COMMON REGULATORY ISSUES

The MAR Legal Hot Line receives a steady stream of requests for information regarding REALTORS®' compliance with certain provisions of Article 25 of the Michigan Occupational Code, MCL 339.2501 et seq. (the "Code") and the Administrative Rules for Real Estate Brokers and Salespersons, R 339.22101 et seq. (the "Rules"). This article is a summary of the most common regulatory issues for which REALTORS® seek information.

I. Earnest Money Deposits ("EMD").

A. The most common question relating to EMDs is when a REALTORS® may or may not release an EMD where one of the parties refuses to sign a release of the EMD. Brokers as a best practice attempt to obtain a release from the seller and prospective buyer upon termination of a purchase agreement, even if there is no dispute between the parties as to who is entitled to the EMD. Rule 313(6) provides that when seller and buyer have made claim to an EMD in a REALTORS®' trust account, the EMD must remain in the REALTOR®'s trust account until entitlement to the EMD is determined in a civil action or the buyer and seller have agreed in writing to the disposition of the EMD. Also, the broker may choose to commence a civil action to interplead the EMD with a court. Rule 313(6) only applies when the seller and buyer have both made claim to the EMD, *i.e.*, there is a dispute. In the absence of a dispute, the broker should release the EMD pursuant to the terms of the purchase agreement regardless of whether the seller or buyer will or will not sign a release.

B. There has been recent confusion over when a broker must deposit an EMD check provided by a buyer. There is absolutely no reason for confusion. MCL 339.2512(k)(iv) requires a broker to deposit an EMD check within two days after a broker has received notice that an offer to purchase is accepted by all parties or, alternatively, a counteroffer has been accepted by all parties. As provided by MCL 339.2512(k)(vi), if the purchase agreement signed by the seller and buyer calls for the EMD to be escrowed with an escrowee other than the broker, then the broker has the obligation to cause the check to be delivered to the named escrowee within two banking days after receiving notice that an offer to purchase has been accepted by all parties or a counteroffer has been accepted by all parties.

II. Disclosure Of Interest As Buyer Or Seller.

A. REALTORS® are generally aware of the fact that when buying, directly or indirectly, an interest in a property, a real estate licensee must disclose the fact that they are a real estate licensee in writing before the owner is asked to sign a purchase agreement. It is recommended that when a licensee is buying an interest in property that the notice of their being a licensee be prominently displayed in the purchase agreement. Thus, there can be no question that the owner received and reviewed the notice prior to signing the purchase agreement as required by Rule 315(1).

B. Rule 315(1) requires a disclosure of a real estate licensee status to an owner when the buyer is "indirectly" acquiring an interest in property. While there is no case law on point, it

has commonly been advised that if the real estate licensee is a member of a limited liability company or a shareholder in a corporation which is acquiring an interest in property, the real estate licensee should indicate to the owner in writing that they are a member or stockholder of the purchasing entity prior to the owner being asked to sign the purchase agreement.

C. Many REALTORS® do not appear to be aware of Rule 317 that specifies if they are acquiring an interest in property, directly or indirectly, and will be paid a commission, a fee or other valuable consideration as a result of the sale, then the REALTOR® must disclose in writing to the seller that he or she will be compensated for the sale and must receive written permission for the seller to receive the specified compensation. The disclosure to the owner and the permission from the owner to receive the compensation should also be included as part of a purchase agreement. Rule 317(c) requires a licensee to provide written proof of compliance upon request by the Department.

D. Rule 319(4) requires that in selling property owned by a real estate licensee, the licensee must disclose, in writing, its status as a licensee to a purchaser before the offer to purchase is signed by the licensee. The Department can require written proof of compliance from the licensee

III. Referral Fees.

A. REALTORS® commonly inquire as to whether a referral fee can be paid to someone other than a Michigan real estate licensee. An example is the payment to a neighbor for the referral of a person who had accepted a job out of town and who was directed to the REALTOR® by the neighbor. REALTORS® are prohibited from paying a fee, commission or any other valuable consideration to a person not licensed under the Code for referrals. MCL 339.2512(h). A Michigan licensee can pay a commission to a real estate broker licensed in another state so long as the real estate broker located in the other state does not conduct any negotiations in the state for which a commission is paid.

B. REALTORS® sometimes confuse the prohibition against payment of a referral fee to a non-licensee with the issue of the payment of a rebate to a seller or buyer. There is no prohibition in the Code or the Rules against a REALTOR® paying a rebate of a portion of their commission to a seller or buyer. The rebate would have to be paid by a broker, and if it was paid to someone other than the broker's client, then disclosure would have to be made by the broker to their client of the payment of the rebate to the other party.

IV. Receipt Of Referral Fees.

A. Rule 321(1) requires a REALTOR® who is receiving, directly or indirectly, a real estate commission as a result of a sale of property to obtain the written consent of the buyer and the seller in the transaction prior to receiving a referral fee or other valuable consideration for placing a loan in connection with the transaction. Emphasis is placed on the receipt of written consent from both the buyer and the seller in the context of receiving a referral fee for placing a loan.

B. Rule 321(2) requires a REALTOR® who is receiving, directly or indirectly, a real estate commission as a result of a sale of property to obtain the written consent of the party or parties with whom the REALTOR® has an agency relationship prior to receiving a referral fee or other valuable consideration from settlement service providers including the following: "an abstract, home warranty, title insurance, or other settlement service provider in connection with that transaction." The requirement of obtaining the written consent from the party or parties is limited to parties with whom the REALTOR® has an agency relationship, not necessarily all parties. Further, the Rule references receipt of a referral fee from a "settlement service provider." Neither the Code nor the Rules contain a definition of "settlement service provider." We have always applied the definition of settlement service provider as defined in RESPA.

C. The authority to obtain a referral fee for placing a loan or a referral fee from a title insurance company or others set forth in Rule 321 does not guaranty compliance with RESPA. RESPA is a federal law and REALTORS® should make certain that the receipt of any referral fees they receive is not only compliant with Rule 321, but also RESPA.

V. Property Management.

A. Property Management is defined in MCL 339.2501(e) as follows:

> (e) . . . the leasing or renting, or the offering to lease or rent, of real property of others for a fee, commission, compensation, or other valuable consideration pursuant to a property management employment contract.

B. A "property management account" is defined MCL 339.2501(f) as an interest bearing or non-interest account or instrument used in the operation of property management.

C. MCL 339.2512c(1) provides, unless otherwise provided in that section, ". . . all property management duties, responsibilities, and activities performed by a real estate broker and his or her agent engaged in property management shall be governed by and performed in accordance with a property management employment contract."

D. MCL 339.2512c also provides that a real estate broker engaged in property management shall maintain property management accounts separate from all other accounts; the accounts may be an interest-bearing account or instrument, unless the property management employment contract provides to the contrary; interest earned on a property management account shall be handled according to the property management employment contract; a real estate broker or any designated employee may be a signatory on drafts or checks drawn on property management accounts; records of funds deposited and withdrawn for property management accounts shall be maintained in the REALTORS®' records indicating the date of the transaction for whom money was receive and to whom it was given; and a REALTOR® engaged in property management shall render an accounting to his or her property management client and handle all monies strictly in accordance with the property management employment contract.

E. MCL 339.2501(g) defines a "property management employment contract" as ". . . the written agreement entered into between a real estate broker and client concerning the real estate broker's employment as a property manager for the client; setting forth the real estate broker's duties, responsibilities, and activities as a property manager; and setting forth the handling, management, safekeeping, investment, disbursement, and use of property management money, funds, and accounts."

F. In sum, REALTORS® engaged in property management will generally be in compliance with the property management provisions of the Code so long as they have a written property management employment contract and carry out their duties and handle all funds pursuant to the terms of the property management employment contract.

VI. Advertising.

A. Rule 329(1) requires that all advertisements to buy, sell, exchange, rent, lease or mortgage real estate by a REALTOR® shall include the broker's name as licensed and a telephone number or street address. The advertising must also affirmatively indicate that the party advertising is a real estate broker. These are effectively the only requirements in the Code or Rules on REALTORS® advertising real estate for third parties.

B. REALTORS® who operate as Teams may also advertise as a Team, so long as the broker's name as licensed and telephone number or street address with whom they are affiliated appear somewhere on the advertisement.

C. A salesperson or an associate broker must advertise under the supervision and in the licensed name of the individual broker unless the salesperson is advertising to sale property which is their principal residence or advertising to rent or lease property for which they are the owner.

D. An individual licensed as a broker or associate broker may personally advertise property owned by them for sale or lease in their own name, and need not use the name of the broker as licensed. Nonetheless, the advertising must indicate that the party advertising is a licensed broker or associate broker.

VII. Activities Requiring Licensure.

A. MCL 339.2501(h) and (i) contain expansive definitions of what constitutes a "real estate broker" and a "real estate salesperson."

B. Rule 319(1) also sets forth other conditions for which a person shall be required to be licensed as a real estate broker when they engage in the sale of real estate as a principal vocation, unless the owner engages the services of a REALTOR®. Acts of an owner of real estate which constitute a principal vocation include the following:

> (a) Engaging in more than 5 real estate sales in any 12-month period.

(b) Holding one's self out to the public as being principally engaged in the sale of real estate.

(c) Devoting over 50% of one's working time, or more than 15 hours per week in any 6-month period, to the sale of real estate.

C. A real estate salesperson who sells real estate, other than its principal residence shall be deemed to have been done as a principal vocation of the salesperson and it must be made through their licensed broker.

VIII. Delivery Of Offers To Purchase.

A. There has been confusion as to when a buyer's agent or listing REALTOR® may hold an offer to purchase contingent upon a buyer or buyer's agent meeting certain preconditions to delivery of the offer to the seller.

B. Rule 307(2) is unconditional in imposing the requirements of delivery of an offer to purchase. This Rule requires that a REALTOR® should "promptly deliver" all offers to purchase to a seller upon receipt by the REALTOR®.

C. Rule 307(2) provides that acceptable methods of delivery of the offer to purchase upon receipt by the REALTOR® shall be by delivery in person or by mail or by delivery by electronic communication, provided that there is a prior agreement with respect to the use of electronic records digital signatures.

D. A seller and REALTOR® may agree upon some delayed delivery of offers to purchase subject to the satisfaction of certain preconditions by a buyer or buyer's agent, provided, however, there is no such exception in Rule 307 specifically permitting such an agreed upon delay.

E. A REALTOR® is not subject to disciplinary action for failing to submit additional offers to purchase to a seller after the seller accepts an offer unless the listing agreement requires the presentation of additional offers.

IX. Preparation And Signing Of Closing Statement.

A. Rule 311(1) provides that a broker or associate broker involved in a closing of a real estate transaction shall provide or cause to be provided to the buyer and seller a closing statement signed by the broker or associate broker showing each party all the receipts and disbursements that affect that party. This requirement continues even if the closing is conducted by a title company – the broker or associate broker is still responsible for the content of the closing statement and shall sign the final closing document.

B. Rule 311(4) provides that in a cooperative transaction, either broker or associate broker may close the sale and furnish closing statements. Nonetheless, it is the final

responsibility of the listing broker or associate broker to close the sale and furnish signed closing documents to both the buyer and seller.

C. There is nothing in the Code or the Rules which would permit someone other than the broker or associate broker responsible for the closing to affix their name through the use of a stamp of their signature. Further, there is nothing in the Code or the Rules which would permit another person to sign for the responsible broker or associate broker even if the broker or associate broker has reviewed and approved the closing statement and authorized his or her signature. In the past, the Department has informally approved of this practice, but the persons offering such informal approval are no longer with the Department.

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