly the type of discussion that should never take place during any type of meeting of Association members. It is likely that many of the members in attendance could identify the solo practitioner from the description given. If more than one firm later decided not to offer

compensation to this licensee, the inference could be drawn that this was a concerted effort to boycott, in violation of antitrust laws.

- C. Requests by officers/directors/members that an Association’s executive officer “do something” to stop a particular firm from conducting its business in a particular fashion.
1. Executive officers should not be put in the position of mediating disputes between competitors where the dispute involves the particular business practices of one of the firms. An executive officer should never start a conversation with a member with language like:  
“Several members of the Association have called me and expressed concerns about the way your firm handles . . . .”  
  
“I know you are new around here, and therefore you might not know the way we do things around here . . . .”
  2. Association leaders and executive officers should be sensitive to the possibility of misuse of the Code of Ethics. The Code may not be used to regulate or “outlaw” innovative or new business practices.
    - a. Article 15, for example, provides that “REALTORS® should not knowingly or recklessly make false statements about competitors, their business or other business practices.” This does not prevent Realtors® from asserting that their firm is superior to all others (*i.e.*, puffing). It is not a violation of Article 15, for example, if a firm advertises that the way it does business is superior to the way other firms in town do business.
    - b. Article 16 precludes Realtors® from engaging in any practice or taking any action inconsistent with exclusive relationship agreements with other Realtors®. It does not prohibit competition – even aggressive competition – to obtain clients. Realtors® can, for example, solicit another Realtor®’s prospective or former client or customer, regardless of the long-term nature of that relationship, and even if there was a prior exclusive agency relationship.
    - c. An example of how a problem could arise occurred recently when an officer of a local Association made the following telephone inquiry:  
“At the end of the last meeting of the Grievance Committee, several of the members were talking and they want the Association to institute an ethics complaint against ‘Firm X’ because its advertisements falsely state that buyers’ interests are not fully served unless they hire an exclusive buyer’s agent . . . .”
- D. An Association enters into a tying arrangement which is an agreement between the Association or its MLS to sell one product (MLS services), but only on the condition that the buyer (MLS participant) also purchase a different product or service.

1. There have traditionally been four (4) elements which must be proven in order to establish an illegal tying arrangement under the antitrust laws:
  - a. There must be two separate products or services;
  - b. There must be a sale or an agreement to sell one product or service on the condition that the buyer purchase another product or service;
  - c. The seller must have sufficient economic power with respect to the tying product to restrain free competition in the market for the tying product; and
  - d. The tying arrangement must affect a “not insubstantial” amount of commerce.
2. Several federal circuit courts of appeals (including the 6<sup>th</sup> Circuit Court of Appeals) have added a fifth element which must be proven in order to establish an illegal tying arrangement. The seller of the tying product must have an economic interest in the tied product. To illustrate: Assume MLS “X” conditions participation in the MLS on a participant owning a 1965 red Chevy Impala. Assuming MLS “X” is the only MLS available to Realtors® in the area, it would be contended that there were two separate products with a requirement that a Realtor® purchase a second product in order to obtain the first (MLS services). MLS “X” would not be liable for an illegal tying arrangement if it had no economic interest in the tied product, *i.e.*, the 1965 red Chevy Impala. In other words, it received no economic benefit from the MLS participant’s acquisition of the cars.

#### IV. ANTITRUST CONCERNS AMONG ASSOCIATIONS

- A. One of the consequences of boards of choice is that local Realtor® Associations are now competitors.
  1. Two or more local Associations may not agree among themselves on the amount of dues or other charges.
  2. Two or more local Associations may not agree that they will not solicit one another’s members.
  3. If two local Associations jointly purchase a product in order to save money (for example, lockboxes), they may not agree on the re-sale price that each Association will charge their respective members.
- B. Regional MLSs are also made up of a group of competitors.
  1. *Sandicor* decision out of California involved service agreements between the regional MLS and the shareholder Associations, pursuant to which the Associations provided support services to the MLS (*e.g.*, enrollment, billing and collection services). The regional MLS required all of its member Associations to charge all MLS participants the same “user fee.” The Associations collected the “user fee” and forwarded the money to the regional MLS, who would then return the “service fee” portion of the “user fee” to the respective Association. The regional MLS did not permit

any Association to discount its “user fee”; thus the “service fees” charged by all Associations were the same. The Ninth Circuit Court of Appeals held that this was an illegal conspiracy to fix prices.

2. The *Sandicor* decision does not affect a regional MLS that delivers MLS services directly to the participants.
  3. Likewise, the *Sandicor* decision does not affect a regional MLS that sells its services to the member Associations, who each in turn, resell the services to their respective members at prices determined by each Association.
- C. The merger of two or more neighboring Associations may also raise antitrust considerations, particularly if it will result in higher dues payments for members of one or more of the constituent Associations. Mergers that result in lower dues and/or more member services are much more likely to withstand scrutiny.

## (4) Designated Agency and Teams

In 2001, when the Michigan Realtors® sought and obtained legislation creating the practice of designated agency in Michigan, no one predicted that 15 years later many Michigan Realtors® would be operating within teams. A threshold question is whether Realtors® can operate in teams while practicing designated agency and avoid any substantial risk. That question will be explored in this article. This article is not intended to address other issues regarding teams in Michigan. MR has just completed a toolkit on teams which more thoroughly addresses the broad legal issues surrounding the operation of a team in Michigan.

### Designated Agency – A Brief Refresher

The key elements of designated agency are contained within six relatively brief sections of a single statute, MCL 339.2517(6)-(11). The key legal elements of designated agency are as follows:

- (a) In the absence of a written designated agency agreement, the client has an agency relationship with the broker and all “affiliated licensees.” “Affiliated licensees” is defined as individuals licensed as salespersons or associate brokers who are employed by the same broker.
- (b) Designated agents who are affiliated licensees (*i.e.*, in the same brokerage firm) representing different parties in the same transaction must notify their clients that their broker represents both the buyer and seller “before an offer to purchase is made or presented.”
- (c) Two designated agents who are affiliated licensees may each represent different parties in the same transaction and are not considered dual agents.
- (d) A designated agent’s knowledge of confidential information of a client is not imputed to any affiliated licensee who does not have an agency relationship with that client.
- (e) A designated agent cannot disclose confidential information of a client to any other agents (including affiliated licensees). The only exception is that a designated agent may disclose confidential information to any supervisory broker for purposes of seeking advice or assistance for the benefit of his or her client.
- (f) A Realtor® who represents a client in an agency capacity does not breach any duty or obligation owed to that client by failing to disclose confidential information obtained through a present or past agency relationship.

### Confidentiality and Teams

Since the inception of designated agency, a primary focus has been preserving the confidentiality of the client’s information within a brokerage firm, particularly when another agent within the firm is representing persons whose interests could be adverse to the client. A simple hypothetical demonstrates how easily a Realtor® could breach the duty of confidentiality owed to his or her client. Assume that Realtor® A affiliated with Acme Real Estate is the designated agent for Seller Smith who owns 123 Elm Street. Realtor® B who is also a member of Acme Realty is a designated agent for Buyer Jones. If Buyer Jones becomes interested in 123 Elm Street, obviously Realtor® A has the duty to safeguard confidential information of Seller Smith and Realtor® B has the same duty with regard to confidential information of Buyer Jones. To complicate matters, assume that Realtor® C who is also a member of Acme Realty is the

designated agent representing Buyer Green who is also interested in 123 Elm Street and wishes to make an offer. There are now three designated agents within Acme Realty, Realtors® A, B and C who have to make certain that the confidential information of their respective client is protected.

Overall, Michigan Realtors® acting as designated agents appear to have been successful in preserving the confidentiality of their clients, assuming that a lack of litigation is a measure of success. The issue now is whether Realtors® acting as designated agents but operating within a team will have greater difficulty when it comes to preserving confidentiality.

As most Realtors® are aware, Michigan's regulatory scheme recognizes the existence of brokers, associate brokers and salespersons. There is no recognition of a legal entity known as a "team."

It is generally believed that use of the team concept began as a loose affiliation of agents within a firm who joined together primarily to provide backup for each other. Early on, these groups did not advertise themselves as teams, again, they were formed to provide internal cooperation. Any team operating on this basis today would not appear to have any additional risks associated with designated agency beyond those of any Realtors® operating as designated agents within a brokerage firm.

The potential for additional difficulties increases as the team concept becomes more formalized. Many teams have incorporated as corporations or organized as limited liability companies with team members becoming shareholders of a corporation or members of a limited liability company. Further, if the team wishes for their broker to be able to pay commissions to the team entity, they have the team entity licensed as a broker and at least one team member acting as an associate broker for both the team and the brokerage firm. Finally, many teams that have become a company within a company also advertise and market the team as a brand. Much of the marketing is aimed at demonstrating to sellers and buyers that they will be better served by the coordinated efforts of a team of specialists working together as opposed to the efforts of a single agent within a brokerage firm.

It would appear that as the operation of a team becomes more coordinated and integrated, it may be increasingly difficult for that team to safely practice designated agency. The risks could become particularly prominent if the team (with the approval of the brokerage firm) adopts a policy that permits individual team members to represent a seller and a buyer as designated agents in the same transaction. Assuming all team members have access to the electronic and paper flow of the team, it would be incumbent upon the brokerage firm and the team to make certain that they can demonstrate either (a) there is no buyer or seller confidential information in the common electronic and paper flow; or (b) the brokerage firm and its team have implemented safeguards to interrupt and prevent any confidential information from entering the common electronic or paper flow of information within the team. Further, if the team meets regularly to review, update or strategize with respect to transactions being conducted by the team, it would have to again either demonstrate that client confidential information is not discussed within these sessions or it has instituted safeguards to make certain that team members with opposing interests are not present during the discussion of a transaction in which team members represent sellers and buyers.

Because of these concerns, a brokerage firm may wish to consider adopting a policy whereby team members may not act as designated agents for a buyer who becomes interested in another team member's listing. In this situation, both team members could act as consensual dual agents as if they were operating in a traditional agency office. Alternatively, the buyer

could be referred to another member of the firm who was not part of the team. To facilitate this policy, a firm could adopt a policy whereby each licensed member of the team is listed in every one of the team's agency contracts – thereby making clear that the client has a fiduciary relationship with everyone on the team. Confidential information about a client could then be freely shared with other team members. It would be the duty of the team members to make certain that a client's confidential information was not shared with other members of the firm who were not members of the team.

Even if a team is very careful not to share confidential information with other team members, there is another reason for not allowing members of a firm to represent a seller and a buyer as designated agents in the same transaction. Even if confidential information is preserved, a court could nonetheless hold that the information is deemed to have been shared with other team members as a matter of law. Firms operating as traditional brokerages fully understand that as a matter of corporate law, any confidential information obtained by an agent within the firm from a client is imputed to all other agents in the firm, *e.g.*, if a buyer tells their designated agent how much they are willing to pay for a home, all other 50 agents in the firm are treated as if they also have that knowledge. One of the keys to making designated agency work was to change this corporate law when Realtors® acted as designated agents. The statute specifically provides:

The designated agent's knowledge of confidential information of a client is not imputed to any affiliated licensee not having the agency relationship with that client.

In other words, in practicing designated agency, when a designated agent is told by a buyer how much they are willing to spend, that information is not imputed to the other 50 agents within the firm unless they are also designated agents of that same buyer.

A problem could arise when another “corporate” layer is added in the form of the team set up as a corporate entity. Obviously, when the designated agency law was implemented, that statute was specifically designed to prevent confidential information provided to a designated agent from being imputed to all other members of the firm. An argument could be made that the statute only prevents knowledge from being imputed to other individual designated agents within the brokerage firm. The argument would be made that the statute was not designed and does not prevent knowledge from being imputed to members of a team that is organized as a corporation. While a strong argument could be made that the definition of “affiliated licensees” within the statute covers both the brokerage firm as a corporation and a team as a corporation, there is a risk that an argument would be made that a corporate team is not recognized by the statute and thus the statute does not prevent knowledge from being imputed to all members of the team.

Realtors® have and will continue to practice designated agency while working within a brokerage firm as an organized team. In doing so, Realtors® need to be aware of the issues as well as the actions and policies necessary to minimize the risks.

## (5) What is Included in The Deal

Based on calls to the MR Legal Hotline and calls from Realtors® who are clients of this firm, a problem that has been around for decades is again on the rise. The problem is easiest to discuss and analyze with a hypothetical.

The Smiths are interested in purchasing 123 Elm Street which is owned by the Jones. The Smiths have been through 123 Elm Street three times with their buyers' agent before sitting down to write an offer.

The offer contains the following with regard to what property is included with the real estate known as 123 Elm Street:

The property includes all buildings; all fixtures; all gas, oil, and mineral rights owned by Seller; built-in appliances; lighting fixtures; plumbing fixtures; water softener (unless rented); heating fixtures; electrical fixtures; radio and television antennas and any mechanical controls; shades; awnings; shutters; window blinds; curtain and drapery rods; attached floor coverings; attached fireplace doors and screens; garage door openers and controls; screens, storm windows and doors; landscaping, fences, and mailboxes, if any; and \_\_\_\_\_

but does not include: \_\_\_\_\_

(the "Personal Property Clause"). The Smiths have concerns about 123 Elm Street inasmuch as it has no central air conditioning. However, there are three window air conditioners which they decide will provide sufficient cooling for a few years until they can afford central air.

After closing, the Smiths travel to their new home and discover that all three window air conditioners are gone. Outraged, they call their buyers' agent and demand that she require the Jones to return the three window air conditioners. The buyers' agent is advised by the listing agent that the Jones never considered the three window air conditioners to be part of the transaction. Thus, the fight begins.

### Fixture vs Personal Property Analysis

The Smiths and their buyers' agent review the Personal Property Clause which indicates that "all fixtures" are to be included in the sale of 123 Elm Street. They recollect that all three window air conditioners were attached to window casings by screws. Thus, they argue the air conditioners were "fixtures" and were included in the sale.

In Michigan, the test as to whether an object is personal property or a fixture is determined by a three-part test: "(1) is the property annexed or attached to the realty; (2) is the attached property adapted or applied to the use of the realty; and (3) is it intended that the property will be permanently attached to the realty?" The Smiths will argue that the three window air conditioners were "attached" to the realty by screws and that it was intended that they remain there permanently (or at least until central air could be installed). The Jones will argue that the presence of screws was insufficient to constitute attachment to the property; that the window air conditioners were not "adapted" to 123 Elm Street but are portable and could be inserted in any standard size window in any home; and that it was never intended that the air conditioners remain permanently with the property.

Where, as here, there is some doubt as to whether property is personal property or a

fixture, a court could decide either way. The fixture/personal property analysis is not going to resolve the dispute between the Smiths and Jones short of going to court to resolve it.

#### MLS Information

In addition to the fixture argument, the Smiths and the buyers' agent rely on the fact that the photographs of the home in the MLS clearly depicted the three window air conditioners. Further, the description of the three window air conditioners was included within the information provided in the MLS. They argue that since the home was "advertised" as including the air conditioners, the air conditioners were included in the sale.

The Jones will rely on the fact that there is no reference to the MLS listing in the Purchase Agreement. Further, they will point out that the Purchase Agreement has a provision which provides:

Buyer and Seller agree that this is the entire agreement between the parties and that there are no other written or oral understandings. Buyer and Seller further agree that this agreement supersedes any and all prior agreements, understandings or representations made by the parties or their agents.

The Jones will argue that in order for the MLS listing to be incorporated into the Purchase Agreement, it had to be specifically referenced in the Personal Property Clause, *e.g.* "and all property referenced in MLS listing XYZ123456." Since the MLS listing was not expressly incorporated, it is not within the four corners of the contract and thus is not included in the sale. As with the personal property/fixture analysis, a court could come out either way on this argument.

As an aside, many times buyers like the Smiths will argue that because the property at issue was referenced in the Seller's Disclosure Statement as being in "working order," it was the sellers' intent to include the property in the sale. For example, if a humidifier is missing, the buyers argue that the sellers intended for the humidifier to be included in the sale because they marked it as being in "working order." This argument cannot succeed. The Seller's Disclosure Statement was specifically amended to address this argument. It now specifically provides: "The items below are in working order (the items below are included in the sale of the property only if the purchase agreement so provides)."

There is a final possible twist on the hypothetical which should be mentioned. Assume that at the time the Purchase Agreement was signed, the three window air conditioners at 123 Elm Street were all less than two years old and were of a brand known to be of high quality. When the Smiths traveled to 123 Elm Street after closing, they discovered that the three window air conditioners now located on the property appeared to have been manufactured shortly after the Korean War and/or are a brand by a manufacturer who went out of business years ago due to its shoddy products. The Smiths demand that the three window air conditioners which were on the property when they wrote their offer be restored to the property.

Assuming there is no argument that the three window air conditioners were to be included in the sale and assuming further that the Smiths had sufficient pictures or other evidence to demonstrate the switch, they will likely prevail in either causing the three modern window air conditioners to be returned or obtaining damages for the difference in value between those air conditioners and the ancient air conditioners recently installed by the sellers.

#### Solution

The issues described above have existed for as long as personal property has been sold

with real estate. There are very few reported cases involving the issue of personal property versus fixtures in the sale of residential real estate. This is the case for one very obvious reason. Typically the amount at issue for the missing property is not sufficient for buyers to go to court to seek damages. In our hypothetical, for example, the difference in value of the three window air conditioners and the replacements provided by the Jones would probably not result in damages sufficient to pay the Smiths' attorney fees.

This problem can only be avoided by having buyers decide what specific property they want included with the real estate. If there is any question as to whether an item of property is a fixture and it is not included in the boilerplate list in the Personal Property Clause, it should be specifically mentioned in the Purchase Agreement. Further, if a buyer wants all of the property described in the MLS listing, then the MLS listing should be incorporated by reference in the Personal Property Clause. Finally, if a buyer wants to make certain that the specific property is included in the sale, *e.g.*, a specific high-end microwave oven located in the kitchen, he or she may want to take pictures and/or obtain serial numbers and then make certain that his or her buyer's agent lets the listing agent know that he or she has done so. The only way to avoid these problems is to eliminate as much uncertainty as possible.

## (6) Role of a Transaction Coordinator

### I. INTRODUCTION

Assume that a friend of yours calls and asks you to assist him on the sale of his cabin to his neighbor. Since he already has a buyer, he does not need to list the property, but he does need help putting the transaction together and getting the sale closed. For many Realtors®, the difficult question here is not how to put the deal together, but rather in what capacity the Realtor® should serve. Obviously, the friend does not need a traditional listing agent, but should the Realtor® set up some type of agency relationship with the seller? Or should the Realtor® act as a transaction coordinator? Can the Realtor® charge for his/her services? As will be discussed below, while in this scenario it is certainly possible for the Realtor® to help his friend (and get paid for his work), because of its limitations, a transaction coordinator role may not be the best choice.

### II. DISCUSSION

#### A. Background

In order to understand the limitations of the role of a transaction coordinator, it may be helpful to understand how this status originally came about. In 1993 NAR imposed a new requirement whereby MLS's were required to permit participants to offer cooperation and compensation to buyers' agents. Prior to this time all cooperating agents acted as subagents of the seller and thus Michigan Realtors® had no experience acting as buyers' agents in residential transactions. Faced with NAR's new rule, MR established a task force to address the implementation of buyers' agency in Michigan.

One of the members of the task force was a representative from a large real estate brokerage firm. This representative advised the task force that once the new rule was in place, his firm was no longer going to offer compensation to subagents to MLS participants. Instead, this firm was going to offer cooperation and compensation only to buyers' agents in order to protect its sellers from potential liability for the misrepresentations and other wrongful acts of a subagent.

While it was certainly legally permissible for a firm not to offer cooperation and compensation to subagents, the MR task force was concerned that this firm's position was going to create a real, practical problem for firms who did not practice buyers' agency or who represented buyers who did not want to enter into a buyer agency relationship. For these reasons, the task force wanted to find a way for a cooperating Realtor® who was working with a buyer as a customer to show that buyer a listing which did not offer compensation to subagents.

MR communicated with NAR as to the possibility of offering cooperation and compensation to non-agents. NAR agreed that it would be permissible to offer cooperation and compensation to non-agents in Michigan only if it could be demonstrated that it was lawful to practice real estate in Michigan as a non-agent.

It was discovered, based on law that originated in the 1880s and the 1890s, that there was precedence in Michigan for a real estate licensee to act as a non-agent. It was determined that a Realtor® could act as a non-agent, but only on a very limited basis. These cases from the 1880s and the 1890s had a very similar fact pattern. A real estate broker had

contacted a farmer, and the farmer agreed to pay the real estate broker a commission in the event the real estate broker found a buyer for the farmer's farm. In turn, the same real estate broker had approached a man in the city, and the man in the city agreed to pay the real estate broker a commission if the real estate broker could find a suitable farm for the man to purchase. The real estate broker put the farmer and the man from the city together, and they ultimately reached a deal. The farmer and the man from the city each paid the real estate broker a commission without notice that the other was paying the real estate broker a commission. In other words, the real estate broker did not disclose to either party that he was also receiving a commission from the other party. Upon learning of the payment of the two commissions, the farmer and the man from the city sued the real estate broker to require him to pay back the commissions based on a claim of undisclosed dual agency.

The Michigan Supreme Court determined that in these cases, the real estate broker had acted as a "middleman." The Michigan Supreme Court determined that the buyer and the seller did not rely upon or use any of the professional skills of the real estate broker. In other words, the real estate broker did not negotiate on behalf of either party or otherwise assist them in reaching an agreement and closing the transaction. The real estate broker simply introduced the two parties to one another. Thus, as a non-agent, the Michigan Supreme Court determined that the real estate broker could lawfully take commissions from both the buyer and the seller.

Based on these 1880 and 1890 cases, the status of "transaction coordinator" arose in Michigan. This status, again, was created primarily as a vehicle by which Realtors® could produce buyers who were not clients and obtain compensation from Realtor® firms that were not offering cooperation and compensation to subagents.

In the two decades since the task force looked at this issue, buyer agency has become standard operating procedure. For this reason, currently the transaction coordinator role is rarely used in the manner originally anticipated by the task force as almost all firms offer buyer agency, and almost all buyers seek representation. Realtors® who discover the transaction coordinator role today – particularly if they are unfamiliar with its origins – sometimes view it as an alternative to an agency relationship – *i.e.*, as a means of working with buyers or sellers without assuming any fiduciary responsibilities. This is simply not the case. While there are isolated instances in which the transaction coordinator role is appropriate, its limitations are such that it is not appropriate for adoption as an overall business model.

#### B. The Role of a Transaction Coordinator Today

A transaction coordinator cannot work for the benefit of either party. A transaction coordinator must be a neutral party. It is often stated that his/her role is simply to bring the parties together. When acting as a transaction coordinator in its traditional form, a Realtor® simply introduces the buyer to the seller, and the parties conduct any negotiations or other activities necessary to acquire the property. If a transaction coordinator accidentally slips out of his/her neutral role, then he/she forfeits any right to a commission.

A transaction coordinator cannot list property for sale. In order to list property for sale in an MLS, a Realtor® must be an agent of the seller. A listing agent can be a limited services agent – but would still be acting in an agency capacity. Since 2008, the law in Michigan has permitted listing agents to provide limited services to their seller-clients so long as the listing contract expressly describes the limitations.

Even when a seller has a listing agent, a transaction coordinator can introduce the buyer to the transaction. In this case, the transaction coordinator is still a neutral party. Here, the transaction coordinator is, in effect, bringing the buyer and the listing agent together so that they can make the deal.

Since a transaction coordinator's role was developed from century old case law, the parameters of the service that may be provided are not clearly defined. As stated above, applicable case law speaks only of bringing the parties together and letting them put together the deal. In today's world of much more complicated real estate transactions, as a practical matter, it is seldom the case that once introduced, a buyer and seller can simply put the transaction together on their own. Questions often come up as to what additional assistance the transaction coordinator can provide, if any. While it is certainly the case that a transaction coordinator cannot be involved in the price negotiations, are there other, more administrative-type services that a transaction coordinator can provide? For example, can a transaction coordinator assist the parties in completing the purchase agreement? Order title work? Locate an inspector? There are no definite answers to these questions, and it is certainly true that the more assistance that a transaction coordinator provides, the more likely he/she will be deemed to have stepped out of his/her neutral role and have forfeited his/her right to a commission. One suggestion that may assist a Realtor® in maintaining his/her neutrality is to adopt a policy by which the Realtor® does not ever meet with or correspond with either party separately.

Finally, a broker should NEVER attempt to act as a transaction coordinator if one of the parties is a friend or relative. A Realtor® is unlikely to be perceived to be acting in a neutral role if the Realtor® has an existing relationship with one of the parties in the transaction. If a friend asks you to "fill in the forms," the better course is to work for the friend as a limited services agent.

#### C. Realtors® Do Not Have to Be Agents in Order to Get Paid

For many years, the rule of law was that Realtors® could not charge a fee for assisting buyers and sellers in filling out a purchase agreement. This rule arose out of a 1955 case in which an attorney organization asked the court to prohibit Realtors® from helping their clients "fill out forms" on the theory that such work actually constituted as the practice of law. The Michigan Supreme Court disagreed and held that Realtors® could fill out forms so long as the work was incidental to their agency transaction, and so long as they did not charge a separate fee for this service. *Ingham County Bar Assoc v Walter Neller Co*, 342 Mich 214 (1955). In 2003, the Michigan Supreme Court changed its mind and held that a non-lawyer could charge for assisting in filling out a form so long as such person does not "counsel or assist in matters requiring legal discretion or professional legal knowledge." *Dressel v Ameribank*, 468 Mich 557 (2003).

### III. CONCLUSION

In most instances, it is easier and safer for a Realtor® to act as an agent for one of the parties to the transaction rather than try to serve two masters equally. In this way, acting as a transaction coordinator is quite similar to acting as a dual agent. In both cases, the Realtor® must maintain neutrality at all times, and if he/she fails to do so, the Realtor® will be deemed to have forfeited his/her right to a commission regardless of whether either party to the transaction was actually harmed. A Realtor® who has a close relationship with one of the two parties should never attempt to serve as either a dual agent or a transaction coordinator.

Serving as a transaction coordinator has an additional burden in that the case law upon which we rely speaks only to bringing the parties together. Until we have additional guidance from the courts, any assistance beyond that introduction runs the risk of forfeiting the commission. For these reasons, Realtors® should enter into transaction coordinator relationships only in the limited circumstances in which it is appropriate.

## (7) Status of Dower and Entireties After U.S. Supreme Court Case on Same Sex Marriage

In *Obergefell v Hodges*, the United States Supreme Court held that the right to marry is a fundamental right protected by the Constitution and that couples of the same sex may not be deprived of that right. Some property rights in Michigan have been limited to opposite sex couples and would not withstand a challenge under the holding in *Obergefell*. Dower and tenants by the entireties are the most obvious.

### I. Dower

In Michigan, upon the death of her husband, a wife is entitled to the use – during her lifetime – of 1/3 of all lands owned by her husband during the marriage. Dower is an expectancy only, meaning that her rights only vest if a wife survives her husband. As a practical matter, this right is rarely, if ever, exercised upon the death of a husband, but its existence does mean that during a marriage, a husband may not convey (or mortgage) any property owned by him alone without his wife’s signature.

Michigan’s statutory dower is the only law in the country providing dower for wives only. Nonetheless, Michigan dower withstood an equal protection challenge as recently as 2007. The Court of Appeals, in *In Re Estate of Miltenberger*, 275 Mich App 47 (2007), held that “the drafters of the Michigan Constitution intended to recognize dower as a legitimate property interest” that serves a longstanding policy of cushioning financial loss for woman reasonably justified by the historic economic disparity between men and women. The Michigan Supreme Court did not overturn that decision.

Michigan’s statutory dower uses the terms “husband,” “wife,” and “widow” and “woman” to make clear that a wife is entitled to dower by surviving a husband. The statute could not be read to apply in the case of a same sex marriage:

MCL 558.1. The widow of every deceased person, shall be entitled to dower, or the use during her natural life, of 1/3 part of all the lands whereof her husband was seized of an estate of inheritance, at any time during the marriage, unless she is lawfully barred thereof.

MCL 558.2. If a husband seized of an estate of inheritance and lands, exchanged them for other lands, his widow shall not have dower of both, but shall make her election to be endowed of the lands given, or of those taken in exchange; and if such an election be not evinced by the commencement of proceedings to recover her dower of the lands given in exchange, within 1 year after the death of her husband, she shall be deemed to have elected to take her dower of the lands received in exchange.

It is therefore likely that Michigan’s statutory dower would be deemed unconstitutional under the holding of the United States Supreme Court in *Obergefell v Hodges*.

For this reason, there is currently legislation pending in Michigan which would abolish dower rights for everyone except for those widows whose husbands are already deceased, if they

have already elected dower or if the time for that election has not yet expired. Although there is a case to be made that this exception also violates equal protection, the exception preserves rights that have already vested, thereby avoiding challenge on other constitutional grounds.

## II. Entireties

Title to property held as tenants by the entirety is unique. Under Michigan law, property held by the entirety can be held only by a married couple. Both parties hold title; both parties have an equal interest in it; and both parties have the same right to use the property. Neither spouse acting alone can transfer any interest in the property and neither spouse possesses a separate interest in the land. Because one spouse cannot separate his or her interest, creditors who do not have a judgment against both spouses cannot reach entirety property to satisfy that judgment. It is not difficult to see why the vast majority of married couples choose to hold real property as tenants by the entirety.

It is important to keep in mind that a tenancy by the entirety may exist **only if the persons are married at the time the deed is recorded**. If two unmarried people attempt to take property as tenants by the entirety, a court will typically declare them to be tenants in common. *In re: Estate of Kappler*, 418 Mich 237 (1983). Moreover, if the parties are not married at the time of the conveyance, their later marriage will not create a tenancy by the entirety.

It is important to understand that the recitation of entirety status in a deed and the acceptance of that deed by a register of deeds does not in and of itself have any legal significance. Any two people can record a deed declaring themselves to be tenants by the entirety. A register of deeds does not, and cannot, determine whether that declaration is accurate; he or she will simply record the deed. The entirety status will only become an issue if someone has reason to challenge that declaration at some time in the future – for example, a challenge from an heir in the event of the death of one of the co-tenants, or from a creditor of one co-tenant alone.

Michigan did not recognize same sex marriage prior to the *Obergefell* decision. It is not at all clear whether same sex couples who took title pre-*Obergefell* (and who had been legally married in another state or country) would be viewed as being legally married in Michigan at the time. Fortunately, there is an easy fix. A same sex married couple who took title pre-*Obergefell* can simply deed the property to themselves and clearly provide that they will be holding title to the property as entirety property. A sample form of such a deed is included with this article.

**QUIT CLAIM DEED**

The Grantors, \_\_\_\_\_ and \_\_\_\_\_,  
a married couple, whose address is 123 Main Street, Lansing, MI, quit claims to the Grantees,  
\_\_\_\_\_ and \_\_\_\_\_, a married couple, as tenants  
by the entireties, whose address is 123 Main Street, Lansing, MI, a parcel of land situated in the  
City of Lansing, County of Ingham, and State of Michigan, legally described as follows:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

for the sum of less than One Hundred Dollars (\$100.00).

The Grantor grants to the Grantee the right to make all divisions under section 108 of the  
land division act, Act No. 288 of the Public Acts of 1967.

This conveyance is exempt from state transfer tax pursuant to MCL 207.526(a) and is  
exempt from county transfer tax pursuant to MCL 207.505(a). The sole purpose of this deed is  
to establish/confirm the Grantors' intent to hold title to the property as tenants by the entireties.

This property may be located within the vicinity of farm land or a farm operation.  
Generally accepted agricultural and management practices which may generate noise, dust, odors  
and other associated conditions may be used and are protected by the Michigan right to farm act.

Dated this \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_\_.

Signature  
\_\_\_\_\_  
Type Name

Signature  
\_\_\_\_\_  
Type Name

STATE OF MICHIGAN                    )  
  ) ss.  
COUNTY OF \_\_\_\_\_)

The foregoing instrument was acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_  
20\_\_\_\_, by \_\_\_\_\_ and \_\_\_\_\_, a married couple.

\_\_\_\_\_, Notary Public  
\_\_\_\_\_ County, MI  
My Commission Expires: \_\_\_\_\_  
Acting in \_\_\_\_\_ County, MI

Drafted by and When  
Recorded Return To:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

## **(8) Principal Residence Exemption Requirements How to Use It Or Lose It**

If a home qualifies for a principal residence exemption (“PRE”), it is exempt from a portion of the real property taxes – specifically that portion of the tax levied by the local school district for school operating purposes. MCL 211.7cc; 211.7dd.

### **Definition/Qualification**

A “principal residence” is defined 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.” As a practical matter, Treasury looks at things like the address on a person’s driver’s license, his or her voting registration card and income tax records.

It is not the case that everyone is entitled to an exemption on one Michigan property. A person could own several homes in Michigan, none of which qualify as a principal residence. For example, if a person rents an apartment in Lansing, where he lives, works, votes and sends his children to school but owns a home in Petoskey, he cannot claim an exemption on the Petoskey home because it is not his “principal residence.”

Spouses who maintain separate principal residences may each claim an exemption unless they file joint federal and state income tax returns. If a person conveys his home to a wholly-owned limited liability company, he or she will no longer qualify for the exemption.

Property adjoining a principal residence also qualifies for the exemption regardless of its size and whether or not the parcel has a separate tax parcel number so long as it is unoccupied and contiguous or adjacent. Contiguity is not broken by a road or right-of-way. The property must be classified as either residential or timber-cutover. (“Qualified agricultural property” has its own exemption – see discussion below.)

Where an individual is in a nursing home or assisted living facility, his home continues to qualify for a PRE so long as it is not occupied, is not leased or used for any commercial purpose. The owner must be providing for the maintenance of the home while residing in the nursing home or assisted living facility.

Where a person rents his or her home, if more than 50% of the home is used as a principal residence, it qualifies for 100% exemption. If less than 50% of the home is used as a principal residence, then a person is entitled to a percentage exemption equal to the percentage of the home that is actually used as a principal residence.

If a portion of the parcel for which a person claims an exemption is used to operate a business, the person may claim an exemption for the portion of the parcel used as a principal residence.

### **Timing**

An affidavit filed on or before June 1 will qualify for the summer tax bill (and future tax bills); an affidavit filed by November 1 will qualify for the winter tax bill (and future tax bills). If a person qualified for the exemption on May 1 (or November 1) but did not file the affidavit by that date, he or she may file an appeal with the board of review any time within the next three years. The three-year limitation does not apply where the absence of the exemption was the

result of an error on the part of the tax collecting unit.

### **Rescission**

If a home with a principal residence exemption is sold, the seller must file a rescission within 90 days. If they qualify for the exemption, the buyers will have to file their own affidavit. Even if the buyers do not qualify for an exemption, the current exemption will remain in effect until December 31 of that year.

A person who purchases a home but has not sold his or her prior home can, under certain circumstances, claim an exemption on both homes. In this scenario, the prior home receives what is called a “conditional rescission.” In order to qualify for a “conditional rescission” on a prior home, a person must be claiming a principal residence exemption on his new residence. A person who is currently renting a home or has moved outside of the state will not qualify for an exemption on the prior, unsold residence. In order to qualify for an exemption, the prior home must be unoccupied, for sale, not leased and not used for any business or commercial purpose. The prior home must have previously qualified for an exemption – *i.e.*, the prior home must have been the owner’s principal residence. If the prior, unsold home qualifies, it can receive a conditional principal residence exemption for up to three years. If, at any time, the prior home is leased, it no longer qualifies for the exemption.

### **Denial**

An assessor who believes a home for which an exemption was claimed was not, in fact, a principal residence may deny a claim. The assessor may deny a claim for the current year and the three immediately preceding calendar years.

If the home has been sold to a bonafide purchaser for value before the additional taxes were billed to the seller as a result of the denial of a claim for an exemption, the taxes, interest and penalties are not a lien on the home and are not billed to the purchaser. In other words, the seller is responsible for all additional taxes, interest and penalties for years up to and including the year of the sale if the purchaser is a bonafide purchaser.

Legislation enacted in 2012 allows a bank or other lending institution to retain the principal residence exemption on foreclosed property for up to three years if the home was exempt immediately before the foreclosure, is for sale and is not occupied by anyone other than the person who is being foreclosed against. A bank can file for such exemption in order to make certain that purchasers of the home will be taxed at the non-homestead rate. However, during the time the lender owns the home, the lender must still pay an amount equal to what would have been levied if the exemption had not been retained.

### **Qualified Agricultural Property**

The qualified agricultural exemption is also an exemption from that portion of the real property taxes levied for school operating purposes. MCL 211.7ee. A parcel qualifies if either: (a) the parcel is classified on the current assessment roll as “agricultural”; or (b) more than 50% of the parcel is devoted to agricultural uses. Qualified agricultural property includes related buildings such as a “residence occupied by a person involved in the agricultural use.” A transfer of qualified agricultural property is not considered a “transfer of ownership” for purposes of

reassessment if both of the following are true: (a) the parcel remains qualified agricultural property after the transfer; AND (b) the new owner files Form 3676 with the assessor and the register of deeds stating that the parcel will remain qualified agricultural property. MCL 211.27a(7)(o).

Unlike the PRE exemption, qualified agricultural property may be owned by a limited liability company and/or leased to a third party (so long as the third party uses the property for agricultural purposes). For purposes of satisfying the “more than 50% agricultural use” requirement, each parcel is considered separately. Note that the requirement is more than 50% of the total acreage and that “total acreage” includes, for example, rights-of-way for roads or drainage purposes and property that is not tillable.

## (9) Offer and Acceptance – A Refresher

1. A seller who receives an offer can accept, reject, counter or do nothing. A seller with multiple offers is not required to consider them in any particular order, or treat all of the offers “fairly.” MR has a brochure on its website, “A Primer on Multiple Offers,” which was specifically drafted for buyers. Realtors® working with buyers are encouraged to give this brochure to their buyers so that they have a better understanding of the process.
2. An offer to purchase real estate cannot be accepted orally. A buyer does not have an enforceable contract after the listing agent calls and reports that the seller has signed the buyer’s offer. Acceptance requires a signature and delivery of the signed acceptance.
3. Delivery of acceptance can be to the buyer or to the buyer’s agent. Under the common law, if the cooperating agent is a subagent of the seller, delivery of the acceptance to that cooperating agent would not constitute delivery to the buyer. MR’s current form of Buy and Sell Agreement changes this old rule. MR’s form has the parties contractually agree that delivery to the cooperating agent shall constitute delivery to the buyer, regardless of whether the cooperating agent is acting as a buyer’s agent or a subagent of the seller.
4. While offers and acceptances relating to the purchase of real estate must be in writing, an offer can be revoked orally. So if the listing agent did call the buyer to report that the seller has signed the buyer’s offer, the buyer could stop the contract by simply stating that he was revoking the offer.
5. Generally, an offer or counteroffer can be revoked at any time before it is accepted. This is true even if the offer contains a stated expiration date. (An exception to this rule is if consideration is given as with an option contract.) MR’s Buy and Sell Agreement says that the offer will expire on the particular date stated or upon seller’s receipt of revocation from the buyer, whichever comes first. This has always been the case – the language is intended to make clear that the offer can be revoked before the stated expiration date.
6. A buyer cannot simultaneously accept and materially change a seller’s counteroffer. Any alteration which changes the obligations of a party in any respect is “material.”
7. Once an offer is countered, it has been rejected. A seller who has countered a buyer’s offer cannot go back and “accept” the buyer’s offer as originally proposed.
8. Under Michigan’s Uniform Electronic Transaction Act, MCL 450.837 (“UETA”), electronic delivery is valid so long as it can be determined that the parties had agreed to conduct business electronically. Where there is no specific provision in a contract providing for allowing electronic delivery, the parties’ intent must be determined “from the context and surrounding circumstances.” Obviously, it is preferable to include an express provision in the contract itself. MR’s form of Buy and Sell Agreement:

- a. Provides for electronic delivery and a place where the listing Realtor<sup>®</sup> and selling Realtor<sup>®</sup> may insert the email addresses and/or facsimile numbers at which they may receive deliveries on behalf of their clients. If a party does not wish to conduct business electronically, he or she can simply cross out the “Electronic Communications” paragraph in the form and/or not provide an email address or facsimile number.
  - b. Provides that electronic signatures shall be deemed the same as handwritten signatures. Under UETA, an “electronic signature” includes any symbol or process used by a person and intended as a signature.
  - c. Provides that an electronic communication shall be deemed delivered at the time it is sent or transmitted (as opposed to the time that it is “opened” by the recipient). This approach was adopted by a Michigan Realtors<sup>®</sup> task force formed to look at the specific issue and is consistent with the procedure in other states.
9. Where the parties agree to conduct business electronically, use of language such as “original to follow” may create ambiguity as to when the contract becomes binding – whether upon the transmission of the electronic signature or upon the delivery of the original. For this reason, use of this language is not recommended.
  10. A “bottom line” signature is not required in order for there to be an enforceable contract. The “bottom line” signature serves only as verification that the signed purchase agreement has, in fact, been provided to the buyer. Even if the buyer refuses to sign the “bottom line” of the purchase agreement, it is nonetheless binding and in full force and effect.

## (10) Private Roads and Land Division Act Refresher

### I. Private Roads – Land Division Act Requirement

Realtors® are well aware that the Seller’s Disclosure Act form specifically asks about shared “walls, fences, roads and driveways.” What Realtors® may not recall is that if, in fact, there is a shared roadway or private road, then there is another statutory disclosure requirement that needs to be addressed.

Section 261 of the Land Division Act provides:

No person shall sell any lot in a recorded plat or any parcel of unplatted land in an unincorporated area if it abuts a street or road which has not been accepted as public unless the seller first informs the purchaser in writing on a separate instrument to be attached to the instrument conveying any interest in such lot or parcel of land of the fact that the street or road is private and is not required to be maintained by the board of county road commissioners. In addition, any contract or agreement of sale entered into in violation of this section shall be voidable at the option of the purchaser.

The requirement only applies to sales of land located in any unincorporated area (*i.e.*, outside of cities). The act provides that a purchaser can terminate a purchase agreement if this requirement is not followed. This requirement would also apply in the case of public roads that have not yet been accepted by the appropriate governmental entity. A sample disclosure is attached as Exhibit A.

### II. Refresher on Other Land Division Act Provisions that Many of Us have Forgotten

After the subdivision act was rewritten in 1997, attorneys and other educators put on countless seminars discussing the fine points of calculating land divisions. It would appear, however, that we have said very little about the Land Division Act in the last decade and that a refresher may be in order.

A. There are three types of land divisions:

- (1) “Exempt splits” which require no governmental approvals; applies where none of the created parcels are less than 40 acres and all of the created parcels are accessible. Keep in mind that if the owner of a 60-acre parcel sells a 40-acre parcel, this is not an exempt split – it creates two parcels: one 40-acre parcel and one 20-acre parcel.
- (2) “Divisions” which must go through a simplified approval process; applies where there are only a limited number of less than 40-acre parcels created. Municipal approval of a land division application is not discretionary. The Land Division Act provides that if the stated standards are met, the application “shall be approved” within 45 days of receipt of a “completed application.”
- (3) Subdivisions which must be platted through the plat review process.

B. The general formula for calculating the number of permissible divisions is as follows: Property of ten acres or less can be divided into four parcels; for each additional ten

acres, up to 120 acres, another parcel is added. Above 120 acres, another parcel is added for every 40 acres in the original parent parcel.

- (1) The formula determines the number of parcels that may be created – they may be of any size the buyer and seller wish.
- (2) A municipality’s authority is limited to determining the amount of the “reasonable” review fee and adopting a stricter depth to width ratio requirement.
- (3) Each parcel created by an exempt split or division can be split again in ten years under a different formula (ten years runs from creation of the original split).

C. The fact that a parcel has been legally created (through an approved division or because it is an exempt split) does not necessarily mean that the owner can build on it. For example, if a local ordinance specifies minimum one-acre lots, the owner may nonetheless divide the property into one-half acre lots. However, no one will be able to build on one of these lots unless and until the zoning is changed.

D. When a property owner divides a parcel and sells off one of the newly-created smaller parcels, the parties must agree as to which of the parcels will be entitled to the remaining available divisions. MCL 560.109(3) provides:

A person shall not sell a parcel of unplatted land unless the deed contains a statement as to whether the right to make further divisions exempt from the platting requirements of this act under this section and section 108 is proposed to be conveyed. The statement shall be in substantially the following form: “The grantor grants to the grantee the right to make [insert number] division(s) under section 108 of the land division act, Act. No. 288 of the Public Acts of 1967.” In the absence of a statement conforming to the requirements of this subsection, the right to make divisions under section 108(2), (3), and (4) stays with the remainder of the parent tract or parent parcel retained by the grantor.

- (1) Where the property has been divided so as to permit the sale of a portion of the property, if the deed to the buyer is silent as to future divisions, all of the divisions stay with the land retained by the seller.
- (2) Where property is being split, it is important to negotiate the allocation of division rights in the purchase agreement.
- (3) In the case of a deed for the entire parcel which has never been divided, all of the permitted transfers run with the land, and a simple warranty deed will transfer all of them.
- (4) A seller who transfers division rights must file notice with the assessor within 45 days.
- (5) Some officials argue that “all” is not a number within the meaning of Section 109, although it is commonly used across the state to effectively transfer all remaining divisions.

## **EXHIBIT A**

### **PRIVATE ROAD DISCLOSURE**

The property does not abut a publicly dedicated and accepted road and is accessed by a private road that is not required to be maintained by the county road commission or any other governmental entity.