

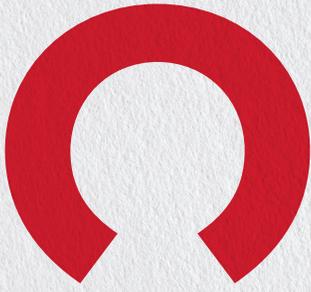
A publication of Michigan Realtors®

LEGAL HOTLINE COMPANION



REAL ESTATE PROFESSIONALS GUIDE TO LEGAL QUESTIONS

2023
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MICHIGAN REALTORS®

LEGAL HOTLINE

Michigan Realtors®:

Welcome to the 2023 publication of the Michigan Realtors® Legal Hotline Companion. For several years, your Legal Hotline attorneys have been compiling the most common questions posed by Realtor® Members. From the best practices associated with Earnest Money Deposits to the rules governing Offer & Acceptance, and many more in between, the Legal Hotline continues to be an extremely helpful resource in staying attuned to the issues that matter to you. This Legal Hotline Companion is intended to provide answers to many of the questions that you face out in the real estate marketplace. Building off the success of past iterations, the 2023 Legal Hotline Companion features some organizational and substantive enhancements. In addition to including the relevant occupational code section or statutory provision, we have also added new sections specific to Appraisals, RESPA, Principal Residence Exemptions, Teams, and Transfer Taxes. These additions should increase the value of this portable reference and make it even easier to read and understand.

On behalf of your Michigan Realtors® Legal Team, we sincerely hope you view this as a significant addition to the various legal resources that Michigan Realtors® develops and distributes. We continue to seek out ways to multiply and diversify the various methods in which we develop and distribute legal research and analysis to our membership. Based on your feedback, we will continue to build upon legal education as a key value proposition for all Michigan Realtors®. We wish you much future success!



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This publication provides legal resources from the Michigan Realtors® Legal Team. Opinions expressed in signed feature articles are those of the author and do not necessarily reflect the viewpoint of Michigan Realtors®. Advertising of property, services or products herein does not imply endorsement by the Michigan Realtors®.

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An individual who is licensed as a real estate broker or associate real estate broker may advertise real property that he or she personally owns for sale or for lease in his or her own name, and is not required to include the name of the real estate broker, or the name of the real estate broker that employs the associate real estate broker, as the sales or leasing agent for the property in the advertisement. However, the advertising shall indicate affirmatively that the individual who is selling or leasing the real property is a licensed real estate broker or associate real estate broker.

* * *

A real estate salesperson shall not advertise to sell real property under his or her own name unless the property is the principal residence of the salesperson. A real estate salesperson shall not advertise real property for rent or lease under his or her own name unless the salesperson is the owner of the property. MCL 339.2512e(2) and (4).

QUESTION: I am a licensed salesperson. I own a commercial building that I would like to advertise for sale. Do I need to include my broker's name in my advertisements?

ANSWER: YES. Licensed salespersons can only advertise to sell their personal residence in their own name. Licensed associate brokers, on the other hand, may advertise to sell any property they own in their own name. (Both salespersons and associate brokers can advertise to lease any property they own in their own name.)

A real estate broker shall not conduct business or advertise under a name other than that in which the broker's license is issued or under an assumed name that is authorized by law. A real estate broker shall notify the department of its adoption of an assumed name with its license application, or within 30 days after it adopts an assumed name, whichever is earlier. MCL 339.2512e(5).

QUESTION: Can a broker advertise in a name other than the one in which its license is issued?

ANSWER: YES, but only if it has an assumed name on file with the Corporations Bureau and with LARA.

QUESTION: My brokerage firm has acquired a small brokerage firm in a nearby city. We would like to continue to use the name of the company we acquired. Can we do that?

ANSWER: YES. However, you will need to register that company's name as an assumed name with the Corporations Division and then notify the Licensing Division of the assumed name filing.

QUESTION: Can we use a team name that does not include any of our team members' individual names – for example, "Best in the West Team?" Each advertisement also will contain a particular team member's individual name (and of course the broker's name).

ANSWER: YES. The Occupational Code does not prohibit this. However, there may be liability issues if the team name/advertisement suggests that the team name is a legal entity apart from the brokerage firm. Your broker's corporate shield and insurance coverage does not protect you if you are not viewed as doing business in the broker's name. You and your broker will want to discuss this matter with your broker's insurance agent (and an attorney).

[A] real estate salesperson or an associate broker shall only advertise to buy, sell, exchange, rent, lease, or mortgage real property or a business opportunity under the supervision of, and in the business name of, his or her employing broker. Any advertising displayed or published on or after January 1, 2018, that includes the name of an associate broker, a salesperson, or a cooperating group of associate brokers or salespersons employed by the same real estate broker, shall include all of the following:

(a) The telephone number or street address of the employing broker.

(b) The business name of the employing broker, in equal or greater type size than the name of the associate broker, salesperson, or cooperating group. MCL 339.2512e(3).

QUESTION: I understand that the name of the brokerage firm must be in equal or greater "type size" than the name of the agent. Does this mean every letter in the firm name must be equal to or larger than every letter in the agent's name?

ANSWER: NO. LARA has said that one way to satisfy the equal type size requirement is to make sure that the point size of the majority of the letters in the name of the agent does not exceed the point size of the tallest word in the name of the firm. Another way to satisfy the equal type size requirement is to make sure that the height of the block containing the name of the agent does not exceed the height of the block containing the name of the firm.

QUESTION: My broker told me that the type font used for the broker's address must be as large as the type font used for the agent's name. Is this true?

ANSWER: NO. The Occupational Code requires that advertising include the broker's address or phone number but does not regulate the type size for the address or phone number. (Of course, brokers may impose advertising requirements on their agents that are more stringent than those required by the Occupational Code.)

QUESTION: I'm a commercial broker. Are the Occupational Code's advertising requirements applicable to the sale of commercial property?

ANSWER: YES. The law is applicable to any advertisement to buy, sell, exchange, rent, lease or mortgage real property or a business opportunity by a real estate broker. There is no exception for commercial property or commercial brokers.



QUESTION: I represent a buyer who has made an offer of \$150,000 on a house listed at \$180,000. The listing agent called and told me that the sellers were rejecting the offer and that the sellers would take no less than \$170,000. My buyer then submitted an offer for \$170,000, which the sellers promptly accepted. Although everyone in this transaction is happy, my broker believes that the listing agent breached a fiduciary duty owed to the sellers by telling me the bottom-line price the sellers were willing to accept. Is my broker correct?

ANSWER: POTENTIALLY, YES. Michigan case law has held that a broker representing a seller may not suggest to a purchaser that the seller will accept less than the stated price. *Harvey v Lindsay, 264 Mich 118 (1933)*. Under your circumstances, unless the sellers gave their agent permission to disclose the minimum price that they were willing to accept, the listing agent may have breached a fiduciary duty owed to her sellers.

A licensee shall disclose to a potential buyer or seller in a real estate transaction all types of agency relationships available and the licensee's duties that each agency relationship creates before the disclosure by the potential buyer or seller to the licensee of any confidential information specific to that potential buyer or seller. MCL 339.2517(1).

QUESTION: I am representing a buyer in the purchase of a house. The listing agent said that by law I am required to provide him with a copy of the agency disclosure statement I furnished to my buyer-client. Is this true?

ANSWER: NO. The law does not require you to provide the listing agent with a copy of the agency disclosure statement you furnished to your buyer-client. But you should submit a new agency disclosure form to the seller – through the listing agent – notifying the seller that you are acting as a buyer's agent.

QUESTION: My buyer wants to put in an offer on a home that is listed with another firm. The listing agent has told me that I should present my client's offer directly to her seller. Isn't the listing broker required to present my client's offer to her seller?

ANSWER: IT DEPENDS. Under Michigan law, assistance in the negotiating process is one of the services that a seller can waive by signing a limited services agreement. Whenever a buyer's agent interacts directly with the seller, the buyer's agent must provide the seller with an agency disclosure form notifying the seller that they are representing the buyer.

QUESTION: My buyer-client is interested in a FSBO home. I have spoken with the sellers, and they are willing to pay me a commission in the event my buyer purchases their home. Do I need to become a dual agent?

ANSWER: NO. You do not need to create an agency relationship with the sellers in order to collect a commission. You should simply have the sellers agree in writing that they will pay you a commission if your buyer purchases the home. Michigan Realtor®'s "One Party Agreement" (Form N) can be used for this purpose. Make sure you also provide the sellers with an agency disclosure form making clear that you represent the buyer.

As used in [the Agency Disclosure Act]:

(b) "Buyer" means a purchaser, tenant, or lessee of any legal or equitable interest in real estate.

(g) "Real estate transaction" means the sale or lease of any legal or equitable interest in real estate where the interest in real estate consists of not less than 1 or not more than 4 residential dwelling units or consists of a building site for a residential unit on either a lot as defined in section 102 of the land division act, 1967 PA 288, MCL 560.102, or a condominium unit as defined in section 4 of the condominium act, 1978 PA 59, MCL 559.104.

MCL 339.2517(1)(b) and (g).

QUESTION: Is it true that an agency disclosure form is not required for commercial property?

ANSWER: YES. The law requires an agency disclosure form only if the property in question includes one to four residential dwelling units or a residential building site. Note that some commercial property includes residential dwelling units. Disclosure would be required for those types of properties.

QUESTION: I represent someone who is interested in leasing a house. Am I required to provide an agency disclosure form?

ANSWER: YES. The agency disclosure law defines a real estate transaction as one involving the sale OR LEASE of real estate consisting of not less than one or not more than four residential dwelling units or a building site for a residential unit.

A broker and a client may enter into a designated agency agreement. In the absence of a written designated agency agreement, a client is considered to have an agency relationship with the broker and all affiliated licensees. MCL 339.2517(6).

QUESTION: I am working in a designated agency office. Is it true that so long as I check "buyer agency" on the agency disclosure form, a buyer agency agreement is not necessary?

ANSWER: NO. Under the law, unless a buyer signs a buyer agency agreement acknowledging his/her agent's designated agency status, the buyer will have an agency relationship with every agent in the office.

QUESTION: I own a brokerage which practices traditional agency. Would it be possible to have one of my agents represent the seller and another of my agents represent the buyer in the same transaction without establishing dual agency?

ANSWER: NO. In the above circumstance, all of the agents in the firm would be dual agents. In order to have your agents represent the buyer and seller exclusively, your firm would have to practice designated agency.

QUESTION: I am listing a property that is owned by my brother. I have shown the property to a buyer who is not working with an agent. Can I handle this transaction as a dual agent if everyone consents?

ANSWER: NO. A dual agent works equally for both parties to a transaction. You cannot work equally for your brother on one side and a stranger on the other side. For this reason, you should never be a dual

agent if you have any type of relationship (familial or otherwise) with one of the parties. You can serve as the sole broker for this transaction if the buyer is willing to be unrepresented – that is, the buyer would be a customer, rather than a client.

QUESTION: I am an agent in an office that practices designated agency. I am currently a designated agent for seller. I also represent someone as a designated buyer agent. My buyer is interested in making an offer on my listing. Is it possible to be a dual agent in a designated agency office?

ANSWER: YES. It is possible to be a dual agent in a designated agency office, but you must get both the buyer and the seller to consent in writing. Without informed consent you have unconsensual dual agency and will forfeit your right to a commission.

QUESTION: I am a listing agent for a real estate firm that practices designated agency. My husband works at the same firm and he is the designated agent of a buyer who wants to make an offer on one of my listings. Can we do this or are we required to enter into a dual agency arrangement?

ANSWER: While the law does not expressly prohibit a husband and wife from acting as designated agents on opposite sides of a transaction, we would strongly advise against it. If a dispute arises, one or more of the parties involved may assume that the married couple shared confidential information or otherwise failed to act in the best interest of the client.

QUESTION: Our office represents the firm's clients as designated agents. Can compensation be offered to sub-agents through the MLS? We were told that no one can be the agent for the seller, unless the seller signs a piece of paper specifically naming them as a designated agent.

ANSWER: Your firm can act as designated agents and offer sub-agency through the MLS to cooperating firms. This is not an attempt to create an agency relationship between the cooperating firm and the seller. Instead, it is an offer of sub agency offered by your firm, i.e., broker to broker.

“Transaction coordinator” means a licensee who is not acting as the agent of either the buyer or the seller. MCL 339.2517(11)(k).

QUESTION: I am representing seller-clients on the sale of their home. I received a call from someone who is interested in making an offer on my clients' home who is not working with an agent. May I represent that potential buyer as a transaction coordinator?

ANSWER: NO. A transaction coordinator does not represent either party but is a neutral party. You cannot both be a transaction coordinator and listing agent in the same transaction. In this circumstance, you could work with the buyer as a customer, rather than a client. Whenever a listing agent works directly with buyers, they should provide the buyers with an agency disclosure form that makes clear that the agent is working only for the sellers.

QUESTION: I am a real estate salesperson purchasing a home for myself. Can I act as a transaction coordinator in this purchase?

ANSWER: NO. According to agency law, a transaction coordinator is an agent that represents neither the buyer nor the seller. Under these circumstances, you are the buyer of this property and clearly cannot hold yourself out as a “neutral” transaction coordinator.

QUESTION: I represent a buyer who is interested in a home that I once had listed but is now listed with another firm. What can I tell my buyer client?

ANSWER: An agent's duty of confidentiality survives the termination of an agency relationship. You may not disclose confidential information that you learned as a result of the agency relationship – for example, you must not disclose the sellers' “bottom line” price. However, not all information that you learned during that agency relationship is confidential. For example, everything that was disclosed to a potential buyer or buyer's agent (for example, the results of an inspection) is not confidential.

QUESTION: If I am working as a buyer's agent in a multiple offer situation, can I offer the listing agent a bonus or other compensation if my client's offer is the one the seller accepts?

ANSWER: NO. It could be a breach of fiduciary duty for a listing agent to try to encourage a seller-client to accept a particular offer because it would result in a benefit to the listing agent. Moreover, under the Code of Ethics, a listing Realtor® has an ethical obligation to present all offers “objectively.” The Occupational Code prohibits a salesperson from accepting a commission from anyone other than his or her own broker. As a buyer's broker, if you want to make your client's offer more attractive to the seller, you should offer compensation to the seller rather than to the listing agent. In the past, LARA has indicated that it does not consider payments to buyers or sellers to fall within the prohibition against referral fees.

QUESTION: My seller-clients signed a 6-month listing contract which does not expire for another 2 months. My sellers just notified me that they no longer wish to work with me. Aren't my sellers required to honor the terms of their listing contract?

ANSWER: NO. Depending on the facts, your sellers may be liable to pay you damages for breaching their listing contract, but they cannot be forced to continue to work with you. You may not force the sellers to work with you, however, you are not required to release the sellers from all liability under the listing contract. In other words, you must honor the sellers' decision not to work with you anymore, but you are not required to waive any breach of contract damages to which you may be entitled.

3. APPRAISERS AND APPRAISALS

Q/A

Acts or practices that violate appraisal independence requirements shall include:

... [when] a person with an interest in the underlying transaction compensates, coerces, extorts, colludes, instructs, induces, bribes, or intimidates a person, appraisal management company, firm, or other entity conducting or involved in an appraisal, or attempts, to compensate, coerce, extort, collude, instruct, induce, bribe, or intimidate such a person, for the purpose of causing the appraised value assigned, under the appraisal, to the property to be based on any factor other than the independent judgment of the appraiser . . . 15 U.S. Code §1639e(b)(1).

QUESTION: My buyer's lender has selected an appraiser who I believe is geographically incompetent. I am afraid the home won't appraise and my client's loan will be denied. Can I ask my client's lender to select another appraiser who is more familiar with the area?

ANSWER: NO. Federal law prohibits real estate licensees from being involved in the selection of an appraiser for any transaction in which the licensee will receive a commission.

QUESTION: I don't think the appraiser is very familiar with the neighborhood. Can I contact the appraiser and provide them with comparable property information?

ANSWER: YES. Applicable regulations do not prohibit appraisers from talking to real estate agents.

QUESTION: Can I ask the appraiser to provide me with its estimated valuation number before it issues its written report?

ANSWER: NO. This is likely to be viewed as an attempt to influence the valuation.

QUESTION: A lender that I work with regularly often uses an appraiser that I think always comes in too low. Can I condition my future referral of business on the lender's agreement not to use this one particular appraiser?

ANSWER: NO. You should not try to get an appraiser removed from a list of qualified appraisers because you disagree with her valuation(s).

QUESTION: The square footage number in the appraisal for the home that my client is purchasing is incorrect. I have tried calling the appraiser to get him to correct it, but he won't take my call. What should I do?

ANSWER: Once the appraisal is completed and sent to the client, the appraiser is prohibited from discussing the results of the appraisal with anyone but the client. In order to get the appraiser to correct the error in square footage, you will need to work through the appraiser's client (typically, the lender).

QUESTION: The appraisal on my seller's home came in less than the agreed-upon purchase price. The purchase agreement did not contain an appraisal contingency. Are the buyers still obligated to close on the sale?

ANSWER: YES, if it is a cash sale or the mortgage contingency is still satisfied. If the results of the appraisal means that the buyers no longer qualify for their mortgage, then they may terminate the purchase agreement pursuant to the mortgage contingency.

QUESTION: My buyer agreed to cover any difference between the appraised value and the sale price up to a maximum of \$10,000. The appraisal came in at \$15,000 below the sale price. Is the seller required to reduce the price by \$5,000?

ANSWER: No, not unless your purchase contract expressly provided for such a price reduction. Ordinarily, under these circumstances, the buyer could choose to either cover the additional \$5,000 or terminate the purchase agreement. The buyer could not require the seller to sell at the lower price.

"Appraisal" does not include any of the following:

A market analysis performed by a person that is licensed under article 25 solely for the purpose of assisting a customer or potential customer in determining the potential sale, purchase, or listing price of real property or the rental rate of real property as long as a fee or any other valuable consideration is not charged for that analysis.

3. APPRAISERS AND APPRAISALS

Q/A

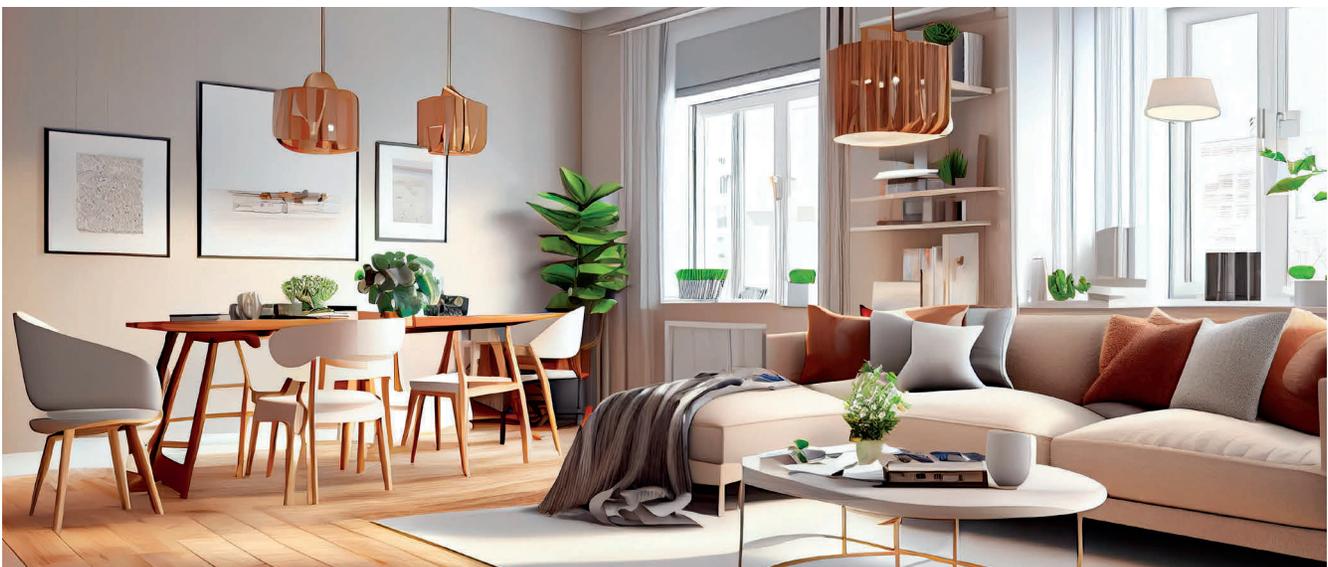
A market analysis of real property for a fee performed by a broker or associate broker who is licensed under article 25 that does not involve a federally related transaction if the market analysis is put in writing and it states in boldfaced print "This is a market analysis, not an appraisal and was prepared by a licensed real estate broker or associate broker, not a licensed appraiser."
MCL 339.2601(a)(i) and (ii).

QUESTION: Who can provide a market analysis and who can be paid for a market analysis?

ANSWER: The Occupational Code allows a salesperson to prepare a market analysis only for a customer or potential customer and only if the salesperson does not charge separately for this service. This means that a salesperson cannot prepare a market analysis for any third party. A broker or associate broker can prepare a market analysis for any person or entity other than in "federally related transactions" and can charge for this service. The market analysis must be in writing and also include this language in boldface print: "This is a market analysis, not an appraisal and was prepared by a licensed real estate broker or associate broker, not a licensed appraiser." MCL 339.2601(a)(ii).

QUESTION: I am both a licensed appraiser and licensed real estate broker. I have a partner who is a licensed appraiser. I will be on vacation and unavailable for 2 weeks. May I have my partner show one of my listings during this time?

ANSWER: NO. Your partner is required to have a real estate license (not just an appraiser's license) in order to show property.



QUESTION: My buyer just entered into a purchase agreement to buy a home. The listing agent is continuing to market the seller's property. Can he do this?

ANSWER: YES. Sellers (and their agents) may continue to market a property even after they have entered into a binding purchase agreement unless the purchase agreement expressly prohibits them from doing so. (The agent must comply with MLS policies requiring status.)

QUESTION: If my seller-client enters into a purchase agreement at a price higher than the list price, can I immediately increase the list price in the MLS to the higher amount?

ANSWER: YES. The seller and the listing agent can adjust the list price in the MLS at any time and for any reason.

QUESTION: I represented the buyer in a purchase of a house that closed this past summer. The buyer discovered some issues with water in the basement that the seller did not disclose. My buyer wants to take the seller to arbitration, but both parties left the section in the purchase agreement on arbitration blank. Can the buyer require the seller to arbitrate this dispute?

ANSWER: Many Michigan purchase agreement forms require the parties to indicate that they agree to arbitrate by initialing the arbitration provision. Assuming that this is the case and the parties did not both initial the arbitration provision, there would be no contractual agreement to arbitrate. If the parties did not agree to arbitrate in the purchase agreement form, the buyer will have to take the seller to court (unless the seller now agrees to arbitrate).

QUESTION: The purchase agreement provides that the seller shall surrender possession of the home on August 1st at 12:00 a.m. Is the seller entitled to possession for the entire day on August 1st?

ANSWER: While the weight of authority seems to be that 12:00 a.m. (or midnight) marks the start of the new day, this understanding is by no means uniform.

For this reason, to avoid confusion, Realtors® are encouraged to avoid using this deadline in contracts and instead use 11:59 p.m. or 12:01 a.m.

QUESTION: I am representing a buyer in connection with the purchase of a home. The agreed upon closing date is "on or before" January 4th. My client is ready to close and wants to schedule the closing date earlier than January 4. Is the seller obligated to close at an earlier date?

ANSWER: NO. This language is typically interpreted to mean that while the parties can agree to close prior to the stated date, neither party can be required to do so.

QUESTION: The listing ticket included an item and the buyers assumed that it was therefore included in the transaction and didn't expressly reference that item in the purchase agreement. Now the sellers say that they are taking it with them because the buyers didn't contract to buy the item. Are they right?

ANSWER: The status of an item that is not specifically contracted for depends on the item. If the item is a fixture, then it becomes a part of the real estate and transfers to the buyer even if not specifically included in the purchase agreement. The general definition of a fixture is something that cannot be removed without damaging itself or its surroundings or that becomes useless when removed. When an item is not a fixture, but personal property, the answer is less clear. Where an item was specifically mentioned in the listing ticket, but was not mentioned in the purchase agreement, a seller's attorney could argue that since the listing ticket is not an offer, it cannot be accepted and the item is not included in the sale. A buyer's attorney, on the other hand, could argue that a listing ticket is in fact an advertisement and that a buyer should be entitled to rely on the fact that the home, if purchased, will include all advertised items. There is simply no all-purpose correct answer to this question. In order to avoid disputes, buyers' agents are encouraged to include all items in the purchase agreement, either by specifically mentioning them, or by simply expressly incorporating all items listed in the listing ticket.

QUESTION: Our seller/client has entered into a purchase agreement, but now does not want to sell. My client has asked us to figure out a way to get him out of the deal.

ANSWER: While you may know from your experience some way to get your client out of the deal without liability, resist the urge to provide this type of legal advice. The appropriate answer to this question is to tell your client to speak to an attorney.

QUESTION: I have a listing on a home owned by a married couple. Currently, the wife is out of town on business but they want to accept an offer. Can the husband sign the contract on the wife's behalf and make this a binding contract?

ANSWER: NO. In order for there to be a binding contract, both the husband and the wife would have to sign the purchase agreement. The husband would be able to sign on his wife's behalf only if she has given him her power of attorney. Typically, you should be able to deal with an out-of-town seller through the use of electronic signatures and delivery.

QUESTION: I represent the sellers as a listing broker. An offer came in from another office but my seller is currently out of town and cannot be reached. The seller authorized me via telephone to accept the offer on my seller's behalf. Is this an enforceable contract?

ANSWER: NO. Brokers cannot sign a purchase agreement on behalf of their buyer-clients. A listing agreement by itself does not give the broker authority to bind his/her principal to a contract for the sale of land. Verbal authority over the telephone would NOT be sufficient.

QUESTION: If property is owned by an LLC, who can sign the purchase agreement on behalf of the LLC?

ANSWER: There is no law as to who can sign on behalf of any LLC. Authorization depends on what a particular LLC's operating agreement says. Some LLCs have an approved manager and some are managed by majority vote of the members. Often the sale of property is treated as an extraordinary event requiring the consent of more than a majority of the members.

QUESTION: My seller received an offer with an escalation clause. The highest offer that the seller received was contingent upon the sale of the buyer's home. Does that type of offer trigger an escalation clause or must it be disregarded because of the home sale contingency?

ANSWER: An offer with a home sale contingency would not be disregarded unless there is language in the escalation clause that says so. Buyer's agents should be careful when drafting escalation clauses if they want to exclude certain types of offers (or adjust for seller concessions).

QUESTION: My sellers have a purchase agreement signed with Buyer A. Buyer B has now made an offer on the same property that the sellers consider to be a better offer. Buyer A has proposed an amendment to his purchase agreement asking to purchase some of the sellers' outdoor lawn furniture and pool equipment. The sellers believe that the purchaser's proposed amendment reopens the terms of the contract. The sellers want to rescind the purchase agreement with Buyer A and enter into a purchase agreement with Buyer B. Does Buyer A's proposal of an amendment to the existing purchase agreement reopen the contract such that my sellers may terminate it?

ANSWER: NO. Some Realtors® have the misconception that if an amendment to an existing contract is proposed and rejected, the purchase agreement is terminated. Ordinarily this is not the case. If a proposed amendment to a contract is rejected, the purchase agreement remains in full force and effect. Note that the rules may be different when the proposed amendment relates to the removal of a contingency, depending on the wording of the contingency.

QUESTION: I am a Realtor® representing sellers on the sale of their house. They entered into a purchase agreement with a buyer YESTerday. Today the buyer's agent called me and said that the buyer wishes to exercise his 3-day right of rescission. Does such a right exist?

4. BUY AND SELL AGREEMENTS

Q/A

ANSWER: NO. There is no 3-day right of rescission on a contract for the sale of real estate.

QUESTION: I am representing a buyer who has made an offer on a home. The seller countered our offer with a clause stating that the buyer waives his right to inspect the property. Is this permissible?

ANSWER: YES. The seller is free to propose such a clause in a purchase contract and it is up to the buyer to either agree or reject such a provision.

QUESTION: I submitted an offer on a home on behalf of my buyer-client. The listing agent told me state law requires that a pre-approval letter was necessary in order for an offer to be valid. Is this true?

ANSWER: NO, while sellers may require a pre-approval with any offers they consider, there is no state law that requires a pre-approval in order for an offer to be valid.

QUESTION: What happens when there are two paragraphs in a buy-sell agreement that contradict one another?

ANSWER: If the paragraphs cannot be reconciled, then an addendum supersedes the main contract, and a later addendum supersedes an earlier one.

QUESTION: I presented an offer from my buyer; however, the listing agent told me that the offer was not valid since the buyer's signature was not witnessed. Does an offer to purchase real estate require a witnessed signature?

ANSWER: NO. There are no legal requirements for witnessed signatures in a contract for the sale of real estate.

QUESTION: I am a Realtor® that just moved to Michigan from another state. The state I'm coming from requires a listing broker to make sure that an earnest money deposit is provided for each transaction. Is this required in Michigan?

ANSWER: NO. While an earnest money deposit is typically provided as a matter of custom (and is a good idea), it is not required in order for there to be a valid binding contract. The parties' mutual promises in a purchase agreement constitute sufficient "consideration" to create a binding contract.

QUESTION: My buyers do not want their identity disclosed to the seller until after the purchase agreement is signed. Can we submit an anonymous offer?

ANSWER: If the seller is willing, you can negotiate the terms of the purchase agreement anonymously, but keep in mind that you will not have a binding contract until it is actually signed by both parties. (A Realtor® should never sign a contract on behalf of an undisclosed buyer – or even arrange for someone else to do so without the involvement of an attorney.)



5. COMMISSIONS / ADMINISTRATIVE FEES

Q/A

QUESTION: As the listing broker, am I entitled to a commission in the event of a full price offer even if the seller does not accept that offer?

ANSWER: Under most listing contracts, theoretically, YES. But an offer with terms – even the most common terms – may not be considered a “full price offer.” A seller could argue, for example, that a purchase offer that requires the seller to provide thirty days’ occupancy is not a “full price offer” under the listing agreement.

QUESTION: I represented the buyer in a transaction that did not close because the seller defaulted. I clearly produced a ready, willing and able buyer. Can I collect a commission from the seller?

ANSWER: No. You did not have a contract with the seller. Our contract was with the listing broker through the MLS. Under MLS rules (and the Code of Ethics and Arbitration Manual), a cooperating broker has no right to a commission from the listing broker if the transaction does not close for whatever reason.

QUESTION: My sellers listed their home with me last week after their prior listing expired. A buyer who called about the home (but did not view it) during the prior listing has now put in an offer. The prior listing agent is claiming that she is due a commission on this sale. Is she correct?

ANSWER: MAYBE. Whether or not the sellers owe the prior listing broker a commission depends on the specific language in the prior listing agreement. Most listing agreements have “protection periods” whereby under certain circumstances, the sellers owe a commission if the home is sold after the listing expires to someone who first became interested in the home during the listing. These clauses vary significantly. For example, some clauses require that the buyer have actually viewed the home during the prior listing. While many clauses contain an exemption if the property is relisted, some require that the second listing agent have “used substantial efforts.” Your sellers should consult with an attorney.

QUESTION: I am representing a seller in the sale of his residence. My seller now has seller’s remorse. I have heard that brokers can file liens on real estate in order to collect commissions. Is this true?

ANSWER: NO. The Commercial Real Estate Broker’s Lien Act allows brokers to file liens for a commission owed in connection with the sale or lease of commercial property. MCL 570.583. Since you have a residential listing, filing a lien could result in a lawsuit for slander of title.

QUESTION: I have a listing agreement with my sellers for the sale of their home. Sellers entered into a purchase agreement with Buyer A. We were all set to close but then the sellers stopped returning my calls. I recently learned that the sellers were planning to close on the property “secretly” and without my involvement in an apparent effort to avoid paying the commission. I intend to hire a lawyer to enforce my right to a commission. In the meantime, may I file a lien on the sellers’ property to protect my rights?

ANSWER: NO. Ordinarily, even if a broker has a legitimate claim to a commission, they have no right to file a lien on residential property in order to protect their claim. Because the penalties for wrongfully filing a lien on real property are severe, a broker should never file a lien on real property without the assistance of a lawyer.

QUESTION: I received an offer through a buyer’s agent, who is a participant in my MLS but never showed the property to his buyers. It turns out that his clients contacted the sellers directly and arranged a showing without a licensee present. The buyers then contacted the buyer’s agent and asked him to write up an offer. Do I have to pay the buyer’s agent a commission if he did not actually show the buyers the house?

ANSWER: An offer of compensation through an MLS does not require that the agent bringing the buyer show the buyer the house. An agent may qualify as procuring cause even if he or she did not show the house to the buyers. A listing broker cannot condition the offer of compensation on the fact that the buyer’s agent accompanied the buyers at a showing

5. COMMISSIONS / ADMINISTRATIVE FEES

Q/A

QUESTION: I am a buyer's agent. My client is putting in an offer on a house where the listing broker is offering cooperating compensation in the amount of 2 ½%. My deal with my buyer has always been that I will get 3%. Can we include this requirement in the buy/sell agreement?

ANSWER: If your buyer's broker contract explicitly states that the buyer must make up the difference if the commission offered is less than 3%, then your buyer may include a provision in the buy/sell agreement which states the seller would agree to assume the buyer's obligation to pay you an additional ½%. Keep in mind though that this negotiation would not affect the listing broker's contractual rights under the listing contract. If the listing contact called for 6%, the cooperating split offered by the listing broker through the MLS was 2 ½%, and the buyers passed on their ½% obligation to the seller, then the seller would be contractually obligated to pay a total commission of 6 ½% – i.e., 6% to the listing broker and ½% to you. You would be entitled to ½% from the seller and 2 ½% from the listing broker.

QUESTION: I was a buyer's agent on a home sale. Prior to the seller's acceptance of my client's offer, the listing broker told me that the seller would not accept my client's below-asking-price offer unless we both reduced our commission by 1%. I reluctantly agreed so that the sale would happen. Isn't the listing broker prohibited from reducing my commission?

ANSWER: A listing broker is prohibited from unilaterally reducing the commission amount after the offer is presented. However, a seller may ask that the cooperating listing broker reduce its commission as a condition of the seller's acceptance of an offer, and the listing broker may, in turn, ask the cooperating broker to share in that reduction.

QUESTION: I am the listing broker. My seller-client just received an offer from a buyer that states that the listing broker must pay the buyer's broker, who is not an MLS participant, a \$2,500 referral fee. I thought that an agent's commission cannot be negotiated in the buy/sell agreement.

ANSWER: You are correct that a buyer's broker cannot negotiate his/her commission in the buy/sell agreement. The listing broker is not a party to the buy/sell agreement. So, if a buyer's broker's right to a commission is, as is typical, from the listing broker through the MLS, that commission amount cannot be changed through the buy/sell agreement. But if the buyer's broker contract obligates the buyer to pay his buyer's broker a specific amount, such as a \$2,500 referral fee, then the buyer can pass on that obligation to the seller in the buy/sell agreement. It would be the same as the buyer requiring the seller to pay for buyer's title insurance. In this situation, the buyer's broker would not be negotiating his compensation with the listing broker. It is the buyer that would be using the buy/sell agreement to try and get the seller to take over the buyer's payment obligation.

QUESTION: Can a real estate broker charge his/her client a closing fee?

ANSWER: YES. However, the fee would need to be part of the contract for services. A listing contract may provide, for example, that the seller will pay a percentage commission and a closing fee. If the listing contract does not provide for such a fee, the listing broker would have no legal basis to charge the seller a closing fee.

QUESTION: Can the listing broker charge the buyer a closing fee?

ANSWER: NO. A listing broker has no contractual relationship with the buyer so cannot charge the buyer a closing fee. (A seller who had a contractual obligation to pay the listing broker a closing fee could pass on that responsibility to the buyer in the purchase agreement.)

An application for a real estate salesperson's license shall be signed by the real estate broker that will employ the applicant. The department shall only issue a real estate salesperson's license to an individual. MCL 339.2505(4).

5. COMMISSIONS / ADMINISTRATIVE FEES

Q/A

QUESTION: I am a salesperson and I formed a corporation for tax purposes. I have told my broker that I want all future commission checks payable in the name of my company. Is this possible?

ANSWER: NO. Since salespersons' licenses can only be issued to individuals and brokers can only pay commissions to real estate licensees, a salesperson cannot receive commission checks from his broker in the name of a corporation or other entity.

An individual shall not hold more than 1 associate real estate broker's license as a nonprincipal, but an individual may hold 1 or more associate real estate broker's licenses as a principal. MCL 339.2509(2).

QUESTION: I am an associate broker who formed a corporation for tax purposes. I have told my broker that I want all future commission checks made payable to my company. Is this possible?

ANSWER: YES, if your new corporation has a broker's license. An associate broker with one real estate company can set up a separate corporation, obtain a broker's license for that corporation and ask the real estate company for which he works to issue his commission checks in the name of his corporation. This option is not available to licensed salespersons.

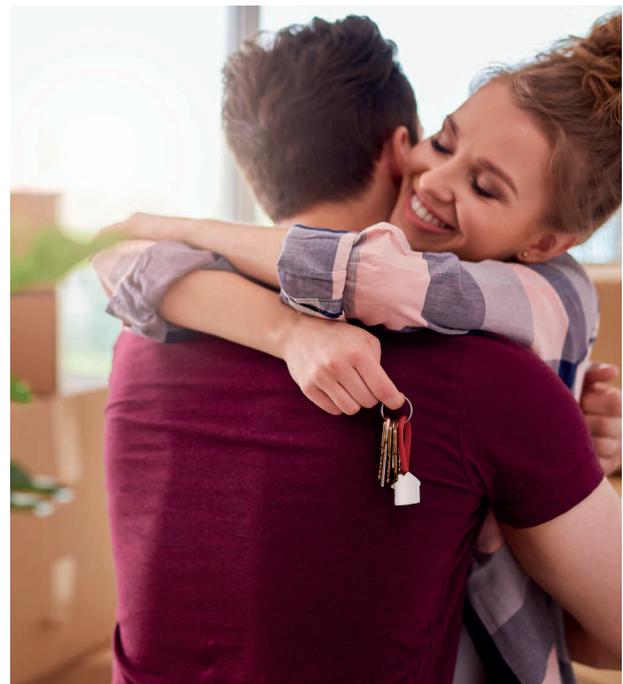
If an individual earned commissions or other income while employed by a real estate broker, it is not grounds for disciplinary action . . . for that broker to pay those commissions or income to that individual, regardless of whether that individual is now employed by another real estate broker or is no longer licensed. MCL 339.2510(2).

QUESTION: I am a broker who had a salesperson recently leave my company on good terms. She is now with another broker but had a number of pending transactions that are now scheduled to close. I would prefer to pay her directly instead of going through her new broker. Can I pay my former salesperson directly for these sales?

ANSWER: YES. You can make these payments directly to your former salesperson.

QUESTION: Does it qualify as a "commission" if my licensed personal assistant is paid a flat fee per closing, or does a "commission" necessarily involve a percentage of the sale price?

ANSWER: While a "commission" payment is typically calculated based on a percentage of the sales price, legally, any per transaction payment qualifies as a "commission." Conversely, if the amount owed to your licensed personal assistant is determined based upon hours worked, it is not a "commission" even if your personal assistant is paid out of closing proceeds.



QUESTION: My agent is representing a seller in the resale of a residential condominium unit. The agent representing the buyer has faxed me a note stating that the buyer wants to terminate the purchase agreement pursuant to their 9 day right of rescission. Can the buyer rescind?

ANSWER: NO. The 9-day right of rescission under the Condominium Act is only applicable to the initial sale of a residential condominium unit from the developer to the first buyer, i.e., the sale of a brand new unit. MCL 559.121. The Condominium Act provides that in connection with an initial sale, a purchase agreement shall not become binding until 9 business days after the purchaser is provided copies of all of the condominium documents. In the case of a resale, if the buyer wants the right to terminate the purchase agreement after reviewing the condominium documents, they need to spell out this contingency in the purchase contract.

QUESTION: I currently represent buyer who is looking to buy a condominium unit as an investment/rental property. The condominium documents provide that the units must be owner-occupied. Can a condominium association prohibit an owner from renting his units?

ANSWER: YES. A condominium restriction prohibiting the rental of units is enforceable.

QUESTION: I represent a buyer in connection with the purchase of a site condominium. The unit he is buying does not have a fence. He wants to build a fence on this property. How can we find out if this is this allowed?

ANSWER: The project's condominium documents, typically the bylaws, should state which type of improvements are allowed to a unit. Your buyer should review the condominium documents to see if there are any prohibitions on fences in the condominium project. Condominium bylaws are recorded along with the master deed. If the documents are unclear about building a fence, your buyer should consult a lawyer.

QUESTION: My clients are putting in an offer on a condominium unit and would like to review the project's financial information as a part of their due diligence. Is the condominium association required to provide this information to a potential purchaser?

ANSWER: NO, but the association is required to provide this information to the seller. If your buyer wants this information, you should include a provision in the purchase agreement whereby the seller agrees to obtain this financial information for your buyers' review and approval.

QUESTION: It is my understanding that with a Condominium Project, the Unit owner is responsible for repairing all parts of the Unit and the Association is responsible for repairing the Common Elements. Is this true?

ANSWER: Not necessarily. The maintenance obligations are spelled out in the Master Deed. It is not uncommon for a Master Deed to require Co-owners to maintain some of the Common Elements. Likewise, an Association may be responsible for maintenance of some portions of the Units. Moreover, day-to-day maintenance responsibilities may be different than maintenance responsibilities in the event of a fire. A potential buyer who is comparing the costs of living at two different projects should never assume that the maintenance obligations work the same way.

QUESTION: I have a client whose condominium association has foreclosed a lien for non payment of dues. How long is the redemption period?

ANSWER: The redemption period for a foreclosure by the association of co-owners is 6 months from the date of sale unless the property is abandoned which will reduce the redemption period to 1 month.

The seller disclosure requirements . . . apply to the transfer of any interest in real estate consisting of not less than 1 or more than 4 residential dwelling units, whether by sale, exchange, installment land contract, lease with an option to purchase, any other option to purchase, or ground lease coupled with proposed improvements by the purchaser or tenant, or a transfer of stock or an interest in a residential cooperative. MCL 565.952.

QUESTION: I am a Realtor® representing a seller in the sale of a vacant parcel of land that is zoned residential. An agent representing a buyer has requested a Seller's Disclosure Statement. The buyer's agent claims that a Seller's Disclosure Statement is required for the sale of all properties that are zoned residential. Is this true?

ANSWER: NO. The Seller Disclosure Act applies only to the transfer of not less than 1 or more than 4 residential dwelling units.

QUESTION: I am listing vacant land. Should I have my seller complete a vacant land disclosure form?

ANSWER: Sellers of vacant land are not legally required to provide a disclosure form. Sellers who do provide vacant land disclosure forms should be cautioned against making any representations where they are unsure. Unlike with the statutorily required residential seller's disclosure form, a seller could be held liable for an innocent misrepresentation made in a vacant land disclosure form.

QUESTION: Is a landlord required to provide a Seller's Disclosure Statement in connection with a residential lease?

ANSWER: A Seller's Disclosure Statement is not required in connection with a residential lease of real estate unless it is a lease with an option to purchase.

QUESTION: I represent a seller who is selling a dilapidated home "as is with all faults." The buyer intends to demolish the house immediately after closing. Does my seller have to fill out the Seller's Disclosure Statement?

ANSWER: YES. This transaction is not exempt from the Seller Disclosure Act. If your seller-client does not provide a form, the buyer will be free to cancel the transaction at any time prior to closing.

The seller disclosure requirements . . . do not apply to any of the following:

(a) Transfers pursuant to court order, including, but not limited to, transfers ordered by a probate court in administration of an estate, transfers pursuant to a writ of execution, transfers by any foreclosure sale, transfers by a trustee in bankruptcy, transfers by eminent domain, and transfers resulting from a decree for specific performance.

(b) Transfers to a mortgagee by a mortgagor or successor in interest who is in default, or transfers to a beneficiary of a deed of trust by a trustor or successor in interest who is in default.

(c) Transfers by a sale under a power of sale or any foreclosure sale under a decree of foreclosure after default in an obligation secured by a mortgage or deed of trust or secured by any other instrument containing a power of sale, or transfers by a mortgagee or a beneficiary under a deed of trust who has acquired the real property at a sale conducted pursuant to a power of sale under a mortgage or deed of trust or a sale pursuant to a decree of foreclosure or has acquired the real property by a deed in lieu of foreclosure.

(d) Transfers by a nonoccupant fiduciary in the course of the administration of a decedent's estate, guardianship, conservatorship, or trust.

(e) Transfers from 1 co-tenant to 1 or more other co-tenants.

(f) Transfers made to a spouse, parent, grandparent, child, or grandchild.

(g) Transfers between spouses resulting from a judgment of divorce or a judgment of separate maintenance or from a property settlement agreement incidental to such a judgment.

(h) Transfers or exchanges to or from any governmental entity.

(i) Transfers made by a person licensed under article 24 of Act No. 299 of the Public Acts of 1980, being sections 339.2401 to 339.2412 of the Michigan Compiled Laws, of newly constructed residential property that has not been inhabited.

MCL 565.953.

QUESTION: I have a seller-client who is the trustee of a property owned by her parents' trust and in which she currently resides. Is she exempt from the Seller Disclosure Act?

ANSWER: NO. The Seller Disclosure Act exempts transfers by a nonoccupant fiduciary in the course of the administration of a trust. Since in your situation the trustee lives in the property, she is not exempt from the Act.

QUESTION: The owner of the home I am listing inherited the home from her father. She does not live in the home but legal title is in her name. Does there need to be a seller's disclosure statement?

ANSWER: YES. While property owned by an estate is exempt under the Seller Disclosure Act (so long as the personal representative does not live in the home), once the property has been distributed from the estate to the heir, it is no longer exempt.

QUESTION: My client is selling a home that she owned with her mother who recently passed away. My client and her mother owned the home as joint tenants with full rights of survivorship. My client has never lived in the home. Is she still required to fill out a seller's disclosure statement?

ANSWER: YES. Under this scenario, your client would not be exempt under the Seller Disclosure Act.

QUESTION: I am listing an REO property. The bank is exempt from providing a seller disclosure form, but I am being told by the agent representing the buyer that my client must provide a signed seller disclosure form that has the word "exempt" on it. Is this true?

ANSWER: NO. There is no provision in the Seller Disclosure Act that requires an "exempt" party to provide a form.

QUESTION: I represent a seller who is selling a home that he owns through a limited liability company. Do we still need to fill out a seller's disclosure statement?

ANSWER: YES. The fact that the property is owned by an entity rather than a person does not make the transaction exempt from the seller's disclosure law.

QUESTION: I am a Realtor® that is listing a residential property that is owned by a non profit organization. It is my understanding that non-profits are exempt from the Seller Disclosure Act. Am I correct?

ANSWER: NO. Non-profit organizations do NOT fall within any of the Seller Disclosure Act exemptions. Your seller will need to provide a Seller's Disclosure Statement.

QUESTION: I am a buyer's agent on a FSBO sale. The seller refuses to provide a Seller's Disclosure Statement. What can I do?

ANSWER: There is no way to force a seller to complete a Seller's Disclosure Statement, even where required by law. A buyer who does not receive a Seller's Disclosure Statement has the right to walk away from the transaction at any time before closing.

QUESTION: My seller bought a house at sheriff's sale. Now that the redemption period has expired, he has decided to list it for sale. Is he exempt from the Seller Disclosure Act?

ANSWER: NO. The foreclosure exemption from the Seller Disclosure Act applies only if the lender acquires the property through foreclosure and not to other purchasers at a foreclosure sale.

QUESTION: I am representing a seller in connection with a short sale transaction. It is my understanding that short sale transactions are exempt from the Seller Disclosure Act. Am I correct?

ANSWER: NO. Short sale transactions are not exempt from the Seller Disclosure Act.

QUESTION: A local township is selling a residential property. Is it required to fill out a seller's disclosure statement?

ANSWER: NO. Governmental entities are exempt from the Seller Disclosure Act.

QUESTION: My sellers are not going to provide a Seller's Disclosure Statement because they have never lived in the residence, but have only used it as a rental. Is this proper?

ANSWER: NO. Sellers are not exempt from Seller Disclosure Act requirements just because they have never lived in the property. Sellers who have owned and leased a residence must nonetheless fill out the Seller's Disclosure Statement to the best of their knowledge.

QUESTION: My client is selling his house to one of his nephews. He believes that he is exempt from the Seller Disclosure Act because he is selling his home to a relative. Is he correct?

ANSWER: NO. The Seller Disclosure Act contains an exception for transfers made to a spouse, parent, grandparent, child or grandchild. No such exception exists for transfers to other relatives.

QUESTION: I am a Realtor® representing a licensed builder who is selling a house that he has built. The builder currently resides in this property. Is he exempt from the Seller Disclosure Act?

ANSWER: NO. The builder would have been exempt from the Seller Disclosure Act had he not resided in the property. Section 565.953(i) exempts a transfer from a licensed builder ONLY if it is a newly constructed residential property that has not been previously inhabited.

The (seller) or his or her agent is not liable for any error, inaccuracy, or omission in any information delivered pursuant to this act if the error, inaccuracy, or omission was not within the personal knowledge of the (seller), . . . and ordinary care was exercised in transmitting the information. It is not a violation of this act if the (seller) fails to disclose information that could be obtained only through inspection or observation of inaccessible portions of real estate or could be discovered only by a person with expertise in a science or trade beyond the knowledge of the (seller). MCL 565.955(1).

QUESTION: My seller indicated on the Seller's Disclosure Statement that there were no known underground storage tanks on his property (i.e., he checked "no" rather than "unknown" when answering this question). The buyer has discovered that there is in fact an underground storage tank and is demanding that the seller pay for the removal. Is my seller responsible?

ANSWER: NO. The Seller Disclosure Act expressly provides that a seller is not responsible for innocent mistakes made when filling out the Seller's Disclosure Statement form.

QUESTION: The Seller's Disclosure Statement asks about "proximity" to a farm and "vicinity" to a landfill, airport, shooting range, etc. How close does something need to be for the answer to this question to be "YES?"

ANSWER: This question on the Seller's Disclosure Statement is poorly written as it is not really a "YES" or "no" question. A logical interpretation would be that the answer to this question is "YES" where the location is close enough to have an impact on the value of the property being sold. This determination should be left to the judgment of the sellers.

QUESTION: I represent a seller who is selling his house that is adjacent to a hospital with a helipad. Does he have to disclose this information in the Seller's Disclosure Statement?

ANSWER: ARGUABLY, YES. The Seller's Disclosure Statement asks about the property's "proximity to a landfill, airport, shooting range, etc." While the use of "etc." in this context is not particularly helpful, arguably the noise made by helicopters landing on an adjacent helipad is similar to the noise generated by a nearby airport or shooting range. This determination should be left to the judgment of the seller.

It is always the case that the ultimate decision as to whether something should be disclosed should be left to the seller-client. A listing agent who advises their seller client that something need not be disclosed has arguably assumed responsibility for any later problem that arises. When in doubt, a seller should disclose.

QUESTION: I am representing a seller of a house and some land. The state has approved construction of a wind farm adjacent to my seller's property. Construction will begin this coming spring. Must this be disclosed?

ANSWER: MORE THAN LIKELY YES. The Seller Disclosure Act has a section that specifically asks whether there is "farm or farm operation in the vicinity; or proximity to a landfill, airport, shooting range, etc." While there is no definitive answer to this question, it is certainly a reasonable interpretation that a future wind farm would fall within this description.

QUESTION: My seller says that her basement leaked 10 years ago, but that she had some grading work done, and it has not leaked since. Can she answer "no" to the question about basement leaks on the Seller's Disclosure Statement?

ANSWER: NO. The Michigan Court of Appeals has said that given the wording of this specific question (i.e., "Has there been evidence of water"), there is no time limitation. (In that specific case, the sellers were required to disclose the fact that the house had flooded 26 years ago.)

QUESTION: My sellers received a letter from the city indicating that there is lead in the water line serving my sellers' home which the city plans to replace at the city's cost sometime in the next couple of years. If the line in question lies outside of the sellers' property boundary, do they still need to disclose?

ANSWER: YES. First, based on language in the Seller Disclosure Act ("SDA") requiring sellers to disclose "conditions affecting the property," Michigan courts have rejected the argument that a seller's disclosure obligation is limited to conditions within the property itself. Moreover, even if there was no duty to disclose under the SDA, Michigan common law requires sellers to volunteer information about hidden defects that are dangerous.

QUESTION: I am listing a 10-acre residential property that is traversed by a utility easement. The easement will service a housing development in the near future. Is my seller required to disclose this easement?

ANSWER: YES. The Seller Disclosure Act requires that a seller of residential property disclose any easements affecting that property.

QUESTION: Do sellers have to disclose if a home is modular?

ANSWER: There is no law which requires sellers to volunteer the fact that their home is a modular home.

QUESTION: On the Seller's Disclosure Statement, my sellers indicated that the microwave was in working order. The purchase agreement said nothing about the microwave. Is the buyer entitled to the microwave?

ANSWER: NO. The Seller's Disclosure form specifically states that "the items below are included in the sale of the property only if the purchase agreement so provides." This language was added to the form some years ago to specifically address this question.

QUESTION: I am currently listing a residential property for a client that has relocated to another state through the company for whom he works. I told him that I would fill out the Seller's Disclosure Statement on his behalf since he is out of town. Is this permissible?

ANSWER: Agents should never fill out the Seller's Disclosure Statement on behalf of their seller-client. If an error is later discovered, the agent may find themselves in a position in which both the buyer and seller are pointing fingers.

QUESTION: My seller suffers from dementia and her daughter has her power of attorney. Should the daughter fill out a Seller's Disclosure Statement on her mother's behalf?

ANSWER: NO. The power of attorney gives the daughter the authority to act on her mother's behalf; it does not give her the authority (or the ability) to make representations on her mother's behalf. The mother is also not able to complete the form. While the Seller Disclosure Act does not contemplate this situation, if you are aware that a seller is not competent, then you should indicate in the MLS that a Seller's Disclosure Statement is unavailable and (very briefly) explain the situation verbally to potential purchasers. The legal analysis is simply that in this situation, compliance with the Seller Disclosure Act is impossible.

An action shall not be brought against a real estate broker, an associate broker, or a real estate salesperson under the following circumstances:

* * *

(b) For failure to disclose to a purchaser or lessee of real property that the real property was or was suspected to have been the site of a homicide, suicide, or other occurrence prohibited by law which had no material effect on the condition of the real property or improvements located on the real property.
MCL 339.2518.

QUESTION: The house that I have listed was the scene of a terrible crime. Is this fact something that I have to disclose to prospective buyers?

ANSWER: NO. An agent is not required to disclose this type of occurrence unless the prospective buyer was to specifically inquire. Realtors® should be aware that if a buyer were to ask if anything of this nature has occurred, the Realtor® must respond honestly to such question.

[Federal law requires] that every contract for the purchase and sale of any interest in target housing shall contain a Lead Warning Statement and a statement signed by the purchaser that the purchaser has –
(A) read the Lead Warning Statement and understands its contents;
(B) received a lead hazard information pamphlet; and
(C) had a 10-day opportunity (unless the parties

mutually agreed upon a different period of time) before becoming obligated under the contract to purchase the housing to conduct a risk assessment or inspection for the presence of lead based paint hazards.
42 USC 4852d(a)(2)

QUESTION: I am listing a home for an estate. It is my understanding that this transaction is exempt from seller's disclosure, agency disclosure and lead-based paint disclosure requirements. Is that correct?

ANSWER: NO. The exemptions under these three disclosure statutes are not the same. In this case, while the transaction is exempt under the seller disclosure act, you must still comply with both agency disclosure and lead-based paint disclosure requirements.

QUESTION: My clients are selling an 8-unit apartment building. Are they required to provide a Seller's Disclosure Statement and/or a Lead Based Paint Disclosure form?

ANSWER: The sellers of the apartment building are only required to provide a Lead Based Paint Disclosure form. The Seller Disclosure Act does not apply to apartment buildings with more than four units; however, the Lead Based Paint Disclosure Act does apply to all apartment buildings.

QUESTION: I am a Realtor® representing a bank that is selling a property that it has repossessed through the foreclosure process. The bank tells me that it is exempt under both the Michigan Seller Disclosure Act as well as the Federal Lead Based Paint Disclosure requirements. Is this correct?

ANSWER: This is partially correct. The bank is exempt from the Michigan Seller Disclosure Act but it is not exempt from the Federal Lead Based Paint Disclosure requirements.

Under the Michigan Seller Disclosure Act, both the foreclosure sale itself, and the subsequent resale by the lender to a third party, are exempt from the disclosure requirements.
As to the Federal Lead Based Paint Disclosure Law, while the original foreclosure sale is exempt, a subsequent resale from the lender is not.

8. DO NOT CALL / TELEPHONE SOLICITATIONS

Q/A

QUESTION: I have heard that it is illegal for a real estate agent to call someone who is selling their house “for sale by owner” if they are on the national “Do Not Call” registry. Am I correct?

ANSWER: An agent may call an FSBO seller on behalf of a buyer who is interested in the FSBO property. The agent may only discuss client’s interest in the property and may not attempt to obtain the listing.

QUESTION: I run a real estate office and I would like to call past clients to see if they are interested in buying new properties or selling their current one. Can I call these clients if they are on the national “Do Not Call” registry?

ANSWER: Since you have a past business relationship with your clients, you may call them for up to 18 months after the end of the relationship unless and until they ask you to not to call again. Note that the past business relationship exception only allows you to make live calls (and not automated calls or robocalls).

QUESTION: I often keep track of the expiration of other companies’ listings so that I can call the seller immediately and hopefully persuade the seller to list with me. Is this permissible?

ANSWER: YES, however, before calling such a seller, you need to make certain that the seller is not listed on the national “Do Not Call” registry. The fact that the sellers listed their home with another firm only gives that particular firm the right to call the sellers under the past business relationship exception.

QUESTION: I am a Realtor® who has hired an unlicensed assistant. I am having my assistant make cold calls to prospective sellers. I have made sure that my assistant has verified that these prospective sellers are not on the national “Do Not Call” registry. Can my assistant make these calls?

ANSWER: NO. Under Michigan license law, an individual must be a real estate licensee in order to make cold calls to prospective sellers.

QUESTION: I am calling leads to see if they are interested in purchasing real estate. When I make these calls, do I have to provide my broker’s name and their address or phone number?

ANSWER: The Occupational Code requires the disclosure of this information in an “advertisement.” While the Occupational Code does not define “advertisement,” such term is not generally used in the context of a telephone solicitation. Moreover, the nature of its advertising requirements makes it clear that the statute is referring to print advertisements.

QUESTION: I have a past business relationship with someone on the do not call list. She has asked that I not call her in the future. Am I obligated to honor that request?

ANSWER: YES. You may not call someone on the federal registry or anyone who has asked you not to call them (regardless of any past relationship). Federal law requires companies to maintain a company “do not call” list of consumers who have asked not to be called by that particular company.

QUESTION: Are there limitations on when I can make sales calls?

ANSWER: YES. Michigan law prohibits any sales calls between 9:00 p.m. and 9:00 a.m.



9. EARNEST MONEY DEPOSITS / TRUST ACCOUNTS

Q/A

A real estate salesperson shall pay or deliver to the real estate broker, on receipt, a deposit or other money paid in connection with a transaction in which the real estate salesperson is engaged on behalf of the real estate broker. MCL 339.2512(k)(ii).

QUESTION: I am a real estate broker and I have heard that some other brokers in my area are allowing their salespersons to hold the earnest money checks until there is a binding purchase agreement signed by all parties. Is this permissible?

ANSWER: NO. Note, however, that the Occupational Code does not contain any definitive time deadline for turning over a check to a broker. It only requires a salesperson to turn over the check "on receipt." While we don't think it is necessary for a broker to require a salesperson to drive over to the broker's house at midnight to deliver a check the salesperson just received, the salesperson must deliver the check as soon as reasonably possible. A salesperson may NOT hold the check until there is a binding purchase agreement signed by all parties.

A real estate broker shall deposit, within 2 banking days after the broker has received notice that an offer to purchase is accepted by all parties, money that belongs to others and is made payable to the real estate broker into a separate custodial trust or escrow account maintained by the real estate broker with a bank, savings and loan association, credit union, or recognized depository until the transaction involved is consummated or terminated, at which time the real estate broker shall account for the full amount received. MCL 339.2512(k)(v).

QUESTION: Can the parties agree that the broker will not deposit the earnest money check until there is a binding purchase agreement signed by all parties?

ANSWER: YES. While the salesperson must deliver the earnest money deposit check to the salesperson's broker upon receipt, the broker can wait to deposit the check until after there is a binding purchase agreement signed by all parties.

QUESTION: I am a broker who represents a buyer. My buyer made an offer on a property that was accepted by the seller. Both the buyer and the seller have agreed in the contract that I am to hold the earnest money check in my office and not deposit it in my trust account until the inspection period has passed. Is this permissible?

ANSWER: NO. An agreement by the buyer and the seller does not relieve the broker from its duty to deposit money in its possession within the 2 days after there is a binding purchase agreement signed by all parties. If the buyer and seller want to delay the deposit of the check, they should agree to have someone other than a real estate broker hold the funds.

QUESTION: My seller just received an offer that states that the buyer will submit the earnest money deposit within 1 week after there is a binding purchase contract in place. Is this legal? I thought that the earnest money deposit had to be made within 2 banking days.

ANSWER: The Occupational Code's 2 banking day rule applies only to a check that is in the hands of the broker. A buyer and seller can agree to delay the delivery of the check to the broker. (In this situation, a broker should have a system in place to follow up on collecting the check from the buyer.)

QUESTION: My seller clients received a backup offer that they would like to accept. The offer says that the earnest money deposit will not be deposited unless this buyer's contract becomes primary. Is this permissible?

ANSWER: A backup offer can provide that the buyer will not deliver the earnest money deposit check until the contract is primary. But once the earnest money deposit check is in the hands of the cooperating broker, then it must be deposited. Parties cannot agree that a broker will wait to deposit the earnest money deposit until the backup offer is primary. (In this situation, a broker should have a system in place to follow up on collecting the check from the second buyer.)

9. EARNEST MONEY DEPOSITS / TRUST ACCOUNTS

Q/A

QUESTION: I am the listing broker. I always ask the cooperating broker for proof of the deposit of the earnest money. Is the cooperating broker obligated to provide proof in the form of a copy of the check?

ANSWER: NO. There is no law requiring the cooperating broker to provide proof of the earnest money deposit. You could, however, make this requirement part of the purchase agreement.

If a purchase agreement signed by a seller and purchaser provides that an escrowee other than a real estate broker shall hold a deposit, a licensee in possession of that deposit shall cause the deposit to be delivered to the named escrowee within 2 banking days after the licensee receives notice that an offer to purchase is accepted by all parties. MCL 339.2512(k)(vii).

QUESTION: I am representing a buyer to a purchase agreement in which the buyer and seller have agreed that the earnest money is to be held by a title company. Is it legal for me to deliver the check to the title company?

ANSWER: YES. Realtors® and their clients should understand that title companies are not subject to the trust account requirements in the Occupational Code and may have their own rules as to how funds will be held and under what terms they will be released. Often a title company will only hold an earnest money deposit if the parties execute the title company's form of escrow agreement.

QUESTION: What are a Realtor's® responsibilities when a title company or other entity is to act as escrow agent and hold the earnest money deposit?

ANSWER: If a purchase agreement signed by a seller and purchaser provides that a title company shall hold the deposit, a licensee in possession of that check must deliver it to the title company within 2 banking days after the licensee receives notice that an offer to purchase has been accepted by all parties.

QUESTION: I am a Realtor® representing a buyer who is making an offer on a property that a bank has taken back through the foreclosure process. The bank,

through its listing agent, has countered my buyer's offer stating that the earnest money deposit will be held by the listing office. Is this permissible or is the selling office required to hold the deposit?

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

QUESTION: I am acting as a transaction coordinator in a real estate transaction. I was told that I am not allowed to hold an earnest money deposit in such a transaction. Is this true?

ANSWER: NO. There is no prohibition against transaction coordinators holding earnest money deposits.

QUESTION: I have a small, two-person brokerage firm. My office policy is that my company does not hold earnest money deposits. Our purchase contract form provides that the earnest money deposit will be held either by a local title company or the listing broker. Is my firm required to have a trust account?

ANSWER: NO. If your firm does not ever hold earnest money deposits (or any other funds belonging to others), you are not required to set up a trust account.

QUESTION: I am a broker who only sells commercial property. Does the rule requiring 2 days to deposit earnest money in a trust account apply to deposits made in connection with the sale of commercial property?

ANSWER: YES. The law applies to any real estate transaction and does not differentiate between residential and commercial transactions.

QUESTION: What if an earnest money deposit check bounces?

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

9. EARNEST MONEY DEPOSITS / TRUST ACCOUNTS

Q/A

A real estate broker may maintain more than 1 trust account. A real estate broker may deposit not more than \$2,000.00 of its own money in each trust account to cover bank service charges and bank minimum balance requirements or to avoid the closing of the account because there is no money in the account. The real estate broker shall account for any of its own money in a trust account MCL 339.2512(k)(iv).

QUESTION: Should the commission check that a broker receives at closing be deposited in the broker's trust account pending disbursement of the salesperson's portion of the commission?

ANSWER: It is not necessary that a commission check be deposited in the broker's trust account and, in fact, it is at least arguable that a broker is prohibited from doing so by the provision that prohibits a broker from commingling his own business funds with trust funds.

QUESTION: What kind of records does a broker need to keep for its trust account?

ANSWER: Trust account requirements include:

- (1) **A trust account must be a non-interest-bearing account;**
- (2) **Checks from a trust account must be signed by broker or associate broker;**
- (3) **Broker must maintain a chronological journal for the account showing all deposits/disbursements and showing a running balance after each entry;**
- (4) **Broker must also maintain separate accounting ledgers showing receipts/disbursements for each transaction; and**
- (5) **Broker may deposit its own funds – not to exceed \$2,000 – so as to avoid bank charges.**

QUESTION: How long should my office hold records?

ANSWER: The Rules require that escrow account records be maintained for at least 3 years. It is possible, based on statutes of limitations for various causes of action, that litigation could be initiated up to 6 years after a transaction has closed. There are also "tolling" provisions in the law that could extend the statute of limitations. Thus, while there are no absolutes, it is advisable to hold all records for a minimum of 7 years.

. . . disbursement of an earnest money deposit must be made at consummation or termination of the agreement pursuant to the agreement signed by the parties. However, any deposit in the trust account of the broker for which the buyer and seller have made claim shall remain in the broker's trust account until a civil action has determined to whom the deposit must be paid, or until the buyer and seller have agreed, in writing, to the disposition of the deposit. The broker may also commence a civil action to interplead the deposit with the proper court. Rule 313(9).

QUESTION: The purchase agreement says that if my buyer clients are turned down for a mortgage, my buyers are entitled to their earnest money deposit back. That is exactly what happened but the seller objected so my broker won't release the earnest money deposit. Why isn't the contract enforced as written?

ANSWER: The purchase agreement is to be enforced as written, but the law says that in the event of a dispute, a court, not a real estate licensee, is responsible for interpreting the contract.

QUESTION: I represent a buyer who has entered into a purchase agreement. My buyer was not satisfied with the home inspection and has decided not to buy the house. The purchase agreement clearly states that if the buyer is dissatisfied with the inspection report he can terminate the contract and receive a full refund of his earnest money deposit. The sellers disagreed with the buyer and have stated that they want the earnest money deposit. I'm of the opinion that I can release the money to the buyer based upon the clear language of the purchase agreement. Am I correct?

ANSWER: NO. Since the sellers are making a claim to the earnest money, you cannot release the money to the buyer. The fact that it seems quite likely that the buyer would prevail in any litigation over the earnest money deposit does not mean that you can release the earnest money to the buyer over the objection of the sellers.

9. EARNEST MONEY DEPOSITS / TRUST ACCOUNTS

Q/A

QUESTION: My seller entered into a purchase agreement that contains a clause that says that the earnest money deposit will become non-refundable if the closing does not occur by the date specified in the purchase contract. The closing date has passed, but the buyer is disputing the release of the money. Since the contract says the deposit is non-refundable, can the money be released to the seller?

ANSWER: NO. If there is a dispute between the buyer and the seller over the deposit, the law requires that the money stay in a broker's trust account until there is either an agreement between the parties or a court order. The fact that one of the parties' claims to the deposit is clearly wrong does not make a difference.

QUESTION: Once a transaction falls through, does a broker need to get a written release from both parties before releasing the earnest money deposit?

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

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

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

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

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

QUESTION: I represented a buyer in a transaction that ultimately did not close. The seller agreed to release the earnest money back to the buyer. Can I mail the money back to the buyer or must I deliver it in person?

ANSWER: There is no requirement that you deliver the earnest money in person.

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

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

QUESTION: I am representing a seller of a home who is entering into a purchase agreement that would allow the buyer to move in before the closing. The seller has requested that the buyer make a \$10,000 non-refundable earnest money deposit directly payable to the seller, which the buyer is willing to pay. Can this be done?

ANSWER: While legally this can be done, this arrangement does present a number of potential issues. For example, what happens if the seller is unwilling or unable to go through with the sale of the home? How will insurance/casualty risks be handled? For these reasons, both parties should be encouraged to seek the advice of a lawyer before proceeding forward.

9. EARNEST MONEY DEPOSITS / TRUST ACCOUNTS

Q/A

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

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

QUESTION: I am representing a buyer who terminated a purchase agreement after the inspection of the property. The seller and buyer signed a mutual release that called for the earnest money deposit to be refunded to the buyer. Buyer is now looking for a different home and told me to leave the deposit in my trust account to be used on his next purchase. Is it legal for me to keep the deposit in my trust account without a purchase agreement in place?

ANSWER: YES. The law does not require that there be a signed purchase agreement in place in order for the broker to be able to keep money in its trust account.

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

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



A person engaging in a real estate transaction, or a real estate broker or salesperson, shall not [discriminate] on the basis of religion, race, color, national origin, age, sex, sexual orientation, gender identity or expression, familial status, or marital status of an individual or anyone residing with that individual MCL 37.2502(1).

QUESTION: I am a broker and some of my agents put Christian crosses on their signs. Are there any consequences to me for permitting this practice? Can I make these agents stop this practice?

ANSWER: Placing crosses or any other religious symbols on real estate signs may be interpreted as an attempt to discourage buyers of other faiths. For this reason, brokers should not permit their agents to do this.

QUESTION: I have a prospective buyer who is Hispanic. He told me that he wants to live in a "Hispanic neighborhood." What can I do about this?

ANSWER: The client needs to be told that it is illegal for you to direct him/her to particular neighborhoods based upon ethnicity or nationality of the residents in that neighborhood. If, on the other hand, the client identifies a particular geographic area in which he wishes to live, the Realtor® can honor the client's request to limit the search to that neighborhood. The Realtor® would be well advised to have a written record as to the client's specific request.

QUESTION: I have a buyer who wanted me to find out the local area school test scores. When I went to the website with the scores, I noticed that they were broken down by many different demographics including race. Can I provide my buyers with this list?

ANSWER: Realtors® should not distribute demographic information broken down by race. Instead, Realtors® should provide buyers with a list of the various websites from which they can obtain school test score information.

QUESTION: I plan on stating on the MLS and other advertising that my seller's house is in a "family neighborhood." Can I use this type of description?

ANSWER: Real estate advertising should not include statements that suggest either that families with children are NOT welcome or that they are the ONLY people welcome. A reference to a "family neighborhood" may be interpreted as an attempt to discourage buyers who are not families with children.

QUESTION: I have a prospective buyer that wants to see a home in a neighborhood that I consider to be very dangerous. However, this neighborhood is primarily made up of a number of ethnic minorities. What can I do?

ANSWER: Realtors® should never refuse to show (or even discourage a buyer from seeing) a particular house that a buyer client has asked to see based upon the Realtor's® assumption that the buyer would not like the neighborhood. Historically, a large number of Fair Housing Act cases have involved agents who have allegedly steered clients to particular neighborhoods where the agent thought the client would be "most comfortable." If a client makes a specific inquiry about crime statistics, the Realtor® should not offer their own perceptions as to an area, but should refer the client to places where official statistics may be available.

QUESTION: We had a buyer come to our office who has plainly stated that he does not want a woman representing him. What should I tell him?

ANSWER: The Fair Housing Act prohibits a broker from matching clients with agents on the basis of gender (or on the basis of any other protected class).

QUESTION: I have clients who are selling their house. In a recent showing, the sellers' neighbors accosted the agent showing the house as well as the prospective buyer because the buyer was an ethnic minority. They hurled racial epithets and the agent and buyer were forced to leave the area. What can be done to remedy this situation?

ANSWER: The neighbors should be advised that this behavior is both illegal and actionable. The buyers and their agent should be advised that the sellers do not condone their neighbors' offensive conduct and be invited back to view the house.

QUESTION: I plan to start an advertising campaign marketing my services exclusively to single women. I also plan to incorporate a donation to women's charities into this advertising campaign. Is this allowable?

ANSWER: While it is permissible to set up a program which donates money to one or more specific "women's charities," an advertising campaign should not be directed at women (as opposed to men) or single persons (as opposed to married persons). Michigan law prohibits discrimination based upon sex or marital status.

QUESTION: I have a rental house that I have recently rented to someone who has physical disabilities. The tenant wants me to install rails in a number of areas within the house at my expense. Must I do this?

ANSWER: If a person has a disability, a landlord must allow him or her to make reasonable modifications to the rental unit; however, the landlord can require the disabled tenant to pay for the modifications and for the restoration of the property to its original condition at the termination of the lease.

QUESTION: I serve as a property manager for a 2-bedroom rental home. Can I restrict large families from leasing this property due to the house's limited capacity?

ANSWER: NO. Familial status is a protected class, so an advertisement for housing should never refer to "large families" or to a specific number of children. That being said, many local governments have rental ordinances in place that limit how many individuals can occupy a rental home or apartment. So, for example, it would be permissible to say, "Pursuant to city rental ordinances, this home is only licensed for 4 occupants." It would not be permissible to say, "No large families" or "No more than two children per unit."

QUESTION: I'm a broker and I want to do everything I can to make sure that my agents are complying with Fair Housing law. My brokerage has a written fair housing compliance policy in place, and my agents complete Fair Housing education every year. If one of my agents violates Fair Housing law, can I still be liable given that I've invested time and money into training my agents?

ANSWER: YES. If an agent violates the Fair Housing Act, their broker is liable. This is true regardless of any written policies in place or how much time and effort the brokerage has put in to training their agents. For this reason, brokers should have a plan in place for how they are going to supervise their agents' licensed activities.

QUESTION: I represent a buyer who placed an offer on a home for sale. The offer included a letter from my buyer explaining to the seller why the buyer was a good fit for the home and why the seller should accept the offer. The listing agent refused to deliver my buyer's letter, claiming that to do so would violate Fair Housing law. Is this true?

ANSWER: Accepting buyer letters (also known as "love letters") isn't a Fair Housing violation per se, but such letters do pose various problems under the law. If a buyer letter contains identifying information relative to the buyer's protected class (such as race or marital status) and the seller later rejects that offer, it raises the question . . . did the seller reject the offer because of its terms? Or because of the buyer's protected class status? Given these concerns, sellers may decide to instruct their agent not to deliver any "love letter" that they receive from a potential buyer.

11. FORECLOSURES AND SHORT SALES

Q/A

QUESTION: I represent the seller on a short sale. I have worked for 6 months to put together a short sale and now the seller's lender has conditioned its acceptance on my agreement to reduce my commission by 2%. Can the seller's lender do this?

ANSWER: Unfortunately, YES. The seller's lender is being asked to agree to take less than it is contractually owed. Accordingly, it can refuse to do so, or it can condition its approval on just about anything, including a lower commission payment.

QUESTION: I represent a buyer who has submitted an offer that will result in a short sale situation. The offer was accepted by the seller subject to the seller's lender's approval. Several months have gone by without any response from the seller's lender. Can my buyer terminate the contract?

ANSWER: There is no law that gives a party the right to terminate a contract after a particular period of time. For this reason, a purchase contract with a contingency for the seller's lender's approval – as with any other contingency – should have a stated deadline for obtaining such approval, after which the buyer can terminate the contract. While the absence of such a clause does not mean that the buyer is bound indefinitely, it certainly creates uncertainty. A buyer who wishes to terminate such a contract should be advised to seek the advice of a lawyer.

QUESTION: I represent a seller whose mortgage is in default and who has a foreclosure sale coming up. We have received numerous offers on the property but we need the lender's approval on what will certainly be a short sale. I was told to have the seller accept all of the offers and present them all to the seller's bank for its consideration. Is this permissible?

ANSWER: A purchase agreement, which is contingent upon the sellers' bank's approval, is in many ways the same as a purchase agreement that is contingent upon the purchasers' bank's approval. In both situations, there is an implied obligation on the part of the sellers or buyers to do all they can to obtain their bank's approval. There is a strong argument that each purchase agreement accepted by the sellers would constitute a binding purchase agreement subject to

satisfaction of any contingencies. In order to avoid problems, a seller who wants to sign more than one offer may wish to include a statement along the lines of: "This agreement shall not be binding on the seller unless approved by sellers' mortgagee. Sellers shall have the right to present more than one contract for their mortgagee's consideration." Keep in mind, however, that if the contract is not binding on the sellers, it is probably not binding upon the buyers either.

QUESTION: I just entered into a listing agreement with sellers that is likely to end up being a short sale. I plan to make this fact known when I enter the listing into the MLS. Should I get my sellers' permission to do this?

ANSWER: YES. Entering information that the sale of the home will be a short sale may affect the sellers' ability to sell the home, therefore, you should get their permission before entering that information into the MLS. (Note that some MLS rules require the disclosure of a potential short sale when "reasonably known.")

QUESTION: I represent a seller whose house is in foreclosure. The property was purchased by the bank at the sheriff's sale. The seller entered into a purchase agreement but due to some unforeseen delays the closing will not be able to take place until the redemption period expires. Must the bank allow the sale to go through since the purchase agreement was in place before the redemption period expired?

ANSWER: NO. Once the redemption period expires the seller has no legal title or rights to the property. The bank has no contractual duty to sell the property to the buyer.

QUESTION: I am a Realtor® that bought a property at a sheriff's sale. The owner of the property no longer occupies the property. As the buyer, am I allowed to declare the property abandoned and shorten the redemption period to 30 days?

ANSWER: NO. Only a mortgagee can file an affidavit of abandonment to shorten the redemption period after a sheriff's sale. A successful third-party bidder at a foreclosure sale cannot use the abandonment process.

11. FORECLOSURES AND SHORT SALES

Q/A

QUESTION: I have clients who have defaulted on their home equity loan, and the bank has foreclosed on their property. Can a lender with a second mortgage foreclose that mortgage?

ANSWER: YES. The second mortgagee can foreclose on the property and sell it at a sheriff's sale. If your clients fail to redeem the property during the redemption period, the purchaser at the sheriff's sale will become the new owner of the property subject to the first mortgage.

QUESTION: I am listing a property for a seller whose house sold at sheriff's sale. The seller owes the bank \$150,000. The bank had a winning bid of \$100,000, resulting in a deficiency of \$50,000. If we are unable to sell the property during the redemption period, will the seller be liable for the \$50,000 difference?

ANSWER: YES, ordinarily the seller will be liable for the \$50,000 deficiency whether or not the property is redeemed. If the seller has other loans which had been secured by junior liens on the property, the seller would also remain liable for those debts as well.

QUESTION: A landlord is currently in the foreclosure process on his investment property. The landlord has tenants that claim they no longer have to pay rent due to the foreclosure. Is this true?

ANSWER: NO. The tenants are still responsible for the payment of rent to the landlord under the terms of their lease, despite the property being in foreclosure.

QUESTION: I represent a buyer who is buying a foreclosed property from a bank. The bank has made a condition of the purchase contract that the bank hold the earnest money deposit. I believe that this is illegal. Am I correct?

ANSWER: NO. There is no prohibition against the seller holding the earnest money deposit. Both the amount of the deposit and where it is to be held are negotiable items between the buyer and the seller.



12. GENERAL LICENSING ISSUES (OCCUPATIONAL CODE AND RULES)

Q/A

QUESTION: I am a licensed agent, and I will be out of town for 1 week on vacation. One of my buyers wants to see a home while I'm out of town. Would it be legal for my unlicensed assistant to arrange to accompany my buyer-client on a tour of the home? My assistant would not write an offer or even attempt to answer any questions about the home during the showing.

ANSWER: NO. Historically, LARA has taken the position that only licensed agents can show property.

QUESTION: I am a licensed real estate agent. Whenever I host an open house, I have my unlicensed assistant accompany me to answer the door and ask prospective buyers fill in a register. Several agents have told me that unlicensed assistants cannot attend open houses. Is this correct?

ANSWER: NO. While a non-licensee cannot independently conduct an open house, an unlicensed assistant can accompany a licensee so long as he/she does not perform any licensed activities.

"Independent contractor relationship" means a relationship between a real estate broker and an associate real estate broker or real estate salesperson that satisfies both of the following conditions:

- (i) A written agreement exists in which the real estate broker does not consider the associate real estate broker or real estate salesperson as an employee for federal and state income tax purposes.
- (ii) At least 75% of the annual compensation paid by the real estate broker to the associate real estate broker or real estate salesperson is from commissions from the sale of real estate.

MCL 339.2501(h).

QUESTION: Can I treat my licensed personal assistant as an independent contractor rather than an employee?

ANSWER: A licensed personal assistant qualifies as an independent contractor ONLY if at least 75% of their annual compensation is from commissions and they sign a written agreement agreeing that they are not an employee for federal and state income tax purposes. If your licensee's compensation is based upon the number of hours they work, they are not an independent contractor.

A real estate salesperson shall not accept a commission or valuable consideration for the performance of an act specified in this article from any person other than the real estate broker that employES the salesperson. MCL 339.2510(1).

QUESTION: I am a licensed salesperson. I want to hire a licensed personal assistant. If I treat them as an employee, can I pay them directly?

ANSWER: If your assistant will be performing licensed activities, then they must be licensed through and paid by your broker. They must be paid by the broker whether they receive commissions or are paid on an hourly basis. The requirement applies to any type payment for work for which a license is required.

(1) Unless the owner engages the services of a real estate broker in connection with those sales, an individual who is the owner of real estate must obtain a license as a real estate broker to engage in the sale of that real estate as a principal vocation. For purposes of this subsection, each of the following is considered engaging in the sale of real estate as a principal vocation:

- (a) Engaging in more than 5 real estate sales in any 12-month period.
- (b) Representing to the public that he or she is principally engaged in the sale of real estate.
- (c) Devoting over 50% of his or her working time, or more than 15 hours per week in any 6-month period, to the sale of real estate.
- (d) If he or she is a real estate salesperson, a sale of real estate other than his or her principal residence.

(2) A sale of real estate that is owned by, or under option to, a real estate broker or associate real estate broker is subject to the provisions of this article.

(3) If a licensee is selling property that is owned by the licensee or in which the licensee has an interest, the licensee shall reveal the facts of the licensee's ownership or interest and the licensee's licensure to the purchaser, in writing, before an offer to purchase is signed. A licensee shall provide written proof of this disclosure that is satisfactory to the department on request by the department.

MCL 339.2502b.

12. GENERAL LICENSING ISSUES (OCCUPATIONAL CODE AND RULES)

Q/A

QUESTION: I have a friend who owns and leases more than five separate homes. Doesn't she need a real estate license?

ANSWER: NO. Licensure is required if a person engages in more than five real estate sales in any 12-month period.

A real estate broker shall maintain a place of business in this state. If a real estate broker maintains more than 1 place of business in this state, the real estate broker must obtain a branch office license for each of those additional places of business. If a branch office is located more than 25 miles from the nearest boundary of the municipality in which the main office of the real estate broker is located, the broker shall ensure that the branch office is under the direct supervision of an associate broker. As used in this subsection, "direct supervision" means that an associate broker is physically present at the branch office on a regular basis to supervise and manage the business during ordinary business hours. MCL 339.2505(3).

QUESTION: I have real estate broker's licenses in both Michigan and Indiana. Currently, I also have offices in both states. I want to close my office in Michigan but still operate in both states. Is this possible?

ANSWER: NO. The Occupational Code requires a real estate broker to maintain a "place of business" in Michigan. A "place of business" is defined as a physical location that a real estate broker represents to the public as a place where clients and customers may consult or do business with a licensee. MCL 339.2501(m).

QUESTION: I am a broker that specializes in property management. I was told that the law requires that any property that we manage be within 25 miles of our office. Is this true?

ANSWER: The Occupational Code does not provide any limits on the distance between a broker's office and the properties they manage. A managed property would not be considered a "branch office" of the real estate broker.

QUESTION: I am an associate broker and have my own firm. I do not have any salespersons who work for me. Can I operate out of my home?

ANSWER: Under the Occupational Code, a real estate broker must maintain a "place of business" in Michigan. A "place of business" is defined as a physical location that a real estate broker, by advertisement, signage or otherwise, represents to the public is a place where clients and customers may consult or do business with the licensee. While there is nothing in the Occupational Code that prohibits you from using your home as your "place of business," there may be a local ordinance or condominium/subdivision restrictions that prohibit you from doing so.

QUESTION: The real estate brokerage that I own has numerous branch offices licensed with the state of Michigan. One of the branches sells vacation homes and is only open during the peak season. Other brokers have told me that an office must be open year round to be a legal branch office. Is this true?

ANSWER: NO. The Occupational Code does not set any rules requiring a branch to be open year round.

(1) A real estate broker or associate real estate broker shall supervise the work of a real estate salesperson. For purposes of this subsection, supervision of a real estate salesperson includes at least all of the following:

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

MCL 339.2512f(1).

12. GENERAL LICENSING ISSUES (OCCUPATIONAL CODE AND RULES)

Q/A

QUESTION: If a salesperson works solely from home more than 25 miles from our office, is their home subject to the requirements for a branch office?

ANSWER: NOT NECESSARILY. If there is no signage and your agent does not meet with clients and customers at her home, it likely does not qualify as a "branch office." That being said, a real estate salesperson who works from home must be supervised by an associate broker through direct communication on a regular basis.

QUESTION: It recently came to my attention that I am required to provide a written policy and procedures manual. Is this true?

ANSWER: YES. The Occupational Code provides that a broker must supervise the work of a real estate salesperson. "Supervision" is defined to include "Providing written operating policies and procedures to the salesperson."

If a real estate salesperson is discharged or terminates employment with a real estate broker by giving the employer a written notice of the termination, the real estate broker shall deliver or mail by certified mail to the department, within 5 days, the real estate salesperson's license. If a written notice of termination of employment is not served on the real estate broker by the real estate salesperson, the department shall notify the real estate broker in writing that it has received an application for a transfer of license by the real estate salesperson. As of the date of the notification, the notification shall operate as if a written notice were served by the real estate salesperson or the real estate broker. MCL 339.2507(1).

QUESTION: I am a broker who has a salesperson who recently tendered her resignation in writing to me. This agent owes me a substantial amount of money in membership dues and MLS fees. I told the agent that I would not be sending her license back to the state until these obligations were met. Can I do this?

ANSWER: NO. If a salesperson has departed, a broker cannot impose any conditions upon the release of the license.

(1) If a licensee buys or otherwise acquires, directly or indirectly, an interest in real property, the licensee shall disclose to the owner of the property that the licensee is licensed under this part before the owner is asked to sign the purchase agreement.

* * *

(3) A licensee that buys or otherwise acquires an interest in real property, directly or indirectly, and that is owed a commission, fee, or other valuable consideration as a result of the sale, shall disclose that the licensee is licensed under this part to the seller or owner to receive the specified consideration.

(4) On request of the department, a licensee shall provide written proof of any disclosures and consents required under this section to the department. MCL 339.2516(1), (3) and (4).

QUESTION: I am a real estate licensee and I would like to make an offer on some property but I do not wish to disclose the fact that I am a real estate licensee until after the purchase agreement is accepted. Can I do this?

ANSWER: NO. The Occupational Code requires that the disclosure take place before the seller is asked to sign the purchase agreement. The disclosure must be in writing. Most often, the disclosure is included in the offer to purchase.

QUESTION: I am a licensee buying a property. I am not taking a commission. Do I still have to disclose the fact that I am a real estate licensee?

ANSWER: YES. You are required to disclose that you are a licensee when you buy property, whether or not you will receive a commission.

QUESTION: A potential buyer of the property is a limited liability company, one of the members of whom is a real estate licensee. Do I need to disclose that fact to the seller?

ANSWER: YES. Disclosure is required if a real estate licensee is acquiring property "directly or indirectly." Acquiring property through a limited liability company in which you are a member would likely be viewed as an "indirect" acquisition.

12. GENERAL LICENSING ISSUES (OCCUPATIONAL CODE AND RULES)

Q/A

QUESTION: I am a Realtor® representing a buyer with whom I am related. I have spoken to other agents and they told me that I have to disclose this relationship to the seller. Are they correct?

ANSWER: There is no legal requirement that an agent must disclose that they are related to the buyer whom they represent. When the Occupational Code refers to someone buying property "indirectly," it is referring to the situation where, for example, the licensee is a partner in a partnership that is buying the home. A licensee whose relative is buying a home is not buying the home indirectly. However, under the Code of Ethics, a Realtor® acting as a buyer's agent is required to disclose if the buyer is a member of their "immediate family." "Immediate family" includes spouse, siblings, parents, grandparents and children.

If a licensee is selling property that is owned by the licensee or in which the licensee has an interest, the licensee shall reveal the facts of the licensee's ownership or interest and the licensee's licensure to the purchaser, in writing, before an offer to purchase is signed. A licensee shall provide written proof of this disclosure that is satisfactory to the department on request by the department. MCL 339.2502(b)(3).

QUESTION: I have a 10% interest in an LLC that owns commercial real estate. I am not the listing agent or otherwise involved in the marketing of the property. The LLC has received an offer to buy the real estate. Do I have to disclose my minority interest?

ANSWER: YES. The Occupational Code (and the Code of Ethics) requires written disclosure of your interest in writing before the offer to purchase is signed.

QUESTION: I am the listing agent. Do I have to disclose that the seller is my brother?

ANSWER: NO. Neither the Occupational Code (nor the Code of Ethics) requires a listing agent to disclose the fact that he or she is related to the seller. However, under the Code of Ethics, a Realtor® acting as a buyer's agent is required to disclose if the buyer is a member of their "immediate family." "Immediate family" includes spouse, siblings, parents, grandparents and children.

QUESTION: If I am the listing agent, am I required to disclose to my seller-client that I am related to the buyer?

ANSWER: Absolutely. But this is more than a disclosure issue. You should not represent one party if you have a familial or other close relationship with the other party in the transaction. Your personal relationship will prevent you from fulfilling your fiduciary obligations to your client.

An individual . . . shall not act as a real estate broker, associate real estate broker, or real estate salesperson if he or she does not have, on his or her person, his or her pocket card or temporary license or a photocopy or digital image of that pocket card or temporary license. MCL 339.2506(1).

QUESTION: I was at a continuing education class and the instructor told us that we are required to carry our pocket cards at all times. Is this correct?

ANSWER: YES. Licensees are required to have their pocket cards in their possession while they are performing licensed activities.

QUESTION: I want to change the name of my brokerage company. Do I need to get a new license?

ANSWER: NO. If you are simply changing the name of your existing company you should file Form LCL-013 (Request for Name and/or Address Update).

QUESTION: I am a licensed salesperson. I am getting married and, for the most part, intend to use my husband's last name. I would like to continue to use my current name in my real estate business. Is that permissible?

ANSWER: YES. However, LARA's position is that the name on your real estate license should be the same as the name on your driver's license. If you change the name on your driver's license, you must notify LARA of the name change within 30 days. You can continue to advertise and conduct business in your professional name even though it is not the name on your real estate license.

QUESTION: A former salesperson who has not been in the business for a number of years has contacted me and wants to join my company. How does she get back in the business?

ANSWER: If it has not been more than 3 years, the salesperson can be relicensed if they pay various fees. If it has been more than 3 years, the salesperson will need to take classes or retake the test.

A licensee is not be subject to disciplinary action for failing to submit to the seller any additional offers to purchase that are received after the seller has accepted an offer and the sales agreement is fully executed, unless a service provision agreement requires that subsequent offers be presented. Rule 307(5).

QUESTION: I am a listing broker and my seller has just recently accepted a purchase offer. Today, I received another offer for this property. Does license law obligate me to present this offer to my seller?

ANSWER: This is one of those instances where the Code of Ethics conflicts with the Occupational Code. The Occupational Code says that you do not need to provide additional offers unless your listing contract requires it. The Code of Ethics says you must provide additional offers unless the seller has waived that requirement in writing. For this reason, Realtors® should either provide all subsequent offers to the seller or include a provision in their listing agreement form which expressly states that additional offers received after a binding purchase agreement is signed will not be presented to the seller.

(3) A licensee that is acting under the terms of a service provision agreement shall provide the following services to a client:

(d) After execution of a purchase agreement by all parties, assistance as necessary to complete the transaction under the terms specified in the purchase agreement. Without written approval of the buyer and seller, a licensee shall not close a transaction on any terms or conditions that are contrary to the terms or conditions of an executed purchase agreement.

(e) For a real estate broker or associate real estate broker that is involved at the closing of a real estate or business opportunity transaction, furnishing, or causing to be furnished, to the buyer and seller, a complete and detailed closing statement signed by the broker or associate real estate broker showing each party all receipts and disbursements affecting that party. However, this subdivision does not apply if the closing is conducted by a title insurance company, or a person designated to act as the agent of a title insurance company, that is licensed or authorized to do business in this state.

MCL 339.2512d(3)(d) and (e).

QUESTION: It is my understanding that a real estate licensee no longer has any responsibilities in connection with a closing handled by a title company. Is that true?

ANSWER: No. If a title company handles the closing, the closing statement need not be reviewed/signed by an associate broker. Licensees are still responsible for making sure that the transaction is closed in accordance with the purchase agreement.

QUESTION: I am the listing broker. The title company will not provide me with a copy of the buyer's Closing Disclosure. Aren't they required to give me a copy so that I can make certain that the transaction is being closed in accordance with the purchase agreement?

ANSWER: NO. A licensee's obligation to supervise a transaction does not give the licensee a legal right to any particular document. Given the level of detail in the Closing Disclosure, it is understandable that a buyer might want that detail kept confidential. Listing brokers should be able to satisfy their obligation to confirm that the transaction is being closed in accordance with the purchase agreement by reviewing the seller's closing statement.

13. INSPECTION CONTINGENCIES

Q/A

QUESTION: I represent a buyer who entered into a purchase agreement with a 15 day inspection contingency. During the inspection, the buyer discovered numerous defects with the property. My client still wants to purchase the property but only if the seller remedies the defects. Can my buyer force the seller to do this?

ANSWER: PROBABLY NOT. While inspection contingency clauses vary, typically an inspection contingency clause gives the buyer the option of moving forward with the purchase agreement as written or terminating the purchase agreement. A buyer can request that a seller make repairs, but typically cannot require the seller to do so.

QUESTION: After the inspection, the buyer terminated the purchase agreement based upon the condition of the roof. If my seller agrees to replace the roof, is the buyer required to buy the home?

ANSWER: NOT TYPICALLY. The answer will depend on the language in the inspection clause, but typically the buyer has the right to simply terminate the contract. (The difficulty with a provision that would allow the seller to "fix" a problem would be getting the parties to agree on the appropriate "fix.")

QUESTION: My seller client has entered into a purchase agreement. After the inspection, the buyers presented my client with a proposed addendum which provides that the seller will make certain repairs. Can my seller terminate the purchase agreement?

ANSWER: The effect of the buyers' request that the seller make certain repairs depends on the wording of the inspection contingency. Some inspection contingency clauses provide that if the seller does not agree to make the requested repairs, the buyers have the option of either terminating the purchase contract or waiving their objections and closing on the purchase. Other inspection contingency clauses give the seller the right to terminate in the event the buyer requests concessions.

QUESTION: I am representing a buyer that entered into a purchase agreement to buy a house being sold by the trustee of an estate. During our inspection, we discovered that the house had a termite infestation. When we asked the seller about it, we discovered that the trustee seller had learned of possible infestation from a previous buyer who terminated their contract. Was the trustee seller required to disclose the existence even though exempt from the Seller Disclosure Act?

ANSWER: NOT NECESSARILY. While sellers may choose to disclose known defects, in Michigan, sellers generally have no legal duty to volunteer information about a home other than the requirements imposed by the Seller Disclosure Act. (On the other hand, sellers may not deliberately conceal known defects or make statements about the condition of a home that are incomplete or misleading.)

QUESTION: I represent buyers who terminated a purchase contract after discovering black mold in the house. I now have another interested buyer who would like to make an offer on the same home. The listing agent said that I cannot tell my buyer about the prior buyers' discovery of mold because I obtained that information during a prior agency relationship. Is this true?

ANSWER: NO. As a buyer's agent you have a fiduciary duty to notify your current client of any issues that you know of about the property. While most buyers' agency agreements expressly provide that the agent will not disclose confidential information learned through another agency relationship, the discovery of black mold is not "confidential" as to the first buyer. Information known to both a seller and a potential buyer is not "confidential" as to either.

QUESTION: My seller was home when the inspector showed up with the buyer's agent. The seller was told that he could not be present during the inspection. Is this true?

ANSWER: NO. There is no law that requires the sellers to vacate their property during an inspection.

14. LISTING AGREEMENTS & BUYER AGENCY CONTRACTS

Q/A

A service provision agreement must include a definite expiration date and shall not contain a provision requiring the party signing the agreement to notify the broker of the party's intention to cancel the agreement upon or after the expiration date. Rule 305(2).

QUESTION: What is a "service provision agreement?"

ANSWER: A "service provision agreement" is the term that LARA uses to refer to both listing contracts and buyer agency contracts.

QUESTION: A competitor's listing agreement has a clause that provides for an automatic 6 month renewal period if the seller does not cancel the contract before the listing expires. I don't believe this is a legal contract. Am I correct?

ANSWER: YES. There can be no automatic renewals of listing agreements.

QUESTION: I am contemplating entering into a listing agreement that will take effect a month from today, but I was told that such agreements are illegal. Is this true?

ANSWER: NO. There is nothing that prohibits you from entering into a listing agreement that takes effect at a later date. Keep in mind, however, that if the seller finds a buyer prior to the effective date of the listing agreement, you will not have an enforceable right to a commission. It is also true that many MLS filing deadlines are triggered by the signing of the listing agreement rather than the start date of the listing period.

QUESTION: Is it illegal to have a purchase agreement that predates the start date in my listing agreement?

ANSWER: No, it is not "illegal," but by doing so, you forfeit the listing broker's contractual right to a commission. A listing agreement only entitles the listing broker to a commission if the purchase agreement is signed during the term of the listing agreement.

QUESTION: My seller tried to terminate my listing agreement two months before it expired. After I said "no," the seller will no longer answer my calls/texts or permit any showings. Isn't my seller required to honor the listing agreement and continue to work with me?

ANSWER: NO. The law says that a person must either honor their contract or be potentially liable for breach of contract damages. But you cannot force a seller to continue to work with you. The law on damages in the event of the seller's wrongful termination of a listing agreement is complicated, so you should consult with an attorney.

QUESTION: My seller who terminated my listing agreement before it expired is now demanding a release. I have been told that I cannot force a seller to continue to work with me. Am I required to provide a release?

ANSWER: NO. A seller who terminates a listing agreement early may be liable for breach of contract damages. You are not required to sign a release giving up your right to those damages.

QUESTION: I am the listing agent on a listing that is about to expire. There is a contingent purchase agreement in place, but closing is not scheduled until next month. Do the sellers have to re-list with my company?

ANSWER: No. The sellers are not required to re-list with your company because there is a pending purchase agreement in place. Most, if not all, listing agreements provide that the commission is owing even if the closing occurs after the expiration of the listing. Sellers should be advised, however, that if they list with another company, they should exclude the pending sale from the new listing (so they don't find themselves inadvertently liable for two commissions).

QUESTION: I have a house listed. A buyer went directly to the seller with an offer which was accepted. Is this a valid purchase agreement?

14. LISTING AGREEMENTS & BUYER AGENCY CONTRACTS

Q/A

ANSWER: YES. Although the buyer went directly to the seller instead of the listing agent, there is still a valid purchase agreement. Assuming the contract was an exclusive right to sell, the seller still owes a commission.

QUESTION: I am the broker/owner of ABC Realty Company. I have decided that I no longer wish to be associated with the ABC Realty franchise and I have decided to go with 123 Realty franchise. Do I have to get the authorization of all my clients to transfer the listings and agency agreements to the 123 franchise name?

ANSWER: It depends. If you are setting up a new corporation, then you will need to transfer the listings from the old corporation to the new corporation and obtain the sellers' approvals to do so. If you are simply using your existing corporation with a new assumed name referencing the new franchisor, then no transfer will be required. (In the latter situation, however, a seller could argue that the new affiliation gives him the right to terminate the listing, if he chooses to do so. In other words, the seller could argue that their decision to list with your company was based upon your affiliation with the ABC-franchise.)

QUESTION: I currently have two buyers under buyers' agency contracts that are both interested in making offers on the same home. How should I handle this situation?

ANSWER: Your buyers' agency contract form should contain language notifying buyers of the possibility of competing offers. The contract should contain language that puts buyers on notice that other buyers you represent may make offers on the same property. The contract should also contain a provision that states that you will preserve any confidential information gained from the agency relationship. The MR Exclusive Buyer Agency Contract contains the following language in paragraph 7:

CONFLICT OF INTEREST (BUYERS): Buyer acknowledges that Broker may represent other buyers desirous of purchasing property similar to the Desired Property. Buyer acknowledges and agrees that Broker may show more than one buyer the same property, and

may prepare offers on the same property for more than one buyer. Broker shall preserve any confidential information disclosed by any buyer-client and shall not disclose the existence of, or the terms of, any offer prepared on behalf of one buyer to another buyer. In the event Broker works for two competing buyer-clients in connection with any specific property, Broker will be working equally for both buyer-clients and without the full range of fiduciary duties owed by a buyer's agent to a buyer. In this situation, the competing buyer-clients are giving up their rights to undivided loyalty and will be owed only limited duties of disclosure, obedience and confidentiality.

If your buyer agency form contains similar language and you are careful not to disclose any confidential information to either client, you should be protected. If you do not have such a written waiver, you could face claims of breach of fiduciary duties from one or both buyers.

QUESTION: I am the listing broker. My sellers have told me that they need to receive a minimum amount of \$200,000 from the sale but that I can keep any amount in excess of this amount as my commission. I told them that such an arrangement is illegal in Michigan. Am I correct?

ANSWER: YES. This would be a "net listing agreement" which is prohibited. Rule 315.

QUESTION: If I get an agency disclosure form signed, do I still need a buyer's agency agreement? I will be paid through the offer of compensation in the MLS.

ANSWER: Buyer's agency contracts cover much more than agency status and compensation. For example, they disclaim responsibility for matters requiring a professional (e.g., attorney, inspector, appraiser). They provide protection in conflict of interest situations that may arise. And, if you are practicing designated agency, they are critical in preventing an office-wide agency relationship with your client.

15. MORTGAGE CONTINGENCIES

Q/A

QUESTION: I represent the seller. My client received multiple offers and based his choice in large part on the fact that the buyer had submitted a pre-approval letter from a particular lender. I just discovered that the buyer has applied for a mortgage from a different lender. Can she do that?

ANSWER: YES. The fact that a buyer presents a pre-approval letter from one lender does not obligate the buyer to use that lender unless the purchase contract explicitly says so. Buyers often switch lenders and are ordinarily free to do so as long as they meet the time deadlines in the purchase contract.

QUESTION: My buyers' lender will not be ready to close by the closing deadline. This delay is not my buyer-clients' fault, and we can show that the buyers responded to all lender inquiries/requests in a timely manner. Are my clients entitled to an extension?

ANSWER: Unless the purchase agreement provides for a grace period in the case of a lender caused delay, sellers are not obligated to extend the closing deadline in order to accommodate the buyers' lender. And this is true even if it can be shown that the buyers did everything they could to try to get their loan approved on time.

QUESTION: The buyer's lender has requested a copy of the seller's disclosure statement and the lead based paint disclosure. Am I legally required to give copies of these documents to the bank?

ANSWER: The buyer's lender can certainly require these documents as a condition of making the loan.

QUESTION: My buyer was denied for a mortgage. The purchase agreement had a mortgage contingency, however, the seller has objected to the release of the earnest money deposit. What good is a mortgage contingency if it isn't enforced?

ANSWER: Even with a mortgage contingency, it is possible that the buyer is not entitled to the earnest money deposit if they did not actually make a reasonable effort to obtain a mortgage. A buyer cannot work to get denied and then rely on the mortgage contingency to get out of the contract. In all events, even if the seller is being totally unreasonable, in the event of a dispute, it is up to the courts to make the decision as to who is entitled to the earnest money deposit.

QUESTION: The buyer waived the mortgage contingency in the purchase agreement. I just found out that the buyer is applying for a mortgage. Can they do that?

ANSWER: YES, by waiving the mortgage contingency, the buyer has simply waived the right to terminate the contract if the mortgage is denied. That does not mean that the buyer is prohibited from applying for a mortgage. (Although if they are denied, they will need to find another way to come up with the money or be in breach of contract.)

QUESTION: The buyer's lender will not be ready to close until 3 days after the deadline in the purchase agreement. My seller-clients have a better offer and want to terminate the first transaction on the basis of the buyer's inability to close on time. Can they do this?

ANSWER: Your sellers should talk to an attorney before proceeding. Michigan courts have not consistently enforced time deadlines in purchase contracts. (The fact that the sellers will be further delaying closing in order to get a better price will not be a point in their favor.)



16. OFFER AND ACCEPTANCE

Q/A

QUESTION: I listed a home for \$300,000. My seller has received a full price offer and wants to counter it at \$310,000. Can he do this?

ANSWER: YES. Even if a full price offer is presented to the seller, he or she is not obligated to sell it at that price and can counter at a price that is higher than the listing price.

QUESTION: I am the listing Realtor®. An offer was made by a buyer that was well below the listing price. I telephoned the buyer's agent to tell him that my seller has rejected the offer. The agent said that it is necessary for the seller to reject the offer in writing. Is this true?

ANSWER: NO. A seller has no legal obligation to reject an offer in writing or to even respond to an offer at all.

QUESTION: I am the listing broker. My seller received an offer that stated that the seller had until 12:00 noon on Saturday to respond. On Friday, I received a text from the buyers' agent stating that the buyers were withdrawing their offer. Can the buyers withdraw this offer before its stated expiration?

ANSWER: YES. Generally, buyers can withdraw their offer at any time prior to its stated expiration (at which time it terminates automatically).

QUESTION: I made a full price offer on a house on behalf of my buyer. The offer stated that the seller had until 5:00 p.m. on Friday to respond. The listing broker emailed me and said that the seller would not respond until Monday because he has an open house scheduled for the weekend and he wants to see if any more offers are made. Can the seller unilaterally extend the time for responding to my offer?

ANSWER: NO. The seller cannot "accept" an expired offer; rather any "acceptance" after the expiration of the offer would be deemed a counteroffer that your buyer could either accept or reject.

Every contract for the leasing for a longer period than 1 year, or for the sale of any lands, or any interest in lands, shall be void, unless the contract, or some note or memorandum thereof be in writing, and signed by the party by whom the lease or sale is to be made, or by some person thereunto by him lawfully authorized in writing
MCL 566.108

QUESTION: My buyer client made an offer on a house listed by another company. The listing agent told me that he had called his seller and that the seller had accepted my client's offer. I never received the written acceptance and I have since found out that the seller entered into a contract with another buyer. My buyer believes that he should get the house because of the verbal acceptance of his offer. Is he correct?

ANSWER: NO. The statute of frauds requires that a contract for the sale of real estate be in the form of a signed written document in order to be enforceable. Since the so called "acceptance" came through verbal communications and was never reduced to a signed writing, the contract is unenforceable.

QUESTION: My buyer submitted an offer. The listing agent texted me and told me that the sellers had accepted my client's offer and that she would be emailing the final signed purchase agreement later that same day. Two hours later, the listing agent called me and told me the sellers had accepted another offer. Don't my clients have a binding contract?

ANSWER: NO. Your buyers do not have a binding contract unless and until the signed agreement is delivered to the buyers (or to you as their agent). A text (or phone call) from the listing agent is not sufficient. Do not tell your clients that they have a deal until you have actually received the signed contract.

QUESTION: My buyer put in an offer on a home. The listing agent texted me and told me that the price offered was so low that the seller was not going to counter. The listing agent and I exchanged text messages back and forth while consulting verbally with our respective clients. Eventually, we agreed on a price. The listing agent's last text to me was "Looks like we have a deal." Now I am told that the sellers have accepted another offer. Can they do that?

ANSWER: YES. In order to have a binding agreement for the sale of real estate, there must be a written agreement signed by the parties – in this case, the buyer and seller. Conversations between the agents via phone/text/email can move the negotiations forward quickly but you must always keep in mind that these are preliminary discussions that are not binding on anyone.

QUESTION: The seller just sent a counteroffer and now has received a better offer. Can the seller rescind his/her counteroffer?

ANSWER: A counteroffer can be rescinded up until the time it has been accepted. The rescission must reach the buyer or the agent for the buyer before the seller or the agent for the seller receives an acceptance.

QUESTION: My buyer made an offer that the seller countered. Before we could respond, the listing agent sent me a text stating that her seller was withdrawing the counteroffer and going with highest and best. Can a counteroffer be withdrawn in a text message?

ANSWER: YES. The seller may withdraw the counteroffer at any time prior to receipt of an acceptance by any means of communication.

QUESTION: We received an offer on a listing, and it was accepted by the seller. We delivered it back to the buyer's agent 2 days ago. Now we have been advised that the buyer refuses to bottom-line the purchase agreement. Can the buyer walk away from the deal and get his earnest money deposit back?

ANSWER: The buyer certainly cannot walk away from the deal and get his earnest money deposit back by simply refusing to bottom-line receipt of the purchase agreement. Unless the specific purchase agreement requires a bottom-line signature in order to form a contract, the contract between the buyer and the seller is formed when the seller signs the offer and delivers their acceptance to the buyer or the buyer's agent. Traditionally, the practice of bottom-lining has been done to assure that Realtors® can prove that they complied with the rule that requires a licensee to provide a fully executed copy of the purchase agreement to the seller and buyer.

(1) A licensee shall promptly deliver to the buyer a signed copy of the offer to purchase after it has been signed by the buyer.

(2) A licensee shall make certain that all terms and conditions of the real estate transaction are included in the offer to purchase.

(3) A licensee shall promptly deliver all written offers to purchase to the seller upon receipt. Delivery may be made through any method acceptable to the parties including in person, by mail, or through an electronic communication pursuant to [the UETA]. The use of electronic records or digital signatures for any real estate transaction requires the prior agreement of the parties.

(4) Upon obtaining a proper acceptance of the offer to purchase, signed by the seller, the licenses shall promptly deliver true executed copies of the acceptance to the purchaser and seller.

(5) A licensee is not subject to disciplinary action for failing to submit to the seller any additional offers to purchase that are received after the seller has accepted an offer and the sales agreement is fully executed, unless a service provision agreement requires that subsequent offers be presented.

R 339.22307.

QUESTION: Do I have to present my seller-clients with additional offers once there is a binding purchase agreement in place?

ANSWER: This is one of those few areas where the law conflicts with the Code of Ethics. The Occupational Code says that you do not need to present additional offers unless you agreed to do so in the listing agreement. The Code of Ethics says you must present additional offers unless the seller has expressly waived that obligation. Most listing agreements in Michigan include language whereby the seller waives their right to receive additional offers after there is a binding purchase agreement in place. If your listing contract does not contain the language, then you should present all additional offers.

QUESTION: A buyers' agent submitted an offer, the sellers countered and the buyers accepted the sellers' counteroffer. Buyers' acceptance was sent to the listing agent who notified the sellers via telephone. The sellers have received a better offer. Are they bound by the first purchase agreement? They have not bottom-line the first contract and, in fact, have never received an actual copy of the accepted counteroffer.

ANSWER: YES. Delivery to the listing agent is effective delivery to the sellers. The first purchase agreement would be binding even if the listing agent had not called the sellers to let them know she had received the signed acceptance. Bottomline signatures are not required.

QUESTION: I have received three offers on a home that I have listed for sale. One of the offers is from my seller's neighbor. My seller would prefer to sell the home to his neighbor; however, the neighbor's offer does not contain the best terms. My seller would like me to share the economic terms of the best offer with his neighbor's agent and give him an opportunity to match those terms. Isn't this confidential information?

ANSWER: No. The terms of an offer received by a seller are not confidential information and may be freely shared. Information known to both sides of a potential transaction is not confidential information.

QUESTION: I represent a buyer who put in an offer on a home where there were multiple offers. My client's offer was not accepted. We have reason to believe that my client's offer was in fact the "highest and best." Are we entitled to see a copy of the offer that was accepted by the sellers in order to verify that it was the "highest and best" offer?

ANSWER: NO. Moreover, it does not matter whether the accepted offer was in fact the "highest and best." As long as the sellers did not engage in unlawful discrimination (for example, on the basis of national origin), they were not required to accept the "highest and best" offer or otherwise treat all offers equally. A "Primer on Multiple Offers" prepared especially for buyers in this situation is available on MR's website.

QUESTION: My buyer-clients submitted what turned out to be one of a dozen offers that were made on a particular home. The seller allowed some but not all of the potential buyers to resubmit their "highest and best" offer. Was the seller required to give all of the buyers an equal opportunity?

ANSWER: NO. A seller is not required to treat all buyers "equally" or "fairly." A seller can pick and choose among potential buyers on any basis other than a protected class (for example, race, religion or marital status).

QUESTION: My seller received an offer for \$200,000 and countered that offer at \$210,000. After the counteroffer had been delivered to the buyers' agent, but before the buyers responded to the counteroffer, the seller decided not to take a chance and withdrew his counteroffer and accepted the buyers' offer for \$200,000. I have been told that the buyers will not honor the contract. Don't we have a binding contract?

ANSWER: No. The sellers' counteroffer operated as a rejection of the buyers' offer. Once an offer has been rejected, it is "terminated" and cannot thereafter be resurrected and accepted. Legally, where you are at now is the seller has offered to sell the property on the terms originally proposed by the buyer, which offer can be accepted (or rejected) by the buyer.

QUESTION: Does a buyer's agent have a legal right to present his client's offer to the seller or at least be present when his client's offer is presented to the seller?

ANSWER: NO. There is nothing in Michigan law that grants such a right. Sellers can determine whether or not they wish to entertain an offer directly from a cooperating agent.

17. PRINCIPAL RESIDENCE EXEMPTIONS

Q/A

A principal residence is exempt from the tax levied by a local school district for school operating purposes . . . MCL 211.7cc(1).

“Principal residence” means the 1 place where an owner of the property has his or her true, fixed and permanent home to which, whenever absent, he or she intends to return and that shall continue as a principal residence until another principal residence is established. MCL 211.7dd(c).

QUESTION: I own two houses in Michigan, one in Lansing and one in Traverse City. I spend about equal time at each. Am I free to choose which home I wish to claim as my primary residence?

ANSWER: It is not a choice but a factual determination based upon how you treat each residence. Much of the analysis will depend on the address used on your driver’s license, voter’s registration card, checks and bank statements, and income tax returns.

QUESTION: Can a husband and wife each file a principal residence exemption on a different property?

ANSWER: Not if they are required to file, or do file, a joint Michigan income tax return.

QUESTION: I rent an apartment during the week and travel to a house I own on weekends. Can I claim the principal residence exemption on my house since it is the only property I own?

ANSWER: You are entitled to the exemption if the house you own is in fact your principal residence. The apartment you rent may be your principal residence. Again, the relevant factors include the address used on your driver’s license, voter’s registration card, checks and bank statements, etc.

QUESTION: My father has moved into an assisted living facility. Is he still eligible for the principal residence exemption?

ANSWER: MAYBE. A person who previously occupied property as his or her principal residence but now resides in a nursing home or assisted living facility may retain an exemption on that property if the owner satisfies all of the following conditions:

- (a) The owner continues to own that property while residing in the nursing home or assisted living facility.
- (b) The owner has not established a new principal residence.
- (c) The owner maintains or provides for the maintenance of that property while residing in the nursing home or assisted living facility.
- (d) That property is not occupied, is not leased, and is not used for any business or commercial purpose. MCL 211.7cc(5).

QUESTION: I have a new listing for a “cooperative housing” unit that is part of a “cooperative housing corporation.” Can the buyer get a principal residence exemption?

ANSWER: YES, if it is occupied as the principal residence of the person who buys it. The buyer will need to file the PRE Affidavit on the state’s form, but, in addition, the cooperative housing corporation must also file a form for the unit to qualify.

QUESTION: My client is purchasing a second home that he will be using as a principal residence. He has listed, but not yet sold, his current principal residence. It is my understanding that he may continue to claim the principal residence exemption on the house he is selling. Is this true?

ANSWER: YES, your client may receive a PRE on the owner’s current property and on one previously exempted property if the previous principal residence meets ALL of the following criteria:

- is not occupied.
- is for sale.
- is not leased.
- is not used for any business or commercial purpose.

If your client’s property meets ALL of these criteria, he can continue to claim the exemption on his prior home for up to 3 years.

17. PRINCIPAL RESIDENCE EXEMPTIONS

Q/A

QUESTION: I am a Realtor® who just recently acquired a real estate license in Arizona. I have moved to my new home in Arizona and am trying to sell my home here in Michigan. Can I claim the principal residence exemption on my Michigan home until I sell it?

ANSWER: NO. You can only continue to claim the exemption on your prior home listed for sale if the new home you purchased is also in Michigan.

QUESTION: I have a client who recently remarried and has moved to her new husband's house, but is not on the title for that house. She has listed her prior home for sale, but has not found a buyer. Can she claim a principal residence exemption on her prior home while she is selling it?

ANSWER: NO. In order to continue to qualify for the exemption on a prior residence, the owner of that residence must be eligible and claim a principal residence exemption on her current Michigan home.



QUESTION: I run a property management company that specializes in luxury home rentals. In order to ensure that only eligible candidates apply, I have instituted a policy that requires prospective tenants to have a minimum credit score prior to viewing the property. Is this an allowable policy?

ANSWER: YES. It is permissible to require a minimum credit rating as a criterion to determine whether a prospective tenant is eligible to see a property. Such a policy should be disclosed to and approved by the owner of the property and must be applied to all applicants equally. Any variation in the application of the policy could subject you to a claim of unlawful discrimination.

QUESTION: I represent someone who is interested in leasing a house. Am I required to provide an agency disclosure form?

ANSWER: YES. The agency disclosure law defines a real estate transaction as one involving the sale OR LEASE of real estate consisting of not less than one or not more than four residential dwelling units or a building site for a residential unit. MCL 339.2517(11)(g). Although the "standard" agency form may be used in lease situations, MR has an agency disclosure form designed specifically for lease transactions available on its website (Form K-Lease).

QUESTION: I manage several residential rental properties. Is it okay to charge first and last months' rent plus a security deposit in advance?

ANSWER: The Landlord and Tenant Relationship Act allows landlords to charge up to 1 ½ months' rent as a security deposit. MCL 554.602. In addition, the first month's rent may be required in advance of move in. If a landlord also charges the last month's rent in advance, it must be considered part of the security deposit. Thus, the security deposit plus last month's rent cannot exceed 1 ½ months' rent. The last month's rent must be deposited with the security deposit.

QUESTION: I heard that any residential real estate lease that is longer than 1 year is illegal in the state of Michigan. Is this true?

ANSWER: NO. There is no prohibition in Michigan against leases that are longer than 1 year.

QUESTION: I am a property manager working for a landlord who owns a number of rental properties. The landlord prohibits pets in its apartments. A blind person who uses a guide dog has expressed interest in one of the apartments. Can the landlord refuse to rent an apartment to this individual based on the pet prohibition?

ANSWER: NO. A guide/leader dog is not considered a "pet," but rather a service animal. Prohibiting service animals would violate various laws/regulations prohibiting discrimination against disabled persons.

QUESTION: I have a rental house that I have recently rented to someone who has physical disabilities. The tenant wants me to install rails in a number of areas within the house at my expense. Must I do this?

ANSWER: If a tenant has a disability, a landlord must permit the tenant to make reasonable modifications to their rental unit; however, the landlord can require the disabled tenant to pay for the modifications and to restore the property to its original condition at the termination of the lease.

QUESTION: I am a property manager for an apartment complex and the owner has a maximum occupancy restriction of two persons per bedroom. Is this legal?

ANSWER: To prevent discrimination against larger families, federal guidelines advocate allowing three people per bedroom. However, a landlord must also comply with local occupancy laws. For health and safety reasons, housing codes set minimum room sizes. Many local codes require that a bedroom have at least 170 square feet in order for there to be three people. If one of the bedrooms is larger than the minimum set by your local code, your client will need a strong justification to defend its 2-person per bedroom rule against a claim of discrimination.

QUESTION: I am representing a buyer in the purchase of an investment property that currently has a tenant who has 8 months left on his lease. Is the buyer obligated to honor the terms of the lease?

ANSWER: A buyer who had knowledge of the existence of the tenant will be obligated to honor the lease (because the buyer would not qualify as a bona fide purchaser). The seller will typically want to make certain that the buyer expressly agrees to assume the seller's obligations under the lease. Otherwise, if the buyer tries to evict the tenant, the seller could be liable to his tenant for breach of contract damages.

QUESTION: I am currently leasing a house to a tenant whose former boyfriend has been stalking and harassing her. She wants to terminate the lease early and go into hiding. Can she do this?

ANSWER: YES, if your tenant has a "reasonable apprehension of present danger." The Landlord Tenant Relationship Act allows tenants to terminate a rental agreement in cases of domestic violence, sexual assault or stalking. MCL 554.601b.

The law states: ". . . a tenant shall be released from his or her rental payment obligation in accordance with the requirements of this section after submittal of written notice of his or her intent to seek a release and written documentation that the tenant has a reasonable apprehension of present danger to the tenant or his or her child from domestic violence, sexual assault, or stalking. Submittal of written notice shall be made by certified mail."

Written documentation of a reasonable apprehension of present danger includes:

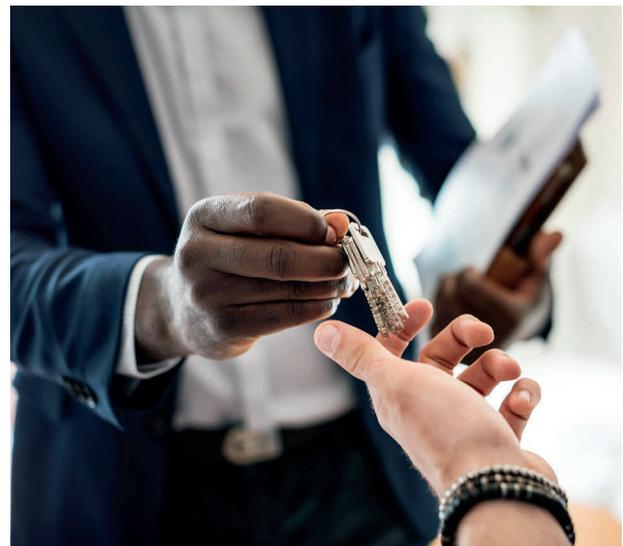
- A valid personal protection order.
- A valid probation order, conditional release order or parole order.
- A written police report that has resulted in the filing of charges by a prosecuting attorney.

QUESTION: I am a broker who wants to get into property management. Can I use my existing trust account for property management funds or should I set up a separate account?

ANSWER: A broker should set up a separate property management account, which may be an interest-bearing account. MCL 339.2512c. The signatory on a property management account can be either a broker or someone who works for the broker. However, it is the broker who is ultimately responsible for the funds in the account and for making sure that all appropriate records are kept.

QUESTION: I am a landlord with over 20 years of experience in residential leasing. I have always handled my own evictions. I was recently told by a judge that I need to hire an attorney to represent me in court. Don't I have a right to represent myself?

ANSWER: Individuals can represent themselves in court, however, an individual cannot represent a company, even if the individual is the sole shareholder of that company.



[A licensee is in violation of the Occupational Code if he/she] shares or pays a fee, commission, or other valuable consideration to a person that is not licensed . . . , including payment to any person that provides the name of, or any other information regarding, a potential seller or purchaser of real estate but excluding payment for the purchase of a commercially prepared list of names. However, a licensed real estate broker may pay a commission to a real estate broker that is licensed by another state if the nonresident real estate broker does not conduct in this state a negotiation for which a commission is paid. MCL 2512(1)(h).

QUESTION: I want to start a marketing program where I will contact past clients for referrals and then enter their names into a drawing to win prizes. Is this legal?

ANSWER: NO. You cannot pay any consideration to individuals who are not licensed under the Occupational Code. Even a chance to win a prize would likely be viewed as "consideration." The only exception is a landlord may pay a referral fee to an existing tenant for a referral of another tenant, so long as the value does not exceed ½ month's rent.

QUESTION: Can I agree with my church that I will donate \$500 to the church for every member of my church who lists and sells their home with me?

ANSWER: NO. While you can agree to make a donation for every property you list and sell, you cannot pay a fee to an organization for referring its members to you. The fact that the organization is a religious or charitable organization does not change the analysis.

QUESTION: Can I advertise a program whereby I agree to donate \$400 to the local high school booster club for every home I list and sell?

ANSWER: MAYBE. If the promotion is advertised broadly in the community (e.g., in the local newspaper), the promotion is probably permissible. If, on the other hand, the promotion is advertised only in the local booster club's newsletter, it may be viewed as an unlawful referral fee. In the latter case, the booster club may be viewed as referring business to you in exchange for a donation. Again, the fact that the booster club is a community service program does not change the analysis.

QUESTION: I have a property that I am trying to move. To generate interest, I am offering tickets to a Detroit Red Wings game to anyone that refers a buyer to me, provided that the sale successfully closes. Is this permissible?

ANSWER: NO. The Occupational Code prohibits such a payment to anyone who is not licensed. (It would, however, be permissible to give the Detroit Red Wings tickets to the actual buyer of the home as LARA does not consider this to be a "referral fee.")

QUESTION: An agent licensed in the state of California referred a buyer to me. Can I pay that agent a referral fee?

ANSWER: YES. A Michigan broker can pay an out of state agent a referral fee provided the out of state agent does not represent either the buyer or seller in a Michigan real estate transaction.

QUESTION: A local attorney referred his client to me to purchase one of my listings. He is not a real estate licensee but he is demanding a referral fee. He said because he is an attorney, he is exempt from the rule prohibiting referral fees to non licensees. Can I pay him?

ANSWER: NO. There is no exemption from the licensing requirement for attorneys.

QUESTION: I have clients that have bought and sold many properties through me over the years. They have just referred a couple to me so that I could assist them in locating a home. I would like to give a gift certificate to my long-term clients. Can I do this?

ANSWER: It depends on the reason for the gift. You may not give your long-term clients a gift for a referral. In this example, unless your client is a real estate licensee, you are prohibited from making any payments for this referral. On the other hand, a licensee can give a gift to the client to show his/her appreciation for the client's past business.

A plan or scheme involving a lottery, contest, game, prize, or drawing shall not be used by a real estate broker or real estate salesperson for the sale or promotion of a sale of real estate. However, a game promotion . . . may be used by a real estate broker or real estate salesperson for any purpose other than the direct promotion of a specific piece of real estate. MCL 339.2511.

[T]he term game promotion shall mean any game or contest in which the elements of chance and prize are present but in which the element of consideration is not present. MCL 750.372a(a).

QUESTION: Based on a large volume of questions on promotional incentives, we put together the following summary of basic rules:

ANSWER: 1. If an incentive program does not involve any element of "chance," then it is permissible.

EXAMPLE: An agent may offer a commission rebate or discount to every seller who lists with them before a particular date.

2. If an incentive program involves both "consideration" and "chance," then it is not permissible. (The question of whether there has been "consideration" is typically determined by whether or not the promotor gained some type of financial benefit from the method of entry.)

EXAMPLE: A listing agent may not offer a chance to win a weekend getaway to every seller who lists with them before a particular date.

3. If an incentive program involves "chance," but no "consideration," then it is permissible unless it is being used to promote a specific piece of real estate.

EXAMPLE: A listing broker may not offer everyone who submits comments on a particular home the agent is listed with a chance to win a gift certificate.

QUESTION: We are having a client appreciation event and we plan on giving all attendees a gift basket that will include a Michigan lottery ticket. Is it legal to give such a gift?

ANSWER: YES. The lottery tickets are from a state licensed lottery and can be given as gifts. If everyone receives a lottery ticket, there is no "chance" involved in the broker's promotion. The "chance" is at the next level, where the promotion is being done by the State of Michigan.

QUESTION: I would like to advertise that I will give a laptop to the first 10 persons who list and sell with me. Is this permissible?

ANSWER: This promotion is permissible because it does not involve an element of chance.



(a) Business referrals

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.

(b) Splitting charges

No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed.

12 USC §2607. (RESPA, Section 8.)

QUESTION: I am selling commercial property to a buyer that is paying cash. Is RESPA applicable to this transaction?

ANSWER: NO. RESPA applies only to residential transactions that involve a federally related mortgage loan. ("Federally related" is defined very broadly and includes any loan made by a federally insured bank or other lender in the residential mortgage business.)

QUESTION: I am representing a buyer in the purchase of a home. I have recommended a home warranty program. Can I receive a referral fee from the home warranty company?

ANSWER: NO. RESPA prohibits referral fees for "settlement services," which are defined as services in any way connected to a residential loan. The definition includes a laundry list of examples of covered services and home warranty programs are specifically mentioned.

QUESTION: From time to time, a local title company hosts an all-expense paid golf outing for agents with whom it regularly does business. Is this permissible so long as there is no express agreement with the agents regarding the referral of business?

ANSWER: NO. RESPA prohibits anything of value in exchange for the referral of business. A pattern whereby a title company who receives referrals provides gifts to the agents who provide those referrals is prohibited under RESPA.

QUESTION: I am a Realtor® and I am interested in going into a joint advertising venture with a title company. Would this be possible?

ANSWER: IT DEPENDS. RESPA does not prohibit joint advertising; however, if one party is paying less than its pro-rata share of the cost of the advertisement, there may be a RESPA violation. For example, if the title company's advertisement covers ¼ of a one-page joint advertisement, it should not be paying ½ of the cost.

QUESTION: I am a licensed real estate agent. Can I buy an interest in a title company and refer business to that title company?

ANSWER: YES, but only if you get an Affiliated Business Arrangement Disclosure form signed for each referral. Remember, however, that this form does not allow you to receive a referral fee from your title company. Your compensation from the title company must be tied directly to your ownership percentage in the title company. Your compensation may not be tied to the amount of business you refer to the title company.

QUESTION: A local title company is offering salespersons membership interests in the title company based on the number of referrals that a salesperson sends to it each year. Is this permissible?

ANSWER: NO. RESPA states that there can be no "value" given in exchange for the referral of business. It does not matter if there is an actual written agreement or if there is simply an "understanding" that the salesperson will be rewarded for their referrals. In either case, it is a violation of RESPA.

(a) No seller of property that will be purchased with the assistance of a federally related mortgage loan shall require directly or indirectly, as a condition to selling the property, that title insurance covering the property be purchased by the buyer from any particular title company.

(b) Any seller who violates the provisions of subsection (a) shall be liable to the buyer in an amount equal to three times all charges made for such title insurance.

12 USC §2608. (RESPA, Section 9.)

QUESTION: Does the buyer or seller get to choose the title company?

ANSWER: RESPA prohibits a seller from requiring the buyer to purchase title insurance from a particular title company. This restriction would not prohibit a seller from choosing the title company for an owner's policy purchased by that seller. This restriction would prohibit the seller from requiring the buyer to purchase the lender's policy from a particular title company.

QUESTION: Can the seller offer to provide the buyer with a home warranty if the buyer will use seller's preferred title company?

ANSWER: Arguably. A number of courts have held that offering an economic incentive for a buyer to use a particular title company is permissible.



QUESTION: I am a Team leader. Can I enter into an agreement with my broker where I agree to take on the responsibility of managing and supervising my Team members?

ANSWER: The Code specifically says that a broker cannot contract with a salesperson or a non-principal associate broker to lose their authority to supervise. Because of these Code requirements, a licensee cannot report only to the Team leader – instead, the broker must continue to supervise licensees who are members of a Team.

QUESTION: Can the brokerage pay my Team, which will, in turn, pay the salespersons who belong to the Team?

ANSWER: NO. Under the Occupational Code, salespersons can only receive a commission (or other compensation) from the broker through whom they are licensed. Team members can direct the broker as to how the commission should be allocated among the Team members, but the payments must come directly from the broker.

QUESTION: Should I insert the name of my Team in my listing contract?

ANSWER: NO. Listing contracts and buyer broker contracts should not list the Team as a party or be signed by an agent as a representative of a Team. Agency contracts should be signed by individual licensees as representatives of the Broker.

QUESTION: Should I use my Team name on the agency disclosure form?

ANSWER: NO. Agency disclosure forms should not be filled out in the name of the Team. If more than one Team member will be working with a particular client, each licensee should be listed by name in both the designated agency agreement and the agency disclosure form. This is not necessary in a traditional agency office because as a matter of law, every agent within the firm has an agency relationship with the client.

QUESTION: Can my Team hire a licensed assistant?

ANSWER: NO. A Team cannot hire a licensed assistant. Licensed assistants must be licensed through the Broker and paid by the Broker. The members of the Team may reimburse the Broker for the cost of a licensed assistant.

QUESTION: My Team would like to use an unlicensed assistant. How can we set that up?

ANSWER: Since a Team is not a legal entity, it cannot have employees. The Broker may employ the unlicensed assistant. Alternatively, one of the members of the Team may employ the unlicensed assistant. Another possibility would be to set up a separate legal entity to act as the employer of the unlicensed assistant. In any of these scenarios, the members of the Team may reimburse the employer for the cost of an unlicensed assistant.

QUESTION: I have a real Team that advertises under the name, "The Smith Team." I have heard that the type size of our Team name cannot be larger than the type size of our broker's name. Is this correct?

ANSWER: YES. The Michigan Occupational Code says that, for all real estate advertisements, the type size of the business name of the employing broker must be equal to or larger than the name of the associate broker, salesperson, or Team.

QUESTION: I am representing three siblings who own a house as joint tenants with full rights of survivorship. They entered into a purchase agreement to sell the property. Prior to closing, one of the siblings passed away. Can the property still be sold by the remaining siblings, or do we have to wait for the deceased sibling's estate to go through probate?

ANSWER: NO, you do not have to wait for probate. Since the property was owned in joint tenancy, upon the death of one sibling, her interest automatically passed to the other siblings.

QUESTION: The deed conveyed the property to "John and Mary Smith, a married couple, and Steve Jones." What is Steve Jones' percentage of ownership interest in the property?

ANSWER: Steve Jones holds a 50% interest in the property. In the absence of specific language to the contrary, a married couple is treated as one person who takes an equal share as tenants in common with the other grantee.

QUESTION: What if only one spouse of a married couple signs a listing agreement? Is the result the same where only one spouse signs the purchase agreement?

ANSWER: A listing agreement or buyer's agency agreement signed by only the husband or wife is binding on that party even if his/her spouse does not sign the agreement. In the event of sale, the spouse that signed the listing agreement would be legally bound to pay a commission. The same is not true for the seller on a purchase agreement. In order to be valid, a purchase agreement must have the signatures of all of the owners of the property. A husband or a wife can make a binding contract to buy property without the signature of his/her spouse.

QUESTION: I was contacted by a prospective seller who wants to sell her deceased father's home. She believes she should be able to sell it without going through probate because she has her father's power of attorney. Is she correct?

ANSWER: NO. The power of attorney expired upon the death of the father.

QUESTION: For estate planning purposes, my neighbor would like to add her 14-year-old daughter to the deed to her home. Is this legal?

ANSWER: YES. There is nothing prohibiting a minor from holding title to real property. The difficulty will arise if the neighbor and her daughter later want to sell the home while the child is still a minor. A conveyance by a minor is binding only when it was executed on the minor's behalf pursuant to a court order.

QUESTION: I represent the buyer on a transaction that fell through after the title work uncovered a large IRS lien that the seller did not have sufficient funds to pay. Isn't the seller in default, and if so, can my buyer recoup his expenses from the seller?

ANSWER: As always, you should advise your buyer to consult with an attorney. However, as a general rule, most purchase agreements permit the seller to terminate the purchase contract without penalty if there are title defects he or she cannot cure.

QUESTION: I am a Realtor® that represents a seller of a home. He recently had a construction company build a deck and patio for him. Because of a dispute, he did not pay the full amount he was charged for construction. The contractor filed a construction lien and is threatening to foreclose. Can the contractor do this?

ANSWER: YES. The contractor claiming the lien may sue to foreclose at any time within 1 year after the lien is recorded. Provided it is a valid lien, a circuit court may order the sale or partial sale of the property.

QUESTION: I am a buyer's agent. The title work shows the seller's deceased father as record title holder of record to a small portion of the land my client is purchasing. Seller has asked his father's estate attorney to take care of this matter. Buyer does not want to delay closing. Should I let my buyer close before this title problem is worked out?

ANSWER: While it may not be advisable to close under these circumstances, the buyer cannot be prevented from closing. In circumstances such as this, you, as a buyer's agent, should give your client something in writing recommending that the closing not take place until the buyer consults with an attorney.

QUESTION: I am a Realtor® that is representing a seller who is selling a large parcel of land in northern Michigan. The oil and gas rights were reserved 30 years ago by the previous owner. There has been no drilling done during this timeframe. Does the previous owner continue to retain these rights?

ANSWER: IT DEPENDS. Under the Michigan Dormant Minerals Act, under certain circumstances, reserved oil and gas rights will terminate after 20 years.

The Dormant Minerals Act applies only to oil or gas rights, and not to other mineral rights. You should advise your seller to discuss this issue with an attorney to see what steps can be taken to clear title.

QUESTION: Can a property owner on an inland lake exclude his neighbor from swimming in that portion of the lake located directly in front of his home?

ANSWER: NO. Assuming the neighbor's property also abuts the lake, the neighbor's riparian rights include the right to boat, fish, swim and wade anywhere on the lake.



There is imposed, in addition to all other taxes, a tax upon the following written instruments executed within this state when the instrument is recorded:

- (a) Contracts for the sale or exchange of property or any interest in the property or any combination of sales or exchanges or any assignment or transfer of property or any interest in the property.
 - (b) Deeds or instruments of conveyance of property or any interest in property, for consideration.
 - (c) Contracts for the transfer or acquisition of a controlling interest in any entity only if the real property owned by that entity comprises 90% or more of the fair market value of the assets of the entity determined in accordance with generally accepted accounting principles which shall be recorded.
- State Real Estate Transfer Tax Act, MCL 207.523(1).

QUESTION: Are the rules for the county and state transfer taxes the same?

ANSWER: NO. These statutes are very similar to one another, but there are differences. There are more exemptions from the state transfer tax than from county transfer tax.

QUESTION: I have a client that is transferring her house to her sister in return for her sister's agreement to pay off the mortgage. No consideration is being paid directly to the sister for her interest. Is this transaction exempt from transfer tax?

ANSWER: Transfers between siblings are not exempt from transfer tax. While conveyances for less than \$100 are exempt under both statutes, here, the consideration paid is the amount of the mortgage being assumed.

QUESTION: I sold a piece of vacant land to my neighbor for \$25,000. The assessor values the property at \$40,000. How is the transfer tax calculated?

ANSWER: If the consideration paid is \$100 or more, then the transfer tax is based upon the value of the property transferred rather than the consideration actually paid. (Of course, most often the two amounts are the same.)

QUESTION: I am paying \$5,000 for an access easement across my neighbor's property. Will transfer tax be charged when the easement is recorded?

ANSWER: YES. An easement is a "conveyance of an interest in real property" and, therefore, subject to transfer taxes.

QUESTION: I am selling the mineral rights on a parcel of land that I own. Am I required to pay transfer tax?

ANSWER: NO. A transfer of mineral rights is exempt from both state and county transfer taxes. MCL 207.505(h); MCL 207.526(g).

QUESTION: I have clients that are in the process of selling one of their properties to their adopted granddaughter. It is my understanding that this is an exempt transaction.

ANSWER: YES. This transaction is exempt from state transfer tax but is not exempt from county transfer tax.

QUESTION: My church is selling some property it owns which is exempt from real property taxes. Will the deed be exempt from transfer tax?

ANSWER: NO. The transfer of real property from a non-profit organization is not exempt from either state or county transfer tax.

QUESTION: I am selling a property on land contract payable over a 5-year period. When is the transfer tax due?

ANSWER: Under both transfer tax statutes, the transfer tax is not due until all land contract payments are made and the property is deeded.

QUESTION: Some clients of mine sold their principal residence last year and the SEV was lower at the time they sold it than when they purchased it. They just found out that they might be entitled to a refund of the state transfer tax they paid. They sold the house at a profit; will they still be entitled to the refund?

ANSWER: YES, to qualify for the state transfer tax refund, the SEV at the time of purchase must be higher than the SEV at the time of sale. The fact that they sold the house at a profit has no effect on their ability to get a refund. The only requirement is that the home was sold at the price that would be arrived at through an arms length negotiation.

QUESTION: I am selling a piece of commercial property that has a lower SEV now than when I purchased it. Is this transaction exempt from state transfer tax?

ANSWER: NO. The declining SEV exemption from the state transfer tax is not applicable to commercial property. It is only applicable to residential property that is your principal residence.



24. UNCAPPING TAXABLE VALUE (REASSESSMENT)

Q/A

(2) Except as otherwise provided in subsection (3), . . . the taxable value of each parcel of property is the lesser of the following:

(a) The property's taxable value in the immediately preceding year minus any losses, multiplied by the lesser of 1.05 or the inflation rate, plus all additions

(b) The property's current state equalized valuation.

(3) Upon a transfer of ownership of property . . . , the property's taxable value for the calendar year following the year of the transfer is the property's state equalized valuation for the calendar year following the transfer. MCL 211.27a(2) and (3).

QUESTION: For estate planning purposes, my wife and I want to add our son to the deed for our home. Will there be uncapping implications?

ANSWER: The transfer of an interest in residential property to your child does not trigger an uncapping.

QUESTION: I own 100% of a corporation, which in turn owns an apartment complex. The corporation has owned the property for many years and the current taxable value is significantly lower than the SEV. I am in the process of selling this property and the buyer has asked that we structure this sale as a stock sale in order to prevent the assessor from uncapping the taxable value. Can we avoid uncapping by structuring as a stock sale?

ANSWER: No. A sale of more than 50% of the ownership interest in an entity will trigger the uncapping of the taxable value.

QUESTION: I am selling commercial property on land contract. Will this trigger an uncapping?

ANSWER: YES. The uncapping occurs as of the date of the land contract, not the date of the deed.

QUESTION: I own my home and recently got married. Can I add my new wife to the deed without triggering an uncapping?

ANSWER: YES. A transfer to a spouse does not trigger an uncapping.



QUESTION: I am a buyer's agent. My clients had their attorney review the offer after I wrote it but before it was presented to the sellers. The lawyer is asking for many changes to the offer which, in my opinion, are unreasonable and will make it unacceptable to the sellers. How should I advise my buyer-clients?

ANSWER: Do not ever advise a client to ignore the advice of counsel, even if the advice of counsel seems like bad advice.

QUESTION: Can I list a boat slip and the yacht located within the boat slip for sale?

ANSWER: YES. A boat slip that may be bought and sold is typically set up as a condominium unit created through the recording of a master deed. As such, it is clearly an interest in real estate. All watercraft 20 feet or larger, and all watercraft with a permanently affixed engine regardless of length, are considered "motor vehicles." However, you do not need a motor vehicle license unless you broker five or more motor vehicles within a 12 month period.

QUESTION: My buyer just closed on the purchase of a home and is allowing the seller to have 6 months occupancy post-closing. Is there a limit to the time of possession allowed for the seller?

ANSWER: NO. There is no law restricting the length of a seller's occupancy period. Buyers who are entering into long-term arrangements should be encouraged to consult with an attorney about putting together a formal lease agreement. Buyers should also make certain that their insurance agent is aware of this arrangement and make certain that the correct insurance is in place.

QUESTION: I have received a Writ of Garnishment on one of my agents. It is my understanding that since my agent is an independent contractor, I do not have to obey this order. Am I correct?

ANSWER: NO. The Writ of Garnishment is a court order, and you must obey it. The fact that the agent is an independent contractor does not absolve you from obeying the order. Failure to honor a writ of garnishment can result in you becoming liable for all or a portion of the agent's debt.

QUESTION: My next-door neighbors' fence is the color brown, but I want to paint the side facing my yard a different color. If the fence is on the property line, do I need my neighbor's permission to paint my side of the fence a different color?

ANSWER: YES. Since the fence is your neighbors' property, you will need their permission to paint the fence.

QUESTION: Some agents in my area are giving potential buyers the combination or code to the lock boxes on vacant properties. Is this permissible?

ANSWER: NO. Although this situation is not specifically addressed by the Occupational Code, it is extremely ill-advised to provide the code or lock box combinations to non-agents. Doing so could subject the agent (and the agent's firm) to any number of possible claims, including breach of fiduciary duty and negligence claims. (This practice may also be deemed to violate the Code of Ethics. Standard of Practice 3-9 provides that "REALTORS® shall not provide access to listed property on terms other than established by the owner or the listing broker.")

QUESTION: My buyers, who closed on the purchase of their home last week, are demanding that the MLS remove all photos of the interior of the home they have purchased. Must the MLS honor my buyers' request?

ANSWER: NO. Presumably, the photographs of the home were taken with the permission of the then-owner of the home – that is, the seller. The MLS obtained the right to publish these photos from the listing broker/agent. The buyers acquired no rights to limit the use of these photographs through the purchase of the property shown in the photographs.

QUESTION: I am a Realtor® who wishes to sell some investment property on land contract. What is the maximum amount of interest that I will be able to charge?

ANSWER: There are a number of different statutes governing interest rates. The permissible rate typically depends on the type of loan and/or the identity of the buyer. While generally, the maximum amount of interest on land contracts cannot exceed 11% per year, a buyer who is a corporation or limited liability company may be charged up to 25% per year.

QUESTION: My real estate company used to be a franchisee with a national company whose name is a registered trademark. During this time, I bought a number of Internet domain names that included the name of the franchise. I am no longer a franchisee for this company. May I still legally use the domain names that I purchased?

ANSWER: NO. Since the name of this national company is trademarked and you are no longer a franchisee, you are not licensed to use this domain name.

QUESTION: When can a real estate licensee sell a "manufactured home" without a mobile home license?

**ANSWER: 1. If the manufactured home was not built on a chassis;
2. If the manufactured home was built on a chassis, but is now part of the real estate on which it is located as evidenced by:
a. An Affidavit of Affixture for the home has been recorded with the Register of Deeds;
b. Home is being taxed as real property (by statute, in a park are exempt from general property taxes but must pay a \$3.00 monthly tax instead);
c. Home is being offered for sale along with the sale or lease of the land on which it is located.**

QUESTION: I have a listing for retail space. Another broker has a buyer who would be using the property for a marijuana distribution center. My seller doesn't want to sell his property for this use. Can they reject this offer?

ANSWER: YES. A seller can reject a buyer for any reason other than because the buyers/occupants are members of a protected class (for example, national origin).

QUESTION: A man from Canada is selling land located in Michigan. Can I represent him or does he need a Canadian agent?

ANSWER: YES, you can represent him in this transaction. Your license authorizes you to sell real estate in the state of Michigan. It does not matter if the client is from another state or country.

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