LEGAL UPDATE 2022

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I. AGENCY REVIEW AND NAR CLASS ACTION FOLLOW UP

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General Agency Reminders:

1. All licensees under a "service provision" agreement (that is, listing agreement or buyer's agency agreement) owe statutory fiduciary duties to that client which cannot be waived. MCL 339.2512.

2. Licensees with service provision agreements must provide the services listed in the statute, some (but not all) of which may be waived; any waiver must be in writing. MCL 339.2512(3); MCL 339.2512(4).

3. A licensee must provide clients and customers with an agency disclosure form *before* that client or customer discloses any confidential information. MCL 339.2517.

4. A buyer or seller may enter into a written designated agency agreement in which the party agrees that they will have an agency relationship with the licensees named in the designated agency contract, but no others. Without a designated agency agreement, the buyer or seller will have an agency relationship with every licensee in the firm. MCL 339.2517(b)(6)-(10).

5. In response to lawsuits that could potentially disrupt the current business model, under which sellers pay commission and listing agents pay selling agents (a/k/a buyer's agents) an agreed-upon percentage under MLS cooperation rules, your Association is reminding of and urging the following:

   i) Make sure to use and have your buyer's agency agreement signed;

   ii) Timely provide an agency disclosure form to clients and prospects or potential clients *before* the client provides any confidential information;

   iii) Don't sell yourself short: between the buyer's agency agreement and the agency disclosure forms, buyer's agents should take a moment to inform their buyers about the services they can expect to receive from you as a buyer's agent. Buyer's agents should provide a fair recitation of some advantages to having a buyer's agent as opposed to relying on the seller's agent or a dual agent;

iv) While promoting buyer's agency there is no need to undermine the seller's agent in any specific transaction. Many members, when they are not representing buyers, have also been dual agents and seller's agents – including in cases where there was no buyer's agent. If you have been a dual agent or a seller's agent (with no buyer's agent) and treated all parties fairly, while also maintaining your duties to clients, assume that other members will do the same;

v) As a buyer's agent you cannot fairly state that, and you should not imply that there is no charge for your services, or that having a buyer's agent is going to be "free" for the buyer. Instead, generally explain the cooperative commission arrangement, note that the commission comes off the seller's side of the ledger technically, but that it is also an increased seller cost that is likely passed on to the buyer, at least in part, through the eventual agreed-upon sales price.

vi) It is fair to tell buyers that having a buyer's agent, in most circumstances, will not increase the overall commission paid in a transaction, and that it merely results in that overall commission being divided.

II. THE GLAR SELLER'S DISCLOSURE EXEMPTION FORM AND SELLER'S DISCLOSURE ACT REFRESHER

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The Membership should be aware of the new GLAR Seller's Disclosure Exemption Form. The MLS rules, as of December of 2021, require that the Seller's Disclosure form be uploaded to the MLS within 24 hours of initiating the listing. As such, the absence of a disclosure form may make the listing appear incomplete, or make the property appear suspicious in some sense.

Since the exemptions from the Seller's Disclosure Act are not matters of common knowledge, and to assist in the situation where the absence of a disclosure form is noted, the Disclosure Exemption Form was created. It explains, with language and concepts taken directly from the Seller's Disclosure Act, why no disclosure form is available in a particular instance.

Since the Seller's Disclosure exemption Form is signed by the seller (just like the disclosure), use of the form protects the Realtor® from having to answer questions about the absence of disclosures. It also Protects the Realtor® from claims that they may have made representations (or misrepresentations) about the condition of the property in the course discussing why no disclosure was made.

Realtor® members will be well-advised to insist on the use of the Seller's Disclosure Exemption Form for better-informed transaction parties, and as a matter of sound liability protection. Use of the new form is also an improvement from the practice of submitting blank forms with a handwritten notes on them stating that "the Seller's Disclosure Act does not apply."

Here are some general Seller's Disclosure Act principles and refreshers to start the discussion.

- The disclosure requirements, if disclosures are to be made, apply to the transfer of any interest in real estate if the property consists of four residential dwelling units or less. MCL 565.952.
- "Transfer" means sale, exchange (like some form of trade), installment land contract, lease with an option to purchase, any option to purchase (whether connected to a lease or not), or ground lease coupled with proposed improvements by the purchaser or tenant, or a transfer of stock (where an entity owns the property; LLC membership interest would qualify as well), or transfer of an interest in a residential cooperative.
- Exceptions to the disclosure requirements include, in general, court ordered transfers, family transfers, foreclosures, co-tenant transfers, government transfers and purchases from a home builder. MCL 565.953. These are detailed further below.
- Disclosures are representations made by the Seller. If they are made fraudulently, or information requested on the disclosure is omitted fraudulently, the purchaser has a cause of action in fraud or silent fraud against the Seller. The purchaser may also sue the Seller's broker and salesperson if they "knowingly act concert with a transferor to violate this act." MCL 565.965.
- To avoid claims of acting "in concert," real estate licensees should insist that the *Sellers* complete the disclosure form themselves. The Seller has a complete defense from successful fraud claims if they, *de facto*, do not fraudulently misrepresent any conditions on the property.
- Disclosures are supposed to be made before the parties enter into a binding purchase agreement. If they are made or amended after the agreement is entered into, the purchaser has a statutory right to terminate the purchase agreement, as a result of that new disclosure, without penalty. MCL 565.954(3). This is the only remedy provision in the Seller's Disclosure Act.
- Being an absentee owner, without more, does not exempt your sale of qualifying property from the Seller's Disclosure Act.

- Contrary to common belief, an absentee owner or a landlord cannot state in a disclosure that, because of their absentee or landlord status, they do not have any knowledge regarding the condition of the property being sold, if that representation is untrue. These assertions are often disproven in lawsuits when the plaintiff obtains the Seller's property maintenance records. Landlords, for instance, are often well-acquainted with their properties. Absentee ownership alone does not provide an exemption, but being a non-occupant can provide part of the basis for an exemption if the non-occupant is also a fiduciary in a trust or estate setting.
- If providing advice to a Seller, the safest advice is conservative advice. When in doubt, the Seller should disclose the condition.

Seller's Disclosure Exemption Form - Annotated

Property Address: _____

Street City, Village, Township

Applicability of seller disclosure requirements

The seller disclosure requirements apply to the transfer of any interest in real estate consisting of not less than 1or 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.

Seller Disclosure Requirement Exceptions

The seller disclosure requirements do not apply to any of the following situations below. Sellers must initial the appropriate exception that applies to their situation and sign this form at the bottom. If exceptions (a) through (i) DO NOT apply to the seller's property, the seller must then fill out the Seller's Disclosure Statement to comply with the Michigan Seller Disclosure Act, Act 92 of 1993.

☐ ☐ 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.

- **These are typically transfers that are against the will of the transferor, or the transferor is not alive at the time. Writs of execution, foreclosures, bankruptcy-related transfers and takings are hostile to the interest of the owner. A decree of specific performance comes in connection with a court ordering a party to sell a property.**

☐ ☐ b) Transfers to a mortgagee by a mortgagor or successor 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.

- **This references situations where the mortgage borrower or successor is in default but either transfers back to the lender or creditor short of completing the full foreclosure process, or agrees that a trustee holding a deed of trust can transfer it to the lender based on payment 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.

- **This has considerable overlap with (a) and (b) above, and appears to basically combine the involuntary creditor transfers and transfers to creditors under duress (that is, a voluntary transfer to avoid an inevitable involuntary one).**

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

- **This is the only section that relates to whether the transferor occupies the property. The "non-occupant" concept is sometimes misunderstood to include other common non-occupant situations. This applies to the executor or an estate, for instance. A common example might be an adult child of the deceased property owner who has not lived in the deceased parent's home. If the estate chooses to see the house, the non-occupant executor does not need to provide disclosures.**

☐ ☐ e) Transfers from 1 cotenant to 1 or more other cotenants.

- **The likely theory here is that co-tenants have an interest in and possession rights, and as such, already know what they are getting in a transaction for some additional fractional interest.**

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

- **This is self-explanatory.**

☐ ☐ 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.

- **This is similar to (b), (b) and (e) in that it incorporates features of involuntary transfer, voluntary transfer under duress, and transfers where one party has been in possession and presumably knows what they are getting into with the property.**

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

- **This most likely contemplates tax auction purchases and situations where a property owner sells to a government entity in lieu of a condemnation; it is also intended to relieve the government of disclosure-based liability when it is the transferor.**

☐ ☐ I) Transfers made by a person licensed under article 24 of Act No. 299 of the Public Acts of 1980, being sections 339.2401 ta 399.2412 of the Michigan Compiled Laws, of newly constructed residential property that has not been inhabited.

- **This refers to new builds sold by the builder.**

If I do not qualify for any of these exemptions; accordingly, the Act states I shall provide the Buyer with a completed Seller Disclosure Statement

Seller certifies that the information in this statement is true and correct to the best of seller's knowledge as of the date of seller's signature.

Sellers Name	Sellers Signature	Date

III. LEAD-BASED PAINT DISCLOSURE
Summary and Review

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What To Look For: Many homes built before 1978 have lead-based paint.

- Look for chipped or flaking paint;
- Look for painted surfaces that rub together (windows, doors) which can generate lead dust.

While there is no affirmative seller or real estate licensee duty to inspect for or identify unknown lead hazards, there are seller duties to disclose known hazards. If you are a buyer's agent and your client is viewing a pre-1978 building with flaking paint and painted-wood-on-painted-wood friction points, it is advisable to point those common potential hazards out to your buyer. The EPA lead hazard rules are codified at 40 CFR Part 745, Subpart F.

Homebuyer Contracts Contingent: Under the EPA lead paint hazard rules, before a buyer can be obligated under a contract to buy "target housing" (which means most buildings built before 1978), that buyer must be provided, by the home seller (which practically means the seller's agent):

- The EPA pamphlet "Protect Your Family From Lead In Your Home";
- Known information concerning lead-based paint hazards; and
- Any lead inspection records or reports in seller's possession for multi-unit buildings, including for common areas an individual units.

Other Basic Principles:

- Purchase agreements must confirm that seller has complied with lead warning requirements;

- There must be an attachment to the purchase agreement or language in it warning about lead and confirming that seller has notified buyer regarding lead hazards;

- The purchase agreement must allow for a 10-day period for lead testing, but that period can be shortened or increased by written agreement of the parties;

- Buyers may waive the lead inspection.

Our GLAR Purchase Agreement Has You Covered: For another reason to use the GLAR template purchase agreement without alteration, note that if it is filled out and complied with, the lead disclosure rules should present no problem. Section 9(C) provides:

> **C. LEAD PAINT DISCLOSURE/INSPECTION** (For residential housing built prior to 1978 only):
>
> BUYER acknowledges that prior to signing this Agreement, BUYER has received the HUD/EPA pamphlet *Protect Your Family From Lead in Your Home* and has received a copy of the *Lead-based Paint SELLERs Disclosure Form* completed by the SELLER on _____, the terms of which shall be part of this Agreement.
>
> BUYER also agrees (check one below):
>
> ☐ BUYER shall have _____ days after the date of this Agreement to conduct an inspection of the property for the presence of lead-based paint and/or lead-based paint hazards. (Federal regulations require a 10-day period or other mutually agreed upon period of time.) If BUYER is not satisfied with the results of this inspection, upon notice from BUYER to SELLER within this period, this Agreement shall terminate and any deposit shall be refunded to BUYER.
>
> ☐ BUYER hereby waives his/her opportunity to conduct a risk assessment or inspection for the presence of lead-based paint and/or lead-based paint hazards.

Members, As "Agents" Under The EPA Rules Must:

- Inform seller of her obligations;
- Provide the requisite EPA "Protect Your Family From Lead In Your Home" pamphlet;
- Provide and facilitate use of the EPA "Disclosure of Information on Lead-Based Paint and/or Lead-Based Paint Hazards" form (sample attached);
- Use your GLAR contract with its built-in lead rule compliance features;
- Ascertain whether the parties care to shorten or lengthen the standard 10 day lead inspection period, if the inspection is not waived.

For additional consideration: Agents may be liable for a seller's failure to comply with the rules, unless the failure is due to seller withholding specific lead hazard information that only seller knows.

What If Something Goes Wrong?

- Disclosure-based fraud principles apply and a knowing failure to disclose can inspire a fraud-based lawsuit;

- 42 USC 4851 et seq., being title X of Pub. L. 102–550, the Residential Lead-Based Paint Hazard Reduction Act of 1992, allows for a private cause of action for money damages for violations;

- 42 U.S.C. § 4852d(b)(3) is the specific statute in question, and treble damages are available under it;

- EPA inspectors may conduct inspections of records of brokers and lessors to measure compliance;

- The EPA may issue information request letters to businesses to assess compliance;

- The EPA has subpoena power in many instances to compel production of documents;

- Disclosure in connection with closing, if prior to it, is not ideal, but and pre-closing disclosure can arguably cure a prior omission by seller. The EPA rule gives buyer a defense to contract formation; buyer can affirm the contract and perform it by paying money and closing. Potential post-closing liability for misrepresentations would remain, however.

Disclosure of Information on Lead-Based Paint and/or Lead-Based Paint Hazards

Lead Warning Statement

Every purchaser of any interest in residential real property on which a residential dwelling was built prior to 1978 is notified that such property may present exposure to lead from lead-based paint that may place young children at risk of developing lead poisoning. Lead poisoning in young children may produce permanent neurological damage, including learning disabilities, reduced intelligence quotient, behavioral problems, and impaired memory. Lead poisoning also poses a particular risk to pregnant women. The seller of any interest in residential real property is required to provide the buyer with any information on lead-based paint hazards from risk assessments or inspections in the seller's possession and notify the buyer of any known lead-based paint hazards. A risk assessment or inspection for possible lead-based paint hazards is recommended prior to purchase.

Seller's Disclosure

(a) Presence of lead-based paint and/or lead-based paint hazards (check (i) or (ii) below):

(i) _____ Known lead-based paint and/or lead-based paint hazards are present in the housing (explain).

_____

(ii) _____ Seller has no knowledge of lead-based paint and/or lead-based paint hazards in the housing.

(b) Records and reports available to the seller (check (i) or (ii) below):

(i) _____ Seller has provided the purchaser with all available records and reports pertaining to lead-based paint and/or lead-based paint hazards in the housing (list documents below).

_____

(ii) _____ Seller has no reports or records pertaining to lead-based paint and/or lead-based paint hazards in the housing.

Purchaser's Acknowledgment (initial)

(c) _____ Purchaser has received copies of all information listed above.

(d) _____ Purchaser has received the pamphlet *Protect Your Family from Lead in Your Home.*

(e) Purchaser has (check (i) or (ii) below):

(i) _____ received a 10-day opportunity (or mutually agreed upon period) to conduct a risk assessment or inspection for the presence of lead-based paint and/or lead-based paint hazards; or

(ii) _____ waived the opportunity to conduct a risk assessment or inspection for the presence of lead-based paint and/or lead-based paint hazards.

Agent's Acknowledgment (initial)

(f) _____ Agent has informed the seller of the seller's obligations under 42 U.S.C. 4852d and is aware of his/her responsibility to ensure compliance.

Certification of Accuracy

The following parties have reviewed the information above and certify, to the best of their knowledge, that the information they have provided is true and accurate.

Seller	Date	Seller	Date
Purchaser	Date	Purchaser	Date
Agent	Date	Agent	Date

IV. WHAT'S IN A NAME?

Lady Gaga or Stefani Germanotta?

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We all probably agree: Lady Gaga sounds cooler and flashier than Ms. Germanotta, in just about any setting. If you were purchasing a multi-million dollar house in the Hamptons, wouldn't you rather have Lady Gaga show it? For good or bad, a house she was showing would probably get lots of foot traffic.

Members have been asking whether, and the extent to which, an individual real estate licensee (salesperson or individual associate broker) can use a stage name, alias or nickname in licensed real estate activities.

A recent REALTOR® "Q and A" document asking whether a licensee can use a nickname in advertising, provides only that use of nicknames is not expressly prohibited.

The LARA Board of Real Estate Brokers and Salespersons (a/k/a the "Department"), when last queried, advised that an individual licensee cannot use a nickname in advertisements. While the Department is correct, there is room for nuance.

Under the Occupational Code provisions below, the individual licensee will have to transact all their business under the name on their license. Specifically, with a service provision agreement (listing agreement or buyer's agency), an agency disclosure or any other contract documents, an individual licensee must use their true name or they will violate the Occupational Code or a related regulation. Because they have to do all their business under their real name, use of a pseudonym in any context becomes problematic.

The touchstone for serious violations or discipline would likely be whether use of a nickname was done to deceive by trying to hide the true identity of the licensee. Because licensure and professional discipline are made public - as a way to inform the public of bad actors - any use of an alias that was intended to deceive or hide the licensee's true identity is going to be unlawful. The Department would argue that advertising under an alias deprives the public of the ability to check the licensing background of the licensee when deciding whether to do business with them. By way of example, if an individual licensee advertises as "Skipper" Jones, but the name on their licenses is actually Griswold Jones, they would arguably be a technical Occupational Code violator. But, they would likely evade serious discipline. That sort of nickname use could be defended without major license sanctions.

But if an individual licensee used a completely different name than the name under which they were licensed, that would be more difficult to defend. While there is no express provision of the Occupational Code that prohibits it directly, the entire thrust of the Code would prohibit an individual licensee from using a completely fictitious name. Thus, licensees should not use a complete pseudonym in advertising or transaction documents and the broker should not tolerate such use.

This conclusion is buttressed by various sections of the Code and is not opposed by any. For instance, MCL 339.2502a, which covers the basics of licensure and re-licensure, clearly contemplates or pre-supposes that an individual licensee will seek licensure in their own name. This is further buttressed by section 339.2504a, which addresses licensee continuing education for associate brokers and salespeople. Under Section 2504a(2)(b), in order to attend continuing education the licensee must identify themselves with their

pocket card, which is in their real name, or identify themselves with their "operator's license or chauffeur's license issued under the Michigan vehicle code," or "other government-issued photo identification." Those items also use an individual's real name. In short, one cannot obtain their continuing education under a pseudonym, and one cannot remain licensed for long without their continuing education.

Under MCL 339.2505(1)(b), covering broker licensing, an applicant must use their name to apply for licensure ("[t]he application must include the name of the individual or business entity that is the proposed licensee"). The only sensible reading of this section would require that the individual licensee use their real name. Under other subsections of this section the Department shall not license those convicted of certain financial crimes. There would be no way to use an alias here, again because the Department needs to know the criminal history of the applicant. Using an alias would likewise deprive the public of its ability to check for licensure or disciplinary history. Under MCL 339.2506, one can't practice without their license and pocket card – which also must be in their true name. Advertising under a complete pseudonym runs counter to these Occupational Code basics, even if there is no literal pseudonym prohibition.

Under 339.2512(1)(b), the section containing most of the prohibitions under the Code, a sales licensee must provide an agency disclosure to a client or face discipline. There's no sensible reading of the Code that would allow that sales licensee to provide an alias at that stage. A licensee also could not meet common law and MCL 339.2512d(2)(c) duties of loyalty to the interest of the client if they are not giving the client their real name.

With respect to advertising, MCL 339.2512e(3) provides that:

> 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.
>
> * * *

Subsection (5) of MCL 339.2512e similarly states:

> 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.

The reference to the name of the salesperson or associate broker in subsection (3) cannot be sensibly construed as allowing an alias. Further, under subsection (5) above, if a broker cannot conduct business or advertise using a name that is different from the name on their license, unless it is an assumed name that is both lawful *and* is reported to the Department (by operation of other provisions of the Occupational Code), it is difficult to imagine that a salesperson could conduct business under a pseudonym.

What is more, Rule AC 339.22305 ("Rule 305") requires licensees to enter into service provision agreements with their clients. It is hard to see how such an agreement that doesn't identify the licensee would be enforceable. Similarly, Rule 333(1) prohibits material misrepresentations by licensees. Insofar as licensure and discipline are matters of public record, and insofar as members of the public can check the disciplinary history of a licensee they may want to do business with, it is difficult to see how hiding behind an alias would not be a prohibited misrepresentation of a material fact.

The only way that an individual licensee can use a pseudonym without running afoul of the Occupational Code would be to use both names, as in: "Homes by John Johnson – WKLT's Zed Figley from the Morning Zoo," or something along those lines. If John Johnson advertised "Homes by Zed Figley" from this example, with nothing more, that would violate the regulations under the Occupational Code at a minimum (and thus, the Code itself), because it would be a misrepresentation. The only way to make this work for an individual licensee would be to use the pseudonym *and* the real name together.

V. THE VIEW FROM THE LANDLORD-TENANT TRENCHES

Amanda "Amy" Wolanin
with
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Realtors® have seen many changes in the general course of landlord-tenant and foreclosure law through the COVID-19 era. This article is a brief refresher on where we have been, and it provides an update on where things stand now in the district courts. The good news is that after years of moratoria and impediments to the rights of property owners that resulted, the district courts, for the most part, are moving through eviction cases and the threat of eviction has returned as way for landlords to manage tenant disputes.

Where We Were – Michigan Moratoria: For the better part of the past two years there were state moratoriums on many foreclosures and evictions – particularly those based on non-payment. In March of 2020 Governor Whitmer signed Executive Order 2020-19 ("Order 19"), which enacted a "temporary prohibition against entry to premises for the purpose of removing or excluding a tenant or mobile home owner from their home" (the "eviction moratorium"). In April of 2020 Order 19 was rescinded, and the nearly identical Order 2020-54 ("Order 54") took its place.

Order 54 prohibited landlords from evicting tenants for non-payment of rent. It prohibited the personal delivery of demands for possession based on non-payment of rent (Notices to Quit), and is prohibited process servers from serving eviction notices. Order 54 was extended many times. In October of 2020 Michigan's supreme Court held that the Governor lacked the statutory authority to exercise emergency powers beyond 30 days.

Enter the CDC: However, in September 2020, the Centers for Disease Control and Prevention ("CDC") announced an Order that purported to temporarily halt all residential evictions in the United States with the stated purpose to prevent the further spread of COVID-19.[1] Similar to the Michigan Orders, the CDC moratorium was extended several times.

The moratorium did not "relieve any individual of any obligation to pay rent, make a housing payment, or comply with any other obligation that the individual may have under a tenancy." Accordingly, landlords could still charge and collect fees, penalties, and interest as a result of the failure to pay rent, assuming such charges were allowed under the lease. They could not evict for non-payment, however, assuming the tenant executed a form claiming the non-payment was attributed to COVID-19. Landlords could also still evict for reasons other than non-payment caused by COVID-19, such as where a tenant is engaging in criminal activity or threatening the health or safety of other residents. Most importantly, tenants could be evicted when leases expired. After being in effect for almost a year, the CDC moratorium was declared unconstitutional on August 26, 2021.

Show Me The Money: Throughout 2020 and 2021 and during these moratoriums, congressional sources of tenant funding were introduced which required a tenant to sign a declaration stating that they were unable to pay rent due to a substantial loss of income, and that they used best efforts to make partial payments to the landlord. Thereafter, Covid emergency Rental Assistance ("CERA") funds became available for application to the tenant's past due rental payments. CERA funds were freely disbursed, with few hard-and-fast checks

[1] Association Counsel Jared Roberts deemed this the "September Surprise" in the following article: https://www.fraserlawfirm.com/blog/2020/09/the-dhs-cdc-september-surprise-the-order-to-temporarily-halt-residential-evictions/

on distribution, and were administered by various private charitable organizations and public agencies acting in connection with the courts.

CERA funds are still available today, but they are not given as freely as they once were. Further, receipt by the landlord was (and is) often conditioned on an agreement not to evict the tenant.

My Day In Court: Substantial federal funding resulted in organizations such as Legal Services Corporation, more commonly known as Legal Aid (with our local branch identified as Legal Aid of South Central Michigan), being flush with funding. These organizations still appear to have substantial federal funding to provide free representation for tenants facing eviction.

Landlord-Tenant proceedings moved exclusively to Zoom for a time, and today remain largely on Zoom. The combination of Zoom hearings and legal aid organizations having ample resources to hire contract attorneys, meant that Legal Aid attorneys often outnumbered potential clients during these Zoom hearings. That also meant that the defense was often zealous, to say the least, and accompanied by any number of counterclaims and retaliatory eviction claims, whether appropriate or not.

Even with no moratoriums in effect, 99% of Landlord-Tenant proceedings are still being heard on Zoom. Fortunately, the scheduling of various landlord-tenant proceedings seems to be generally caught up and pretty efficient. Thus, when a Complaint for Nonpayment of Rent or Complaint to Recover Possession of Property is filed, property owners can expect that the initial Zoom pre-trial hearing will be scheduled within two or three weeks of case filing, and that a final pre-trial hearing will occur two weeks after that. Then if the matter is not resolved a trial will be scheduled – again within one to three weeks

if it is a bench trial. If the tenant demands a jury trial, the scheduling of that event is anybody's guess – it can linger for months, and we have seen them scheduled locally for an long as four or five months out.

In sum: All in all, our local district courts are back in business and hearing eviction cases. There is nothing about current procedures that should discourage any landlord from pursuing legal remedies, and there is nothing that should discourage a Realtor® member from advising their client to obtain counsel and exercise judicial remedies.

VI. THE TROUBLE WITH "OFF MARKET" LISTINGS

Jared A. Roberts, Esq.
Association Legal Counsel

There is an apparently growing trend among residential listing agents to suggest to the seller, when taking a listing, that the listing agent handle the transaction "off market." Or, in other words, not post the property to the MLS for full dissemination (as that term is used in your MLS rules).

In some settings, such as the sale of certain commercial assets through well-established brokers, a seller might trust the broker to float the idea of the sale to some regularly-purchasing buyers, as a way to gently test the market or obtain a quick or quiet sale without public marketing. Multi-unit apartments, strip plazas and industrial properties come to mind.

However, in the residential sale setting, when a listing agent urges their seller to allow the agent to seek a buyer "off market," it most certainly will result in poor customer service. In addition, the conditions are ripe for breaches of duty to that seller, for violations of the MLS rules, and for violations of the Realtor® Code of Ethics.

Customer Service Considerations: Agents that suggest “off market” listings are often not acting in their client's best interest, primarily because the property does not receive the needed exposure to the public and the full market. In some instances, that market is nationwide.

By way of example, A recent New York Times article in the real estate section presented staggering statistics on how popular "Zillow surfing" has become, particularly in tourist-driven markets and places where short term or Airbnb rentals proliferate. The number of internet-based investors who purchase sight-unseen was eye-opening, if not

mystifying. This is a factor driving the market, along with our re-evaluation of the sanctity and importance of the home in the COVID-19 era. In light of this, and the popularity of online searching closer to home, no listing agent's list of private buyer contacts (who also doubtlessly surf listings) can compete. The MLS gives the property full market exposure, and Realtors® taking note of low inventories have watched sale prices exceed the initial asking price as a routine. That is the free market at work, and there is no reason not to expose your client's listing to the full market.

Further, the desire for the agent to handle both sides of the transaction is something perceived to be in the agent's interest, but is rarely something that is in the seller's interest.

Legal Duties, Contractual Requirements and Ethics: In addition to the customer service issues raised by "off market" listings, there are legal and ethical issues.

First, as a matter of policy and as a service to their members and the public at large, Realtor® Associations, including NAR, MAR and GLAR devote substantial resources and energy to helping the real estate market remain fair and transparent. They devote resources to fostering the perception that the real estate market is fair and transparent. Everyone should feel that, if they make the right offer, they have at least a fair shot at home ownership. It helps everyone in the business if the American Dream of home ownership is perceived to be available to all.

However, off market listings, and the related reliance on insider and personal contacts attendant thereto, undermine that transparency. Steering listings away from the public (many of whom seek a home to live in and not an investment to flip or re-rent) and into an investor class – as often occurs with these off market listings – has reportedly been shown to disproportionately exclude opportunities to buyers of color. If the market is not

perceived as being fair and transparent, it discourages people from entering it. That is not good for anyone in the industry and is not good for the home-buying public. It is likely not good for our overall economy.

Occupational Code: With respect to legal duties, the Occupational Code, MCL 339.2512d(2) provides that "[a] licensee that is acting under the terms of a service provision agreement owes, at a minimum, the following duties to a client:

(a) The exercise of reasonable care and skill in representing the client and carrying out the responsibilities of the agency relationship.

* * *

(c) Loyalty to the interest of the client.

There are arguments that the failure to expose the property to the full market is a violation of both these sections. It may show a lack of proper client care, and a lack of loyalty through self-interest (interest in currying favor with buyer-investors at the expense of seller; interest in securing commission from both sides of a transaction).

MLS Rules; Your Contract with the MLS: When Realtor®-members join GLAR and the Greater Lansing MLS, you have entered into a voluntary contractual agreement. The Association provides services to you in exchange for fees. Association membership and MLS participation likewise bind you to the rules of the Association and the MLS. Failure to market listings on the MLS and allow to full dissemination may violate those rules. Under the MLS rules:

SECTION 1 LISTING PROCEDURES

Listings of real or personal property of the following types, which are listed subject to a Real Estate Broker's license and are located within the territorial jurisdiction of the Multiple Listing Service, and are taken by Designated REALTORS®/MLS Participants on GLAR's or other acceptable forms **shall be delivered** to the Multiple Listing Service within one (1) business day (March 2020) with all necessary signatures:

[emphasis added]

In all legal contexts, "shall" is an indicator of a mandatory action. All listings must be delivered to the MLS, at a minimum. This provision, however, does not require that they be publicly disseminated and distributed.

Consistent with that, MLS rules and notes interpreting Section 1 make it clear that the seller is not in contractual privity with the MLS. Thus, MLS policies do not directly bind sellers. More importantly, the MLS rules and notes interpreting Section 1 also state that "[t]he Listing contract must include the Seller's written authorization to submit the agreement to the Multiple Listing Service." Along those lines Rule 1.3, which covers exempted listings states that: "[i]f the Seller refuses to permit the Listing to be disseminated by the MLS or marketed to the public, the Designated REALTOR®/MLS Participant may then take the Listing (office exclusive) and such Listing shall be filed with the MLS but not disseminated to the Designated REALTORS®/MLS Participants." In addition, "[f]iling of the Listing should be accompanied by certification signed by the Seller that he does not desire the Listing to be disseminated by the MLS or marketed to the public."

Thus, the seller has the ultimate say on this issue, but: information on the listing must still be provided to the MLS even if not disseminated and publicly marketed through it. But, it appears to be a rare case where a seller would cut themselves out of the broader market and ask to stay off the public side of the MLS if they were not steered into that position by a listing agent.

If the seller is not insisting that the listing be kept off the publicly-disseminated portion of the MLS, Realtor®-members pushing them in that direction or not otherwise following

through with their contractual obligation to the MLS to publish non-exempted listings, violate the "Clear Cooperation" MLS Rule (Rule 1.01), which provides:

1.01 **Clear Cooperation**
Within one (1) business day of marketing a property to the public, the listing broker must submit the listing to the MLS for cooperation with other MLS participants. Public marketing includes, but is not limited to, flyers displayed in windows, yard signs, digital marketing on public facing websites, brokerage website displays (including IDX and VOW), digital communications marketing (email blasts), multi-brokerage listing sharing networks, and applications available to the general public. (Adopted 11/19)

Note: Exclusive listing information for required property types must be filed and distributed to other MLS Participants for cooperation under the Clear Cooperation Policy. This applies to listings filed under Section 1 and listings exempt from distribution under Section 1.3 of the NAR model MLS rules, and any other situation where the listing broker is publicly marketing an exclusive listing that is required to be filed with the service and is not currently available to other MLS Participants.

The important feature of Rule 1.01 is that, once a member starts marketing the property publicly (flyers, yard signs, emails, other digital platforms, etc.) to others, the Member is required to enter the listing on the MLS, for distribution to other members for cooperation – even if the listing is exempt from full dissemination to the public under Section 1.3. The only way to not have that listing available to other members for cooperation purposes is for the listing agent to not engage in any non-MLS public marketing.

Ethical Considerations: The Code of Ethics applies to all aspects of off market listings. Whether the behavior is unethical – just like whether it violates the Occupational Code or MLS rules - turns on whether the seller is making their own informed decision to prevent the listing from being disseminated through the MLS and fully available for public review. The provisions that are implicated are as follows:

Article 1- "When representing a buyer, seller, landlord, tenant, or other client as an agent, REALTORS® pledge themselves to protect and promote the interests of their client."

As discussed above, there are many scenarios under which the decision keep the listing from being disseminated publicly through the MLS might not be in the client's best interest.

Article 3- "REALTORS® shall cooperate with other brokers except when cooperation is not in the client's best interest."

The analysis here is similar to that under the MLS cooperation rules. If the seller does not want public dissemination of the listing, and the proper certification (consistent with MLS Rule 1.3 is filed), the listing need not be made public. Otherwise, it must. Making a listing public means agreeing to cooperation principles. Further, any non-MLS public marketing activates the requirement to submit the listing for cooperation under Rule 1.01.

Article 11- "The services which REALTORS® provide to their clients and customers shall conform to the standards of practice and competence which are reasonably expected in the specific real estate disciplines in which they engage."

In like manner with the analysis under Article 1 (loyalty to the interest of the client), the standard of practice of competence would start with marketing a listing as far and wide as possible – that is, disseminating it throughout the MLS.

Conclusion: As shown by the analysis above, issues raised by "off market" listings are complicated and at times, nuanced. When confronted with difficult choices the clear path for the Realtor® who seeks to avoid Occupational Code violations, MLS contract, rule or ethics violations, is to take the path that is in the client's best interest. In nearly all instances the client's interest favors full dissemination of the listing on the MLS over the "off market" option.

VII. SECTION 604 – THE OCCUPATIONAL CODE CATCHALL

Jared A. Roberts, Esq.
Association Legal Counsel

Article 25 of the Occupational Code, MCL 339.2501 et seq., is widely understood to govern the conduct of real estate licensees. More specifically, most Realtor® members remain aware of the most common prohibitions in the Occupational Code under MCL 339.2512. In shorthand form, these include:

> (a) Acting for more than 1 party in a transaction without the knowledge of the parties.
>
> (b) Failing to provide a written agency disclosure.
>
> (c) Representing or attempting to represent a real estate broker other than one's employer without express consent of the employer.
>
> (d) Failing to account for or to remit money that belongs to others.
>
> (e) Changing a business location without notification to the department.

These also include numerous prohibitions and requirements regarding handling, accounting for and returning client funds and transaction party funds.

However, Realtor® licensees sometimes lose sight of general Occupational Code provisions that apply to all regulated professions. Beware the "Catchall." It provides:

339.604 Violation of article regulating occupation or commission of prohibited act; penalties.

A person who violates 1 or more of the provisions of an article which regulates an occupation or who commits 1 or more of the following shall be subject to the penalties prescribed in section 602:

(a) Practices fraud or deceit in obtaining a license or registration.

(b) Practices fraud, deceit, or dishonesty in practicing an occupation.

(c) Violates a rule of conduct of an occupation.

(d) Demonstrates a lack of good moral character.

(e) Commits an act of gross negligence in practicing an occupation.

(f) Practices false advertising.

(g) Commits an act which demonstrates incompetence.

(h) Violates any other provision of this act or a rule promulgated under this act for which a penalty is not otherwise prescribed [the catchall to the catchall].

(i) Fails to comply with a subpoena issued under this act.

(j) Fails to respond to a citation as required by section 555.

(k) Violates or fails to comply with a final order issued by a board, including a stipulation, settlement agreement, or a citation.

(l) Aids or abets another person in the unlicensed practice of an occupation.

As the terms of this catchall provision show, five of these prohibitions are broad and may be subjective:

(a) and (b) – fraud or deceit;

(d) lack of good moral character;

(e) gross negligence; and

(g) incompetence.

Realtor® members should always remain aware of these general and important features of the Occupational Code that fall outside the familiar Article 25.

VIII. OFFER, COUNTEROFFER – DO WE HAVE A DEAL?
There's Never a Bad Time for a Contract Law Refresher

Jared A. Roberts, Esq.
Association Legal Counsel

A Michigan Circuit Court recently decided a case that raised questions concerning real estate purchase agreement formation and enforcement. In the end, following over a year of litigation, the court found the purchase agreement enforceable (and a Realtor® escaped liability and successfully defended the conduct in question). This case helps illustrate contract formation and enforcement concepts helpful to Realtors®.

Sally Seller listed her home for sale. Billy Buyer made an initial offer. The Realtor® was a disclosed, consensual dual agent. The first offer was rejected as being too low. Sally Seller e-mailed the dual agent, advised that the email should be shared with Billy Buyer, and Sally wrote that she wanted <u>x</u> *dollars* for the home. To help justify her request that Billy Buyer increase his offer, she wrote that all the furniture in the home, save for a few excluded items, would be transferred to Billy Buyer with the home.

After receiving that email, Billy Buyer made a new offer for *x dollars*, as Sally Seller suggested. Billy signed the offer through DocuSign. The offer mentioned some personal property items but did not expressly list the furniture that was referenced in the pre-offer e-mail. This was a cash sale, not contingent on financing.

After Billy Buyer first e-signed the offer he texted with the dual agent and expressed concern that the furniture was not mentioned in the offer he had just e-signed. He also texted that he was content to rely on his offer as e-signed, along with the email from Sally Seller. Those mixed messages and communications (Billy Buyer being comfortable with the offer on one hand, but being concerned about the lack of a furniture reference on the other) were complicated by the fact that Billy Buyer and the dual agent made another version of the offer

that added furniture, and added Billy Buyer's initials to that change. This second offer used the same e-signature as appeared on the initial offer that did not list the furniture.

There was uncertainty and a lack of recall between the dual agent and Billy Buyer as to whether the new offer should have been posted to DocuSign, or whether that language was to be used instead for a future addendum, or whether the effort was jettisoned in reliance on Sally Seller's furniture-related email after all. In any event, the offer that Sally Seller e-signed (arguably creating a signed, enforceable purchase agreement) was the initial signed offer that did not reference the furniture. That signed offer (now arguable purchase agreement) was emailed by the dual agent to Sally Seller and Billy Buyer right after Sally signed. Nobody took issue with the lack of furniture at that time.

From there, Billy Buyer conducted numerous inspections and had several interactions with Sally Seller. The parties met at the property and discussed the furniture (what would stay and what would go). They entered into an addendum for Sally Seller to make some repairs, and they entered into an addendum that removed all contingencies and set a closing date. Before closing Sally Seller emailed Billy Buyer and invited him over so she could show him how the TV and audio systems - which were personal property to transfer with the sale – worked.

When the closing date arrived Billy Buyer claimed that he did not have the cash to close, and he did not close, essentially leaving Sally Seller "at the altar." Sally sold the home months later to a different purchaser, for less money. Sally then sued Billy Buyer for breach of contract for failing to close as agreed. Her primary measure of damages was the sale price differential (the second sale was for less money), plus her carrying and maintenance costs incurred between the time of the lost Billy Buyer sale and the subsequently closed sale.

In litigation Billy Buyer argued that the Purchase Agreement (which listed some personal property) was not enforceable because it did not list the agreed-upon furniture items (herein the "furniture defense"). Sally Seller then brought the dual agent, Rhonda Real, and her brokerage, into the case as defendants. Sally Seller's claim was contingent: if the purchase agreement was not enforceable because it did not list the furniture, Rhonda Real was either negligent, or she breached a contractual or fiduciary duty to have the purchase agreement reflect the intent of the parties. If the furniture defense did not succeed, and there was an enforceable purchase agreement, the furniture was not a legally relevant issue and there were no damages caused by Rhonda Real, even if she did make some mistake. Sally Seller insisted that, had the sale closed, she would have left the furniture, as she discussed with Billy Buyer and as she stated in a pre-contract email.

The Competing Legal Principles

Realtor® Rhonda Real argued that the following contract law principles applied:

"A contract for the transfer of real property is valid and enforceable if the agreement contains the essential elements of a contract with sufficient certainty and definiteness regarding the parties, property, consideration, terms and time of performance." *In re Day Estate*, 70 Mich App 242, 245 (1976).

The essential terms of a contract require an offer, acceptance (that is, a "meeting of the minds" between the parties) and consideration – being the item (often money) to be exchanged for the other item or the other side's performance.

The Purchase Agreement fully complied with Michigan's Statute of Frauds under MCL 566.106 and 566.108 (requiring a signed writing to transfer fee ownership of real estate).

Even if there was some issue about the description of personal property, "[t]he right of a court of equity to correct a written conveyance so as to carry out the intention of the grantor, where a mistake has been made by the scrivener, is well established." *Newland v First Baptist Church Soc of Bellvue*, 137 Mich 335, 337 (1904). The operative principle is, had the sale closed and had Sally Seller refused to transfer the furniture, a court of equity could reform the Purchase Agreement or simply enforce the promises in the email.

Further still, "equity may give relief where by mistake the intent of the parties has not been expressed." *Schoenfield v Veenboer*, 234 Mich 147, 163 (1926). This equity principle, it was argued, should apply to purchase agreements.

Rhonda real also argued that "the absence of certain terms . . . does not necessarily render a contract invalid," *Calhoun County v Blue Cross Blue Shield Michigan*, 297 Mich App 1, 14 (2012), and contracts are routinely "enforced despite some terms being incomplete or indefinite so long as the parties intended to be bound by the agreement." *Id.* at 15.

Finally, an arguable missing contract term means even less if "one or another of the parties has rendered part or full performance." *Id.* at 15 (citing Corbin on Contracts, Williston on Contracts and the Restatement of Contracts). In this case Sally Seller appeared at closing and fully performed her side of the bargain.

Billy Buyer argued that, because there was a second offer including the furniture, and he intended (or thinks he intended) that the furniture offer was to be submitted to Sally Seller, there was no acceptance of the proper offer and no "meeting of the minds."

Billy Buyer also argued that the furniture was material to the deal, and since it was omitted from the purchase agreement (basically ignoring all the emails and verbal exchanges on the furniture issue), the consideration was not agreed-upon, so there was no contract. If

there was no contract, there was no breach, and Billy was entitled to the return of his earnest money deposit.

Billy Buyer relied on Zurcher v. Herveat, 238 Mich. App. 267 (1999). In this case, prospective purchasers, the Zurchers, made an offer to purchase from their neighbor, Ms. Herveat. The "TERMS OF PURCHASE" section of the type-written offer stated:

"Purchase is to include all furnishings in house, sauna and shed, with the exception of: wall hangings and pictures, braided rugs, Singer Sewing Machine & Cabinet and small cedar chest located in living room."

When seller Herveat signed, and as buyers thought, accepted, in handwriting, she added these words after the sentence referencing personal property: "With the additional exception of lawn mower and ceramic vases—Also all costs & fees (except for proration of . . . taxes below and preparation of deed) related to sale will be paid by Purchaser, including certifications." In other words, seller's acceptance changed the personal property *and* allocated some of the closing costs to the buyers. Buyers never countersigned or treated the Herveat acceptance as a counteroffer. Indeed, both parties treated it as an acceptance and worked toward closing the transaction.

When seller Herveat backed out of the sale buyers sued for specific performance (an equitable remedy whereby the court may order the buyer's side to tender the money and enter an order transferring title to buyer). The Court of Appeals held that it did not have enough information (based on how the trial court handled the case) to determine whether the seller change was "material" such that it resulted in a counteroffer. Thus, it remanded the case (that is, sent it back) to the trial court to determine that issue.

Somewhat ignoring that fact that seller Herveat changed financial terms by re-allocating closing costs, Buyer Billy argued the Zurcher v Herveat stands for the proposition that the addition or removal of personal property from a real estate transaction is a material term of the agreement, and if the agreement here did not have personal property as Buyer Billy thought it should, there was no purchase agreement for him to breach.

The circuit court held that the initial purchase agreement, that was fully signed, was enforceable. The court noted that:

- The purchase agreement was emailed back to the parties the same day and they proceeded for months trying to close without complaint regarding the furniture;
- Sally Seller fully performed her side of the deal, and there was no evidence that she would not have performed the part covered verbally and in emails regarding leaving behind the furniture, making the arguable omission legally irrelevant;
- Billy Buyer was equitably estopped from denying that he had an enforceable purchase agreement because he too performed under it right up to the time he failed to close, and he made seller undertake repairs following his inspections, and Sally Seller relied on that agreement being in place (equitable estoppel here simply means that the court's equity or fairness powers would not let Billy Buyer act like he had a contract right up to the last moment).

The legal provisions underlying this result, any (or many) of which could apply in your transactions and transaction party contract-related disputes, are as follow:

Contracts may omit some terms and still be enforced:

The absence of certain terms—including at times the price—does not necessarily render a contract invalid. *JW Knapp Co v Sinas,* 19 Mich App 427 (1969) (the general common-law rule is that a contract may be enforced despite some terms being incomplete or indefinite so long as the parties intended to be bound by the agreement).

"Where the price is indefinite, the purchaser may be required to pay and the seller to accept a reasonable price. Where the time of performance is indefinite, performance may be required to be rendered within a reasonable time. Each case will turn on its own facts and circumstances." Calhoun Cty v Blue Cross Blue Shield, 297 Mich App 1 (2012) (citing various contract law encyclopedias and restatements).

If one party performs the contract is more likely to be enforced:

A trial judge may enforce an arguably incomplete contract "if it is established that the parties intended to be bound by the agreement, particularly where one or another of the parties has rendered part or full performance." Calhoun Cty v Blue Cross Blue Shield, 297 Mich App 1 (2012) (citing various contract law encyclopedias and restatements).

The party accepting the offer typically cannot change it without rendering it a counteroffer:

As noted in Zurcher v. Herveat, a purchase offer cannot be materially changed or altered during acceptance; otherwise, it creates a counteroffer that must be accepted by the initial offeror. In the court's words: "[f]or a response to an offer to be deemed an acceptance as opposed to a counteroffer, the material terms of the agreement cannot be altered."

The GLAR template offer/purchase agreement document reduces the possibility of this error with check boxes for qualified acceptance, which it treated as a counteroffer:

30. **SELLER'S RESPONSE: The offer is**

☒ **ACCEPTED AS WRITTEN**
☐ **REJECTED**
☐ **AMENDED AS FOLLOWS:**

If you signed it, it is probably binding:

Courts presume that the parties intent to be bound by the terms of the document they signed. Zurcher v Herveat, 238 Mich App at 299; see also Int'l Transp Ass'n v Bylenga, 254 Mich 236 (1931) ("This court has many times held that one who signs a contract will not be heard to say, when enforcement is sought, that he did not read it, or that he supposed it was different in its terms").

Failure to inquire about or otherwise read the contract does not provide a defense. A party failing to read a contract cannot claim a defense based upon such failure. *Montgomery v Fidelity Life Ins Co,* 269 Mich App 126 (2005).

A party has a duty to examine a contract and know what the party has signed, and the other party cannot bear the responsibility for the non-reading party's neglect. Id.

Michigan law presumes that one who signs a written agreement knows the nature of the instrument so executed and understands its contents. Watts v Polaczyk, 242 Mich App 600 (2000).

If a party does not understand the terms of a contract, they have the duty to obtain an explanation. Scholz v Montrogemery Ward Inc, 437 Mich 83 (1991) (a Plaintiff that failed to find out information contained in a contract could not then argue ignorance of the contents as a defense).

Parties can waive and modify contracts through writing or conduct:

A waiver "is established through clear and convincing evidence of a written agreement, oral agreement, or affirmative conduct establishing mutual agreement to modify or waive the particular original contract." Quality Products & Concepts Co v Nagel Precision, Inc, 469 Mich 362 (2003). "Clear and convincing evidence" is a high, but not insurmountable burden of proof.

Courts can prevent or "estop" a party from denying certain facts:

"Estoppel is a bar which precludes a person from denying the truth of a fact which has in contemplation of law become settled by the act of the party himself, express or implied. If one's conduct induces another to believe in the existence of certain facts, and the other acts thereon to his prejudice, the former is estopped to deny that the state of facts does in truth exist." Detroit Savings Bank v Loveland, 168 Mich 163 (1911); Am Ele Steel Co v Scarpace, 399 Mich 306 (1976) (finding that seller's wife was estopped by her actions from arguing that the power of attorney under which she signed her husband's name was invalid). In that case a seller's wife represented that she was empowered to sign for her husband. She signed the contract in her name and for her husband. Buyer was led to believe that the power of attorney was valid. Seller's wife was estopped from denying the validity of the contract and the sale was upheld.

IX. NAVIGATING ADVERSE POSSESSION AND ACQUIESCENCE

Amanda "Amy" Wolanin
with
Jared A. Roberts, Esq.
Association Legal Counsel

Adverse possession arises when a party without legal title to real estate takes and holds possession of the property for fifteen years or longer, in a manner adverse to the true owner. In essence, if a party makes productive use of property adversely for fifteen years while the titleholder was not taking care of the real estate, title passes by operation of law to the adverse party who was using the property. That adverse passage of title is perfected though a lawsuit and a court order, however.

Often this occurs in rural or undeveloped areas where the seller might not know that someone else has taken possession of the property. However, adverse possession and the related doctrine of acquiescence may also arise in urban areas where boundaries between lots may evolve over time.

Elements of Adverse Possession

Adverse possession requires that the party hold continuous, uninterrupted possession for fifteen years by actual, visual, open, notorious, exclusive, and hostile possession under a claim of right. Actual entry on the land by the party claiming adverse possession is required. Permissive entry and use does not qualify as adverse possession. By way of example, a party entering property under a lease cannot assert a claim of adverse possession unless actual notice is given that the tenant is treating the lease as having terminated, is claiming possession, and is adversely holding the property. Actual possession requires that the adverse possessor actually occupy the land. This is commonly shown by

cutting grass, maintaining trees, or building fences. The possession must continue every day during the whole fifteen years required to acquire title, or continue in the normal patterns that one may follow using the type of land in question. In some cases, for instance, entry and possession for tilling, planting and tending crops through harvest, for fifteen years, will ripen into adverse possession, even though no use is made between harvest time through the start of the next planting cycle.

In addition, successive periods of adverse possession by different parties claiming possession may be tacked together to meet the fifteen year requirement, but only if there is privity of estate between the adversely possessing grantor and the grantee. In other words, if a seller has been adversely possessing a part of an adjacent parcel for ten years, then sells to a new owner who continues that pattern of use, the new owner only needs to continue use for five years in order to meet the fifteen year requirement.

One of the most difficult facts to prove in adverse possession cases is the element of hostility. In this context, "hostile" does not mean "unfriendly." Rather, it means that the possession infringes on (or is hostile to) the rights of the true owner. It is important to note that if a party intends to claim title up to a tangible boundary line, regardless of the true boundary line, the hostility element is satisfied, even if the parties merely maintain the property under the mistaken assumption that it was the true boundary line.

As a final note, adverse possession must be shown by "clear and cogent evidence." That is similar to the "clear and convincing" standard, which is a heightened standard from a "preponderance of the evidence." A preponderance is slightly more than 50% of the evidence being in the winning party's favor. Clear and cogent means that the evidence weighs much more heavily to the winning party's side, but the standard defies mathematical

computation. In any event, clear and cogent is something less than the criminal standard of "beyond a reasonable doubt."

Elements of Acquiescence

The concept and doctrine of acquiescence – a judge-created common law concept – is similar to adverse possession. It provides a basis for a court to set a boundary between two parcels. Though there are no strict elements of the doctrine, it is often described as adverse possession without the hostility. In summary, the doctrine of acquiescence **provides that where adjoining property owners acquiesce to a boundary line for at least fifteen years, that line becomes the actual boundary line**. There are three general types of acquiescence. One involves adjoining landowners treating a specific boundary as the correct property line for fifteen years. A court of equity may find that an enforceable boundary is in place even if that boundary is different than a boundary that may be described in a deed or measured in a survey. This is most commonly found where adjoining property owners treated a hedge row, tree line or fence as the true boundary for the requisite time period. Like adverse possession, the fifteen years may be tacked between successive owners.

Another acquiescence theory involves a dispute and agreement, or the doctrine of practical location. If there is a property line dispute that is resolved by express or implied agreement to a certain boundary, that line will become the true boundary. This doctrine depends on the actions of the parties, so the state of agreement and use does not need to continue for fifteen years.

As a third theory, the "intention to deed to a marked boundary" theory provides that, when a line has been treated by neighbors as the true line over a significant time period, when one of the lots is transferred by deed to another party, it is presumed that the grantor intended to transfer the land based on that recognized boundary line. The acquiesced line should continue thereafter to be the line recognized in future transfers.

Precautions for Realtors®

Though listing agreements, buyer's agency agreements and standard form purchase agreements typically and repeatedly disclaim a Realtor's® obligation to be a surveyor or to opine on title issues, an experienced listing agent or buyer's agent should be able to spot and warn clients of the possibility that adverse possession issues may arise. Indeed, these visible or ascertainable encroachments are typically excluded from title coverage.

When listing or assisting a client with buying property, a Realtor® should look for obvious signs that someone may be claiming all or part of the premises by adverse possession or by acquiescence. The first step to avoid claims of adverse possession is to inspect the premises. As part of the inspection, it is preferrable to have the property surveyed showing all improvements, not just the boundaries. If the client is advised to get a survey and declines, the Realtor® has met her duty. That extra actual advice (above and beyond what may be stated in a purchase agreement) is helpful to the client. The survey should mark fences and legal boundary lines – which may be in different places.

Look for signs of and ask whether a neighbor may be tending to certain areas of the property – particularly those that may appear to be shared or remote (such as behind a garage).

If there is a shared driveway advise that there should be some title record of that relationship.

Advise that fences might not follow legal boundaries, and advise that tree lines and hedge rows – especially in rural settings – may be well off the deeded line. Indeed, rural properties and farm properties are somewhat notorious for this.

While a warranty deed has the seller warranting title and the right to convey the described premises, that warranty is only as good as the seller's ability to pay your damages if it is breached.

If the conveyance is made by quitclaim deed, there is not warranty of title and the seller is only conveying that which they own. If another has adversely possessed part of the property, nothing in the deed can be used as a basis to recover against the seller.

In Conclusion

A Realtor® never does a disservice to a client by reporting things that the Realtor® observes in connection with a property – either on the buying or listing sides. Indeed, it is part of Realtor's® duty. If you are representing a buyer and it seems possible that someone may be helping themselves to seller's land, advise your buyer and propose follow-up. If you are representing a seller and see the same signs, it makes sense to suggest a survey or counsel to help ensure that the seller is not heading headlong into a lawsuit alleging breach of title warranties and related misrepresentations.

X. I LOVE YOU MAN
I LOVE YOU MA'AM

Recent Attempt by State of Oregon to Prohibit "Love Letters" Enjoined as Violation of Rights to Commercial Speech

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In the Summer of 2021 the State of Oregon became the first to statutorily require sellers' agents to reject any communication other than customary documents in a real estate transaction. Though "customary documents" was not defined in the statute, the Oregon Real Estate Commission (being the general equivalent of Michigan's Department of Licensing and Regulatory Affairs "LARA" and its Board of Real Estate Brokers and Salespersons a/k/a the "Department") issued guidance (regulations) listing documents one might expect. The thrust of the statute and its legislative history made clear that the statute sought to ban what has become known as "love letters." That is, letters from a buyer seeking to personalize the offer, flatter the seller, or otherwise situate themselves in a way that makes them look like more attractive buyers. Love letters were not considered "customary."

Customary documents, under the Oregon Commission's guidance, included disclosure forms, sales agreements, counter offer(s), addenda, and inspection reports. The Oregon Commission also included lender preapproval letters for financed transactions and verification of funds documents (bank records) for cash transactions as being "customary documents." The Commission also allowed that seller's agents may accept cover letters "written by a buyer's agent explaining the prospective buyer's interest in the property." Thus, it allowed the seller's agent to review and re-transmit a *buyer's agent's* statements (or hype) about the buyer, but not the buyer's own statements or hype about themselves.

More specifically, section 696.805 of the Oregon Revised Statutes generally establishes duties and prohibitions vis-à-vis seller's agents. Subsection 7 thereof provided that:

> (7) In order to help a seller avoid selecting a buyer based on the buyer's race, color, religion, sex, sexual orientation, national origin, marital status or familial status as prohibited by the Fair Housing Act (42 U.S.C. 3601 et seq.), a seller's agent shall reject any communication other than customary documents in a real estate transaction, including photographs, provided by a buyer.

This has been known as the love letter ban.

Love letters present complicated issues. On one hand, the buyer is seeking to put her "best foot forward," as it were, using intangibles to make the seller comfortable. She might express interest in renovating and preserving the 50's vintage "atomic ranch" that the seller clearly loved. All other things being equal, the ranch-loving seller, that never had the money to really bring the place back to life, might prefer the love letter buyer who seeks to preserve the funky, space age essence of the place over the "McMansion" builder who is looking for another teardown. As such, there are genuine market forces at work with love letters, and pure and legitimate intentions in many cases – on both the buyer's and seller's side.

However, the potential for abuse – particularly the potential to exchange information that my inspire seller considerations that violate the spirit, if not the letter of fair housing and equal opportunity housing laws – inspired Oregon policy makers to seek to regulate these communications. The "classic" version of the problematic love letter makes religious references, such as "looking forward to seeing the kids coming down the stairs on Christmas morning." Some love letters include photos. Some may make cultural references that tie the buyer to a race or ethnicity, and many reference marital status. In some instances love letters can be common enough that the absence of such a letter, a photograph or a reference to a

family may raise suspicions in the seller. The seller may think that a buyer who does not present a love letter must have some problem or have something to hide.

In addition, if there are multiple offers with basically identical terms, and the seller (fairly or unfairly) accepts the offer of a love letter writer that is of the same religion, same ethnicity, or that lacked disabilities, other buyer who lost out could accuse the seller of using discriminatory criteria in making the selection. In some cases, they could be right. Thus, NAR, MAR and GLAR all disfavor love letters as a matter of policy. That remains the most sound advice from a legal perspective; love letters may be perceived as helping some buyers, but they present dangers and risks to sellers. A policy against love letters also gives Realtors® at least one less thing to worry about in their transaction. Further, with the internet and people promoting themselves and their lifestyles so publicly, sellers have plenty of opportunity to learn about the buyer if they so choose - Realtors® do not need to facilitate that.

The Oregon Lawsuit

In *Total Real Estate Group v Stroad*, a 2021 case in the United States District Court for Oregon, Total Real Estate Group, the broker-plaintiff, sought to prevent the Oregon Real Estate Commissioner from enforcing Oregon's statutory love letter ban. At the outset, the federal district court - and even the plaintiff - admitted that Oregon sought "to achieve a laudable goal: to stop discrimination in home ownership based on protected class status including, race, color, religion, sex, sexual orientation, national origin, marital status, or familial status." However, in order to do so, the Court observed, "it passed a law that unquestionably interferes with speech." Thus, the question before the Court was "whether that law" went "too far" it its regulation of that speech. The Court found that it did.

Oregon argued that the "(1) history and prevalence of housing discrimination in Oregon; (2) [the] prevalence of protected characteristics in love letters; and (3) effectiveness of love letters supported this governmental limitation on commercial speech." For further detail, about "(93%) of the love letters reviewed in the case disclosed the buyer's race, color, religion, sex, sexual orientation, national origin, marital status, familial status, or disability. About half of the letters included photographs that revealed some information about race, color, and sex or gender, among other characteristics."

There was other evidence that "[s]ellers may consciously or unconsciously prefer buyers who describe a profile that is most similar to their own in terms of demographics and family status. Those decisions reinforce existing gaps in homeownership (predominantly white) and existing neighborhood segregation as sellers are replaced with like buyers." Further, a Redfin study reviewed 14,000 transactions. "It found that 40% of offers included love letters and that love letters increased the likelihood of having an offer accepted by 52%." Thus, they appear to be effective. This later piece of evidence shows dangers in their use, but also desirability on the part of the market participants.

On the broker's side, evidence showed that the love letter ban might "lead to many angry and dissatisfied clients." Clients often want to tell their story, and the psychology of ego is such that people like their own stories and believe those stories make them likeable. Buyers want to feel like they and their Realtor® did everything they could to get the house – particularly in a competitive market. Further, the brokers argued that clients would accuse agents of not fulfilling duties to "disclose material facts known by the seller's agent" if seller's agents had to withhold these love letters as a matter of law. Some salespeople also argued

that love letters allow some individual and family buyers "to compete with higher offers, including those submitted by investors."

Commercial Speech Analysis

This is a commercial speech case. While "First Amendment protections extend to speech connected to a commercial transaction," the government has more latitude to regulate commercial speech than private speech. The Court noted that if the love letter ban did not regulate commercial speech, it would likely be unconstitutional because it is a content-based regulation. "As a result, it would be subject to strict scrutiny. Under the First Amendment, strict scrutiny requires the government to show that the regulation is narrowly tailored to promote a compelling Government interest, and that there are no less restrictive alternatives that would further the government's interest." Very few regulations survive that level of scrutiny, so analyzing the love letter ban under commercial speech principles gave it a fair chance of surviving.

Commercial speech, on the other hand, is subject to "intermediate scrutiny." That means, for non-misleading communications that discuss generally lawful subject matter: 1) the government must have a substantial interest in restricting the commercial speech; (2) the restriction must directly advance that government interest; and (3) the restriction must not be "more extensive than is necessary to serve that interest."

As a threshold matter, nobody argued that the speech was misleading. It is not like untrue claims about the health benefits of a product. The subject was also generally lawful, so the speech was entitled to the protection afforded by the intermediate scrutiny analysis.

The parties agreed as well that there is a substantial governmental interest in seeking to limit discrimination. Cases have found that "the government has a compelling interest of

the highest order in eliminating discrimination and assuring its citizens equal access to publicly available goods and services."

The issue then, was whether the love letter ban "directly advances" the government's interest and whether it is "more extensive than is necessary to serve that interest." Here, the Court weighed various factors, but determined that the love letter ban sufficiently advanced the government interest in preventing housing discrimination. The regulation failed, however, on the test of whether it was more expansive then necessary to serve that interest. In other words, were there alternatives that did not limit as much speech? The Court found that there were, and that the love letter ban was, in lay terms, too heavy-handed.

In support, the Count noted that, instead of banning love letters entirely the state could have banned certain information in them. The state could have considered banning only the use of photographs. The ban, as written, had the unfortunate effect of excluding or banning "innocuous information prospective buyers include in love letters" such as expressing "a desire to live permanently in the area," or explaining "unusual provisions of the offer," or discussing "a love of gardening and how the home is well suited for growing plants," or complimenting "the architectural style of the home." So it clearly prohibited speech that was otherwise non-discriminatory.

As for a lack of narrow tailoring, Plaintiffs also presented the alternatives of "greater enforcement of existing fair housing laws; requirement that agents redact client love letters;" a limited ban that just prohibits photos; creation of a "fair housing disclosure requirement" that explains the issue to both sides," along with increasing "fair housing training for real estate agents." The Court agreed that there were less intrusive, interim steps the legislature could have taken, short of the total ban. Thus, the ban was not narrowly tailored enough.

Government Regulation of Speech is Different than Private Trade Association Regulation

While the love letter ban statute was struck down, Realtors® must note that the First Amendment operates as a check against *federal* and *state government* power. It generally does not regulate private economic actors, nor does it regulate your non-governmental employer. Thus, with respect to controlling or punishing speech, there are substantial differences between a trade organization's stated policy or a brokerage's terms and conditions of employment (that might urge against or lawfully ban the use of love letters), and a state prohibition against them. Private employers and trade organizations have more latitude than government actors in this setting.