

FREQUENTLY ASKED HOTLINE QUESTIONS*

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1. AGENCY

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: 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 dwelling units or a residential building site. MCL 339.2517. 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. MCL 339.2517.

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.

QUESTION: I am representing clients with the sale of their home. A Buyer whom I am also representing is interested in purchasing my Sellers' home. Neither party wants me to be a dual agent in this transaction. May I change my status to that of transaction coordinator to close this sale?

ANSWER: As an agent to both parties, you may have learned confidential information about each of them, which could compromise your ability to act as a neutral transaction coordinator. If you are going to serve in this capacity, at a minimum, you should require the parties to acknowledge in writing the prior written agency relationship with both parties. MAR form N can be used in this situation.

2. BUY AND SELL AGREEMENTS

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: 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 that grants such a right. Sellers can determine whether or not they wish to entertain an offer directly from a cooperating agent.

QUESTION: The listing ticket includes an item and we 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 we 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 (or, our buyer/client has entered into a purchase agreement, but now does not want to buy). 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 only answer to this question is to tell your client to speak to an attorney.

QUESTION: We received an offer on a listing, and it was accepted by the seller. We delivered it back to the buyer's agent two 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 calls for bottom-lining to form a contract, the contract between the buyer and the seller is formed when the seller signs the offer and delivers his 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 Rule 307 which requires a licensee to provide a fully executed copy of the purchase agreement to the seller and buyer.

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. He would be able to sign on her behalf if she were to execute a power of attorney that expressly grants him that power. As an alternative, to facilitate signatures from out-of-town parties, often a contract expressly states that the parties may sign and deliver an acceptance via facsimile. In this scenario, the offer would be forwarded to the wife, who then could sign the faxed copy and fax it back.

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. One party can neither change the terms of a purchase agreement nor terminate the purchase agreement without the consent of all parties to the transaction. 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. Suppose, for example, the purchase agreement provides that if the buyer does not waive the inspection contingency in writing within 10 days, the purchase agreement shall be null and void. On the 10th day, the buyer presents the seller with a proposed addendum in which the seller is to agree to make certain repairs. The seller may take the position that the purchase agreement is null and void, because the buyer did not waive the inspection contingency within the time frame set out in the purchase agreement. Again, however, the effect of the buyer's request that the seller make certain repairs depends on the wording of both the contingency and the proposed addendum and the timing of same.

QUESTION: I am a REALTOR® who represents a buyer. My buyer became interested in a property and wanted to make an offer. I contacted the listing agent and he told me that an offer had been made for less than full price. My buyer really wanted this property and decided to make a full price offer. The listing office then contacted me and told me that my buyer should present his "best offer." The listing agent told me that he made the same request of the first buyer. It is my understanding that since my buyer made a full price and terms offer, the seller must sell him the property. Am I correct?

ANSWER: NO. The Michigan Court of Appeals has held that a listing does not constitute an "offer" and cannot therefore be "accepted." *Eerdmans v Maki*, 226 Mich App 360 (1997). It should be noted however, that depending on the terms of the listing contract, a seller who rejects a full price and terms offer may nonetheless be obligated to pay a commission to the listing broker.

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. A broker can sign a binding purchase agreement on behalf of the buyer or seller only if he has explicit written authority to do so. Verbal authority over the telephone would NOT be sufficient. A listing agreement by itself does not give the broker authority to bind his/her principal to a contract for the sale of land absent explicit language granting such power. *Weitting v McFeeters*, 104 Mich App 188 (1981). Moreover, the written authorization must be very specific. The agent's lack of written authority renders the purchase agreement void and does not bind either party unless it is ratified by each. *Baldwin v Schiappacasse*, 109 Mich 170, (1896).

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 three day right of rescission. Does such a right exist?

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

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 (MCL 566.108) 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 between the seller, the listing agent, and the buyer's agent and was never reduced to a signed writing, the contract is unenforceable.

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 representing a Buyer who has made an offer on a home. The Seller countered our offer with a clause stating that the Buyer is waiving 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 am representing a Buyer in connection with the purchase of a house from a Seller-couple. One week before the scheduled closing, the Seller-husband suffered a stroke that left him permanently disabled. The Sellers now want to back out of the sale due to the husband's condition. The Buyer still expects to close and is willing to give the Sellers some more time before closing. The Sellers have rejected this proposal. The Buyer is now considering filing a lawsuit against the Seller asking the court to enforce the contract against the Sellers. Would a court do this?

ANSWER: While it is true that the Buyer and Sellers have a binding contract, it is probably unlikely that a judge would immediately order the sale of the property due to the circumstances in this matter. A judge is more likely to either order breach of contract damages – presumably, the difference between the sale price and the fair market value of the home, if any, or provide a reasonable period of time for Seller-couple to remain in the house prior to closing.

QUESTION: I submitted an offer to an agent listing a home. 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: 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.

3. COMMISSIONS/ADMINISTRATIVE FEES

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

ANSWER: NO. Rule 201(3) states:

Associate broker and salesperson licenses shall only be issued to individuals.

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. A real estate broker's license, on the other hand, may be issued to an individual or to an entity. An associate broker with one real estate company could set up a 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.

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. Rule 339 states:

If an individual earned commissions or other income while licensed to a broker, it shall not be grounds for disciplinary action as a violation of section 2512 of the code for the broker to pay such earned commissions or income to that individual, regardless of whether that individual is now licensed to another broker or is no longer licensed under the code.

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 file a *lis pendens* on the Sellers’ property to secure my commission. Is this acceptable?

ANSWER: NO. Ordinarily, a REALTOR® has no right to file a lien on residential property in order to protect his or her claim to a commission. In order to file a lien, a person must have a contractual or statutory right to file a lien. Because the penalties for wrongfully filing a lien on real property are severe, a REALTOR® should never file a lien on real property without the assistance of a lawyer.

4. CONDOMINIUMS

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 nine-day right of rescission. Can the buyer rescind?

ANSWER: NO. The nine-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 559.184. 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. Thus, while in the case of the initial sale, the approval of the condominium documents is automatically a contingency, for resales, a buyer needs to explicitly include 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.

5. DISCLOSURE

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

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

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. The list of exceptions can be found in Section 3 of the Seller Disclosure Act. MCL 565.953.

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. MCL 565.953(f).

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 from both the Michigan Seller Disclosure Act 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. MCL 565.953(c).

As to the Federal Lead Based Paint Disclosure Law, while the original foreclosure sale is exempt, a subsequent resale from the lender is not.

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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.

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 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. MCL 565.952.

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. However, if a lender acquires the property through foreclosure or a deed in lieu of foreclosure, the lender is exempt from the Seller Disclosure Act.

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's exemptions. Your seller will need to provide a Seller's Disclosure Form.

6. DO NOT CALL

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 federal "Do Not Call" list. Am I correct?

ANSWER: MORE THAN LIKELY YES. An agent can call a FSBO under limited circumstances based on a ruling by the Federal Communications Commission (FCC). The FCC ruled that agents can call FSBOs who have a sign in their front yard with a telephone number on it, ONLY if they have a client who is interested in purchasing that seller's property.

The FCC's ruling states: "[w]e find, however, that calls by real estate agents who represent only the potential buyer to someone who has advertised their property for sale, do not constitute telephone solicitations, so long as the purpose of the call is to discuss the potential sale of the property to the represented buyer. The callers, in such circumstances, are not encouraging the called party to purchase, rent or invest in property, as contemplated by the definition of 'telephone solicitation.' They are instead calling in response to an offer to purchase something from the called party." (FCC 05-28; CG Docket No. 02-278, 2/10/05.)

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 Do Not Call List. Can my assistant make these calls?

ANSWER: NO. An individual must be licensed in order to make cold calls to prospective clients.

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 federal do-not-call registry. Also, firms with agents who use this practice need to maintain a company specific do-not-call registry.

7. EARNEST MONEY DEPOSITS

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 buyer's 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. Rule 313(6) states:

Disbursement of an earnest money deposit shall be made at consummation or termination of the agreement in accordance with 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.

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.

QUESTION: Six months ago the buyers refused to go forward with the purchase of my sellers' home. The deal is dead, but the earnest money is still in dispute. Are my sellers prohibited from selling their home to someone else as long as the earnest money is in dispute?

ANSWER: No. The status of disputed earnest money has no effect on your sellers' right to sell their home. The earnest money dispute does not create a lien upon the property, nor does it entitle the buyers to prevent a subsequent sale. The sellers should, however, contact an attorney if there is any chance that the buyers are still claiming a right to purchase the home.

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. It is my understanding that salespersons are required to turn over these checks to their brokers' upon receipt. Am I correct?

ANSWER: YES. The Occupational Code provides:

A real estate salesperson shall pay over to the real estate broker, upon receipt, a deposit or other money on a transaction in which the real estate salesperson is engaged on behalf of the real estate broker. MCL 339.2512(j)(ii).

Note that the rule 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 "upon 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, on the other hand a broker should not have a policy that permits a salesperson to hold a check until the purchase agreement is accepted. The broker, however, is not required to deposit the check in its trust account until the purchase agreement is accepted.

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. The Occupational Code states:

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

REALTORS® should understand that title companies are not subject to the requirements of Article 25 of 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 title companies will only hold earnest money deposits if the parties execute a separate escrow agreement.

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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. Would this be allowable under Michigan law?

ANSWER: NO. The Occupational Code provides:

A real estate broker shall deposit, within 2 banking days after the broker has received notice that an offer to purchase has been accepted by all parties, money belonging to others made payable to the real estate broker in 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(j)(iv).

An agreement to the contrary by the buyer on the seller does not relieve the broker from his duty to deposit money in his/her possession within the prescribed time set by the code. If the buyer and seller want to make such an agreement, then they should also agree to have someone other than a real estate licensee hold the funds.

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 contained in a purchase agreement constitute sufficient "consideration" to create a binding contract.

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. I told the listing agent that this is illegal. Am I correct?

ANSWER: NO. There is no prohibition against the 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: 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: A seller and purchaser can agree that any third party will hold the deposit. In such event, if the check is first given to the REALTOR®, then the REALTOR®'s responsibility is to make sure the check is delivered to that escrow agent within two banking days of receiving notice that the offer to purchase was accepted. MCL 339.2512(j)(vi).

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: For their own protection, it is always advisable for REALTORS® to obtain a written release from both parties prior to disbursing an earnest money deposit. However, the rules only require that a written release be signed if there is a dispute. Once a broker is aware that both sides claim a deposit, the rules require that the broker not disburse the funds until he has a written agreement signed by both parties or a court order. R 339.22313(6).

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.

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.

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

ANSWER: Unclaimed money "escheats" to the State. (Michigan Department of Treasury – Unclaimed Property Division – 517-636-5320.)

QUESTION: Five years 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. R 339.22313(6). After a dispute arises, there is no provision that allows a REALTOR® to release the deposit after a stated time period has elapsed.

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 rule that prohibits a broker from commingling his own business funds with trust funds. MCL 339.2512(j)(iii). Informally in the past, the Department has indicated that this practice is permissible so long as the funds are disbursed "immediately."

QUESTION: Four years ago, I represented a Buyer in a purchase agreement that failed to close. Both the Buyer and Seller claim the earnest money deposit belongs to them. Since there is a dispute, I have held it in my trust account. I recently received a notice from the Michigan Department of Treasury regarding changes to the Unclaimed Property Act. The correspondence stated that the “dormancy” period on unclaimed property is now 3 years. Am I required to send this money to the Michigan Department of Treasury?

ANSWER: NO, the Unclaimed Property Act specifically states that this applies to **unclaimed property**. Specifically the notice sent out by the Michigan Department of Treasury states as follows:

If your entity does not have unclaimed property to report, complete and return the Attestation of Compliance with Unclaimed Property Reporting (Form 4305) by July 1.

Since there both the Buyer and Seller are still claiming the money, you do not have to send the money to the Michigan Department of Treasury.

8. FAIR HOUSING

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 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 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 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 may not refuse to let him or her make reasonable modifications to the 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.

*LAST UPDATED January 5, 2012.

QUESTION: I own a two-bedroom rental home. Can I restrict large families from leasing this property due to the house's limited capacity?

ANSWER: Landlords can restrict the number of persons that may occupy a home or apartment and, in fact, many municipalities license rental units for a particular number of occupants. While it is appropriate to restrict the number of occupants, a restriction should never refer to "large families" or a specific number of children.

QUESTION: I have a buyer who wanted me to find out the local area MEAP 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 MEAP 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 either suggest 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 her own perceptions as to an area, but should refer the client to places where official statistics may be available.

*LAST UPDATED January 5, 2012.

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 "women's charities," an advertising campaign should not be directed at women (as opposed to men) or single persons (as opposed to married persons). Unlike the Fair Housing Act, the Michigan Elliot-Larsen civil rights act also prohibits discrimination based upon marital status. MCL 37.2502.

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).

9. FORECLOSURES AND SHORT SALES

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 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 represent a buyer who is buying a foreclosed property from a bank. The bank has made a condition of the contract that it holds 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.

*LAST UPDATED January 5, 2012.

QUESTION: I represent Sellers who are trying to negotiate a short sale. We have accepted an offer and presented it to the lender for approval. We have received a second offer, but have not heard back from the lender on the first offer. It is my belief that we can present this offer to the lender since the lender has not yet accepted the first contract. Am I correct?

ANSWER: This is not advisable as the Sellers have already accepted the first offer. It is likely that a court would conclude that lender approval is simply one contingency in a binding contract. The Sellers would be better advised to accept the second offer in a back-up position.

QUESTION: I just entered into a listing agreement with Sellers that is likely to end up to be 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 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.

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: A tenant is renting a house that has gone to sheriff's sale. The redemption period will run out in one month but the tenants have three months remaining on their lease. Is their lease valid after the redemption period expires?

ANSWER: PROBABLY YES. A new federal statute provides that in certain circumstances, a lease will survive foreclosure. In the case of a "bona fide lease" and a "federally related" mortgage, the lender (or other purchaser at the foreclosure sale) must give the tenants at least 90 days to vacate the home. In addition, in these circumstances, the tenants have the right to stay beyond the 90-day period for the duration of their lease, unless the new owner intends to occupy the home.

QUESTION: I represent a Buyer in a short sale. The Seller has a tenant on a month to month lease. Will the Buyer be able to evict the tenant after the closing or does the Protecting Tenants at Foreclosure Act of 2009 prevent an eviction?

ANSWER: NO, the Protecting Tenants at Foreclosure Act of 2009 does not apply unless the new owner takes title through the foreclosure process.

QUESTION: I represent sellers whose house was auctioned at a sheriff's sale and is currently in the redemption period. The house was purchased at the sheriff's sale by someone other than the lender. How can my client redeem the property?

ANSWER: By law, payment of the redemption price may be made either to the register of deeds or to the person who actually purchased that property at the foreclosure sale. The sheriff's deed should have a "redemption affidavit" attached which includes the calculation of the redemption price and provides contact information for the purchaser or the "purchaser's designee" representative for facilitating the redemption.

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 and either payoff the deficiency or obtain a release from the bank, will the Seller be liable for the \$50,000 difference?

ANSWER: Yes, ordinarily the Seller will be liable for the \$50,000. If the Seller happens to have other loans which had been secured by junior liens on the property, the Seller would also remain liable for those debts.

*LAST UPDATED January 5, 2012.

QUESTION: I am a REALTOR® representing a client whose house was sold at a sheriff's sale and is currently in redemption. Does the redemption period begin at the time of sale or at the time of the filing of the sheriff's deed with the register of deeds?

ANSWER: The redemption period starts at the time of the sheriff's sale, provided the sheriff's deed is recorded within 20 days of the sale. (MCL 600.3232, 600.3240). If the sheriff's deed is not recorded within 20 days of the sale, then the redemption period runs from the date of recording. Michigan Land Title Standards, 6th, 16.28.

10. GENERAL LICENSING ISSUES (OCCUPATIONAL CODE AND RULES)

QUESTION: What must be included in a real estate licensee's advertising?

ANSWER: Rule 329 states that all advertisements to buy, sell, exchange, rent, lease, or mortgage real estate or business opportunities must include the broker's name, as licensed, and either the broker's telephone number or street address. Salespersons may only advertise to sell property in their own name if the property is their personal residence.

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: How long should my office hold records?

ANSWER: Rule 313(5) requires that escrow account records be maintained for at least three years. It is possible, based on statutes of limitations for various causes of action, that litigation could be initiated up to six 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 seven years.

QUESTION: I am a real estate broker and have heard that other brokers are giving their salespersons permission to sign closing statements on their behalf. I have always understood that closing statements must be signed only by a broker or associate broker. Am I correct?

ANSWER: YES. Rule 311 states that *“the broker or associate broker who is involved at the closing of a real estate transaction shall furnish, or cause to be furnished, to the buyer and seller, a complete and detailed closing statement signed by the broker or associate broker showing each party all receipts and disbursements affecting that party.”* An associate broker may not delegate this responsibility to a salesperson, however, in the past, the Department has allowed an associate broker to review and sign a closing statement prior to closing.

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. Rule 315 states the following:

When buying or acquiring, directly or indirectly, an interest in property, a licensee shall disclose the fact of his or her licensure as a real estate broker, associate broker, or salesperson clearly, in writing, to the owner before the owner is asked to sign the purchase agreement.

Remember also that Rule 317 requires the express written permission of the seller if the buyer/licensee will be collecting a commission on the purchase. The easiest place to obtain this written consent is in the purchase agreement.

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. Rule 315 requires disclosure 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.

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. The Occupational Code states:

If a real estate salesperson is discharged or terminates employment with a real estate broker by giving the employer a written notice of termination, the real estate broker shall deliver or mail by certified mail to the department, within 5 days, the real estate salesperson's license MCL 339.2507.

If a salesperson or associate broker has departed, the original wall license needs to be returned to the Department. A broker cannot impose any conditions upon the release of the license.

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 applicable provision for Michigan brokers can be found in Rule 323(1), which states:

A broker shall maintain a place of business in this state which is an actual and established physical location from which the broker can and does conduct the broker's business and where the broker's books and records are maintained.

QUESTION: I am a REALTOR® representing a seller to whom I am related. I have spoken to other agents and they told me that I have to disclose this relationship to potential buyers. Are they correct?

ANSWER: NO. There is nothing in the Occupational Code or the rules that require agents to disclose that they are related to a seller or buyer whom they represent. When Rule 315 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 does not hold an "indirect" interest in a home by virtue of the fact that the home is owned by a relative of that licensee.

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 list agreement” prohibited by Rule 315(3), which provides:

A licensee shall not become a party to a net service provision agreement for an owner, seller, or buyer as a means of securing a real estate commission.

QUESTION: I am the REALTOR® salesperson who has hired a non-licensed assistant. I scheduled an open house but I will not be able to attend it due to a family emergency. Can I send my assistant in my place?

ANSWER: NO. The Department has put together a fairly specific list as to what unlicensed assistants can and cannot do. This list can be found at the website Michigan.gov/realestate in the “frequently asked questions-legal issues” section. The Department has stated that an unlicensed assistant may not independently hold open houses or staff booths at home shows or fairs.

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

ANSWER: NO, unless your listing agreement provides to the contrary. Rule 307(5) states:

A licensee shall not be subject to disciplinary action for failing to submit to the seller any additional offers to purchase which 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.

To avoid some type of breach of fiduciary duty claim from a seller-client, REALTORS® who do not wish to present additional offers are strongly encouraged to 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.

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. The Occupational Code states:

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(b).

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.

QUESTION: I am a Broker REALTOR® with an office in Grand Rapids. I would like to expand into the Lansing area. Do I need to have an associate broker supervise the agents on site at this location?

ANSWER: YES. The Occupational Code states: *“A branch office maintained in excess of 25 miles from the city limits in which the broker maintains a main office shall be under the personal, direct supervision of an associate broker.” MCL 339.2505(3).*

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

ANSWER: The requirements of R 339.22313 provide:

- (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;
- (5) Broker may deposit its own funds – not to exceed \$500 – so as to avoid bank charges. Broker must maintain a ledger for its own funds.

Trust account records must be maintained for at least 3 years.

More detailed recordkeeping requirements are contained in Rule 313.

QUESTION: I am a broker looking to recruit agents to my company. I plan on leaving flyers at a continuing education class. Is this permissible?

ANSWER: NO. Rule 603 (R339.22603) prohibits business-related solicitations during continuing education or pre-licensure courses.

QUESTION: I am a real estate broker and have a client who is disputing a property tax assessment. My client wants to hire me to prepare a market analysis to assist him in his assessment challenge. Is this something that I can legally do?

ANSWER: There is no requirement that a property owner present an appraisal to a board of review or, for that matter, to the Michigan Tax Tribunal ("MTT"). The MTT's rule requires a party pursuing a property tax appeal to file a "valuation disclosure" with the MTT. Rule 205.1252. There is no requirement that the valuation disclosure be prepared by a licensed appraiser. A licensed salesperson (as opposed to a broker) may not prepare a market analysis for this purpose.

11. LISTING AGREEMENTS AND BUYER AGENCY CONTRACTS

QUESTION: What is a “service provision agreement?”

ANSWER: A “service provision agreement” is the term that the Department uses to refer to both listing contracts and buyer agency contracts. [Rule 101(s).]

QUESTION: Is it true that as long as I mark “buyer’s agent” on an agency disclosure form, a buyer agency agreement isn’t necessary?

ANSWER: No. While the agency disclosure form is required by the Occupational Code, it does not offer REALTORS® all of the protections set forth in a typical buyer’s agency contract. A buyer’s agency contract, for example, should put the buyer on notice as to the limitations on the role of the buyer’s agent. Moreover, for designated agency firms, a buyer’s agency contract is not just a good idea, but is required in order to establish the designated agency relationship.

QUESTION: I am the listing agent on a listing that is about to expire. There is a binding 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 once the listing period expires. They should be advised, however, that if they list with another company, they will need to exclude the pending sale from the new listing (so they don’t find themselves inadvertently liable for two commissions).

QUESTION: I am the listing REALTOR®. The seller has told me that he will not entertain any offers under \$200,000. This request was formalized in the listing agreement. An agent has presented me with an offer for \$190,000, which I immediately rejected. The buyer’s agent told me I was obligated to present all offers. Is this true?

ANSWER: NO. It is true that Rule 307(2) states that “a licensee shall promptly deliver all written offers to purchase to the seller upon receipt.” However, a seller is certainly entitled to impose whatever requirements he chooses on offers to purchase. Accordingly, we think a reasonable interpretation of the rule requiring delivery of all offers would make such obligation subject to a seller’s written instructions to the contrary.

*LAST UPDATED January 5, 2012.

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 in listing agreements. Rule 305(2) provides:

A service provision agreement (i.e., listing/buyer agency agreement) shall 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.

12. LOTTERIES/RAFFLES/GAMES OF CHANCE

QUESTION: The property that I have listed has attracted very little interest. In order to create more interest I want to set up a raffle at the next open house whereby agents can drop off their business cards for the opportunity to win a \$500 gift certificate at a local retailer. Can I do this?

ANSWER: NO. The Occupational Code provides that: *“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.”* MCL 339.2511. It does not matter whether the prize is offered to the potential buyers or to their agents – both are prohibited.

QUESTION: I am a REALTOR® representing sellers in connection with the sale of their property. In order to generate some traffic, my sellers suggested that we give away instant lottery tickets to the first 20 people who come to an open house. Is this legal?

ANSWER: YES. There is no prohibition against the giving away instant lottery tickets to a predetermined number of prospective buyers. What you need to avoid, however, is conducting any raffles or other games of chance at open houses.

QUESTION: My Sellers are having a difficult time selling their home. They have asked whether they can sell their property by having a raffle. Is this legal?

ANSWER: NO. According to the Michigan lottery statute, only certain nonprofit organizations are eligible for a license to conduct bingos, millionaire parties, and raffles, and to sell charity game tickets.

13. PROPERTY MANAGEMENT/LEASES

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. The Occupational Code states:

A property management account may be an interest-bearing account or instrument, unless the property management employment contract provides to the contrary. The interest earned on a property management account shall be handled in accordance with the property management employment contract. MCL 339.2512c(3).

QUESTION: I am a REALTOR[®] that owns some investment property that I plan on leasing. I am concerned about prospective tenants that own pets and the damage that may result. I wish to protect myself by charging the usual deposit of 1 ½ months rent, plus an additional pet deposit. Is this allowed?

ANSWER: NO. Under Michigan law, the total security deposit amount may not exceed 1 ½ months rent. MCL 554.602. A landlord can charge increased rent to tenants who have pets.

QUESTION: I heard that any residential real estate lease that is longer than one-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 one year.

QUESTION: I am a REALTOR[®] representing an individual who owns rental properties. He prohibits pets in his apartments. A blind person who uses a guide dog has expressed interest in one of the apartments. Can the property owner 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 most likely be deemed to violate various laws/regulations prohibiting discrimination against disabled persons.

*LAST UPDATED January 5, 2012.

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 (MCL 339.2517) 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.

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 one and one-half 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 one and one-half month's rent. The last month's rent must be deposited with the security deposit and handled in accordance with the Security Deposit Act.

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

ANSWER: Landlords can restrict the number of persons that may occupy a home or apartment and, in fact, many municipalities license rental units for a particular number of occupants. While it is appropriate to restrict the number of occupants, a restriction should never refer to "large families" or a specific number of children.

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 may not refuse to let him or her make reasonable modifications to the 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.

14. REAL PROPERTY TAXES/TRANSFER TAXES

QUESTION: I have heard that a person who purchases a new home, but has not yet sold the prior home, can claim a principal residence (household) exemption on both homes. 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 her prior home for sale, but has not found a buyer. Can she claim a conditional principal residence exemption on her prior home?

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

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 transfer tax.

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. Is this permissible?

ANSWER: NO. A sale of more than 50% of the ownership interest in an entity will trigger the uncapping of the taxable value. (Such transaction will also be subject to state transfer tax.)

QUESTION: My client is purchasing a second home that he will be using as a primary residence. It is my understanding that he may claim a homestead exemption on the house he is leaving. Is this true?

ANSWER: YES, provided certain criteria are met.

The Michigan Department of Treasury allows for a Conditional Rescission of Principal Residence Exemption (PRE). A conditional rescission allows an owner to receive a PRE on both the owner's current property and on 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 claim a Conditional Rescission of Principal Residence Exemption.

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 Conditional Rescission of a Principal Residence Exemption (PRE) on my Michigan home?

ANSWER: NO. You can only claim the Conditional Rescission of a Principal Residence Exemption if both of the residential properties you own are in Michigan.

15. REFERRAL FEES AND RESPA ISSUES

QUESTION: I recently entered into an arrangement with the local school system whereby I will be making donations to the school system on behalf of the students whose parents are referred by the school system to me as clients. Is this acceptable?

ANSWER: NO. The Occupational Code states that a licensee is subject to the penalties set forth in Article 6 for *“sharing or paying a fee, commission, or valuable consideration to a person not licensed under this article”* MCL 339.2512(h). A licensee may not pay referral fees to an organization, even if the organization is a public or a charitable organization.

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. The Occupational Code states that a licensee is subject to the penalties set for in Article 6 for *“sharing or paying a fee, commission, or valuable consideration to a person not licensed under this article”* MCL 339.2512(h). 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.

QUESTION: An out-of-state broker has a buyer interested in purchasing one of my listings here in Michigan. He also wants to represent the prospective buyer in this transaction. It is my understanding that an out-of-state broker cannot negotiate on behalf of anyone without a Michigan license, but that I can pay the out-of-state broker a fee for the referral of his client. Am I correct?

ANSWER: YES, so long as the broker is actually licensed in another state and does not negotiate in Michigan. The Occupational Code states:

[A] licensed real estate broker may pay a commission to a licensed real estate broker of another state if the nonresident real estate broker does not conduct in this state a negotiation for which a commission is paid. MCL 339.2512(h).

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. The only exemption to the referral fee prohibition deals with paying existing tenants for the referral of other tenants. MCL 339.2512(b).

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

ANSWER: This is simply a matter of contract between the parties. REALTORS® should keep in mind, however, that RESPA prohibits a seller from requiring the buyer to purchase title insurance from a particular title company. This restriction would not apply in the typical situation where the seller is paying for the buyer's owner's policy. However, this prohibition would apply if the seller required the buyer to purchase the lender's policy from a particular title company.

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.

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. MCL 339.2512(h) prohibits such a payment to anyone who is not a licensed under the Occupational Code. (It would, however, be permissible to give the Detroit Red Wings tickets to the actual buyer of the home as the Department does not consider this to be a "referral fee.")

QUESTION: I am representing a Buyer in the purchase of a home. I have referred the Buyer to a moving company and I will be receiving a referral fee from this company. Is this a violation of RESPA?

ANSWER: NO. RESPA regulates “settlement services” related to the making of a federally related mortgage loan. Services that are provided after closing, such as moving services, are not considered “settlement services” as defined by RESPA.

16. TITLE ISSUES

QUESTION: I am a REALTOR® representing two brothers who are selling property they own as joint tenants. They both have wives. Do their wives have to sign the deed?

ANSWER: NO. A wife has no dower right in lands owned by her husband and another person as joint tenants.

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 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 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: 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. Your neighbor should consult an estate planning attorney prior to adding her daughter to the deed.

*LAST UPDATED January 5, 2012.

QUESTION: I am representing a married man in the purchase of a property. Do I also need his wife's signature in order to have a valid purchase agreement?

ANSWER: NO, the wife's signature is not required in order for a married man to purchase property; however, when he decides to sell this property, he will need his wife's signature since she will acquire a dower interest in the property by virtue of marriage.

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 one 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.

17. MISCELLANEOUS

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: 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: The answer to this question depends on the status 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: I represented a Buyer that qualified for the Federal Housing Tax Credit in a sale that occurred in 2010. Do they have to repay this credit?

ANSWER: NO, with one exception. If the home the Buyer purchased with the credit ceases to be the Buyer's primary residence within 36 months from the day of purchase then the Buyer must repay it in full. The full amount of the credit received becomes due on the tax return for the year the home ceased being the Buyer's principal residence. This answer does not apply to homes purchased in 2008 and some homes purchased in 2009. If any of your past clients has any questions pertaining to the repayment of this credit, have them consult with their tax preparer.

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*LAST UPDATED January 5, 2012.