# LEGAL ISSUES YOU HAVE TO UNDERSTAND TO STAY OUT OF REAL ESTATE BROKERAGE JAIL![*]

## A. COPING WITH INDEPENDENT CONTRACTOR STATUS/FAIR HOUSING LAWS

1. Although the N.J. Supreme Court decision on May 13, 2024, held that a real estate salesperson who has an independent contractor agreement with a broker is not an employee under the Wage Payment Law, the salesperson may still be treated as an employee in New Jersey for purposes of workers' compensation, the Whistleblower Act, wrongful termination and the Law Against Discrimination. **TRUE or FALSE?**

2. On July 31, 2024, the N.J. Appellate Division held that, under the Fair Housing Act, age-restricted communities can require that at least 80 percent of the owners must be 55 or older. **TRUE or FALSE?**

## B. FIGURING OUT THE NAR ANTITRUST LAWSUIT AND SETTLEMENT

3. A judgment was entered against NAR for $1.78 billion that likely would have been trebled for violating the antitrust law by conspiring to increase commissions for buyers' agents if NAR had not settled for $418 million. **TRUE or FALSE?**

4. NAR's settlement of the antitrust lawsuit prohibits MLSs covered by the settlement from posting offers of cooperating compensation by sellers and listing agents to buyers' agents but does not prohibit Realtors® from offering such compensation through most other marketing means. **TRUE or FALSE?**

5. Under the settlement, buyers' agents are required to have a written buyer agency agreement to represent a buyer that includes the compensation the buyer's agent will be paid in an amount that is objectively ascertainable when the agreement is signed before allowing an unrepresented buyer to tour the open house. **TRUE or FALSE?**

## C. UNDERSTANDING THE NEW JERSEY REAL ESTATE CONSUMER PROTECTION ENHANCEMENT ACT (the "ACT")

6. Although the Real Estate Commission regulations prohibit both a buyer and seller from paying a portion of a commission to a dual agent, this now is permitted under the Act, which went into effect August 1, 2024. **TRUE or FALSE?**

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[*] *Prepared by Greenbaum, Rowe, Smith & Davis LLP for Triple Play Convention on December 11, 2024.

7. The Act requires listing agents for residential properties to provide a seller property condition disclosure statement to a buyer before the buyer becomes obligated under any contract to buy the property as long as the buyer requests it. **TRUE or FALSE?**

8. When a brokerage firm represents the buyer and the seller, the Act provides that a broker can appoint a designated agent from the brokerage firm to represent the buyer and a different designated agent to represent the seller and each of the designated agents will owe full fiduciary duties to their respective principals. **TRUE or FALSE?**

## D. DEALING WITH FAIR CHANCE IN HOUSING ACT/LEAD-BASED PAINT LAWS

9. Under the New Jersey Fair Chance in Housing Act, a landlord and its agent are prohibited from requiring a potential tenant to complete any application that includes any inquiry or asking any applicant about the applicant's criminal record before making a conditional offer to the applicant. **TRUE or FALSE?**

10. There must be a lead-based paint inspection as of July 22, 2022, for one-family, two-family and multiple dwellings at tenant turnover, or within two years, for housing that has not been certified as lead free and was constructed before 1978, except for seasonal rentals of less than six months and multiple dwellings registered with the DCA for at least ten years. **TRUE or FALSE?**

# A

# Alerts

## NJ Supreme Court Holds That NJ Wage Payment Law is Inapplicable to Real Estate Salesperson Who Has Independent Contractor Agreement with Broker

*Greenbaum, Rowe, Smith & Davis LLP Client Alert*
5.21.24

**What You Need to Know**

- The New Jersey Supreme Court ruled that a written agreement between a real estate broker and a salesperson, in which the salesperson is defined as an independent contractor, determines the nature of that relationship and must be enforced by the courts.
- The Court held that a written independent contractor agreement excludes the salesperson from the New Jersey Wage Payment Law, which governs compensation paid to employees but does not apply to independent contractors.
- Following five years of litigation, the Court enforced the intent of the New Jersey Brokers Act in its ruling, rejecting the Appellate Division's 2023 finding in the matter.

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On May 13, 2024, the New Jersey Supreme Court issued its decision in a class action lawsuit known as *James Kennedy, II v. Weichert Co.*, conclusively finding that for the purpose of determining whether a real estate salesperson is an independent contractor or an employee under the New Jersey Wage Payment Law, the ABC Test, which is set forth in the New Jersey Unemployment Compensation Law (and which the Court previously held

in another case should be used to determine if a worker is an employee or independent contractor under the Wage Payment Law) cannot be applied to a real estate salesperson who enters into a written contract with the salesperson's broker as an independent contractor.

The ABC Test is a three-pronged analysis utilized to determine if a worker can be considered an independent contractor. Classification under the ABC test is critical to employers because they have greater responsibilities to employees as opposed to independent contractors.

The Supreme Court's decision, which follows five years of litigation in this case, preserves the well-established and long-standing practice of real estate salespersons contracting with brokers as independent contractors. It cements that the designation of a real estate salesperson as an employee or independent contractor in the required written agreement between a broker and a salesperson determines the nature of the relationship notwithstanding any other law, rule or regulation to the contrary.

Relying on the plain language of Section 3.2 of the New Jersey Brokers Act, the Supreme Court rejected the finding of the New Jersey Appellate Division that the designation in the written contract between a real estate salesperson and the salesperson's broker is just one of several factors to be considered when determining whether a real estate salesperson is an independent contractor or an employee. The Supreme Court recognized the plain and unambiguous language of Section 3.2 and enforced the statute's intent by finding that a written agreement entered into between a real estate salesperson and the salesperson's broker that states that the salesperson is an independent contractor must be enforced.

The Supreme Court's ruling in this case is significant, as a loss would have resulted in broad-based changes for New Jersey's real estate brokerage industry. Exemption from the New Jersey Wage Payment Law allows real estate

salespersons who contract as independent contractors to write-off many of their costs. This includes compensation and other benefits for staff who assist the salesperson, costs related to vehicles used for business purposes, depreciation of equipment, advertising costs, meals and travel related to brokerage activities, attendance at association conventions, continuing education expenses, certain insurance costs, subscriptions and dues, and licensing fees. Real estate salespersons working as independent contractors can also retain the benefit of working for themselves and setting the hours that they are available, including whether to work on a full-time, part-time, or occasional basis.

If the Supreme Court had deemed all New Jersey real estate salespersons to be "employees" for purposes of the New Jersey Wage Payment Law, real estate brokerages of all sizes would undoubtedly have laid off many full-time and part-time salespersons to avoid having to comply with the New Jersey Wage Payment Law. It would likely have not been worthwhile for brokerages to put part-time real estate salespersons on their payroll and pay their marketing fees, membership fees, and other costs that a broker typically pays upfront and then charges back to its salespersons as provided in the independent contractor agreements.

The authors of this Alert, **Barry S. Goodman** and **Conor J. Hennessey**, are partners in the firm's Litigation Department and Real Estate Brokerage Practice Group. Mr. Goodman successfully argued this case on behalf of amicus curiae New Jersey Realtors®, with Mr. Goodman of counsel and on the brief, and Mr. Hennessey on the brief. Please contact them with questions concerning this case or to discuss your specific business circumstances.

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New Jersey Statutes Annotated
Title 45. Professions and Occupations (Refs & Annos)
Subtitle 1. Professions and Occupations Regulated by State Boards of Registration and Examination
Chapter 15. Real Estate Brokers and Salesmen (Refs & Annos)
Article 1. Real Estate Brokers and Salesmen (Refs & Annos)

N.J.S.A. **45:15-3.2**

**45:15-3.2.** Written agreement; requirement before commencing a business activity; terms; contents

Effective: August 10, 2018
Currentness

a. No broker-salesperson or salesperson shall commence business activity for a broker and no broker shall authorize a broker-salesperson or salesperson to act on the broker's behalf until a written agreement, as provided in this subsection, has been signed by the broker and broker-salesperson or salesperson. Prior to an individual's commencement of business activity as a broker-salesperson or salesperson under the authority of a broker, the broker and broker-salesperson or salesperson shall both sign a written agreement which recites the terms under which the services of the broker-salesperson or salesperson have been retained by the broker.

b. Notwithstanding any provision of R.S.45:15-1 et seq. or any other law, rule, or regulation to the contrary, a business affiliation between a broker and a broker-salesperson or salesperson may be that of an employment relationship or the provision of services by an independent contractor. The nature of the business affiliation shall be defined in the written agreement required pursuant to subsection a. of this section.

**Credits**
L.2018, c. 71, § 3, eff. Aug. 10, 2018.

**Editors' Notes**

**ASSEMBLY REGULATED PROFESSIONS COMMITTEE STATEMENT**

**Senate Bill No. 430 (First Reprint)--L.2018, c. 71**

DATED: JUNE 11, 2018

The Assembly Regulated Professions Committee reports favorably Senate Bill No. 430 (1R).

This bill eliminates the referral agent license category, which was created pursuant to P.L.2009, c.238, and replaces it by codifying the current business practice of real estate brokers housing real estate salespersons in real estate referral companies. Under the provisions of the bill, the referral agent license category is replaced by a real estate salesperson licensed with a real estate referral company that is supervised by a licensed real estate broker whose real estate brokerage-related activities are limited to referring prospects for the sale, purchase, exchange, leasing or rental of real estate or an interest therein. The bill defines a real estate referral company as a business entity supervised by a real estate broker, separate and apart from any other business entity maintained by the real estate broker, for

the purpose of housing licensed salespersons that strictly engage in the referral of prospects for the sale, purchase, exchange, leasing or rental of real estate or an interest therein solely on behalf of the supervising real estate broker. The bill also expands the definition of real estate broker to include any person, firm, or corporation who supervises a real estate referral company.

The bill maintains operating limitations, which are currently in place for referral agents, for salespersons licensed with a real estate referral company, including:

(1) salespersons licensed with a real estate referral company will not be permitted to be simultaneously licensed as a real estate broker or broker-salesperson; and

(2) salespersons licensed with a real estate referral company will only refer prospects to the real estate broker supervising the real estate referral company through which the salesperson is licensed and will not be licensed with more than one real estate broker or real estate referral company at one time.

The bill provides that the license and renewal applications for a salesperson licensed with a real estate referral company must include a certification signed by the real estate broker confirming that the salesperson and broker have reviewed the restrictions placed on a salesperson licensed with a real estate referral company and that the salesperson acknowledges these restrictions. Furthermore, a salesperson licensed with a real estate referral company is not required to complete continuing education requirements as a condition of license renewal or under any other circumstances.

The bill stipulates that any person licensed as a referral agent through a real estate referral company will be deemed to be a salesperson licensed with a real estate referral company until the next renewal of licenses by the commission. All requirements set forth in the bill with respect to licensure and length of experience as a salesperson licensed with a real estate referral company who seeks to change licensure status must include licensure and length of experience as a referral agent licensed with a real estate referral company, as applicable.

The bill also predicates the disqualification of real estate licenses issued to certain individuals upon the basis of a conviction of any sex offense that would qualify the person for registration under "Megan's Law," or an equivalent statute of another state or jurisdiction. The bill also permits the New Jersey Real Estate Commission to place licensees on probation, suspend or revoke any real estate license, or impose penalties on a real estate licensee, for failure to notify the commission that the licensee has been convicted of any sex offense that would qualify the person for registration under "Megan's Law," or an equivalent statute of another state or jurisdiction. However, the bill stipulates that no provision of the laws concerning real estate licensees (R.S.45:15-1 et seq.), or any supplement thereto, will be deemed to supersede P.L.1968, c.282 (C.2A:168A-1 et seq.). That law provides that a person will not be disqualified or discriminated against by any licensing authority because of any conviction for a crime, unless N.J.S.2C:51-2 or section 7 of P.L.2009, c.53 (C.17:11C-57) is applicable, or unless the conviction relates adversely to the occupation, trade, vocation, profession, or business for which a license, certificate of authority, or qualification is sought.

The bill revises current law so that continuing education courses would be prohibited from being delivered through distance learning or a correspondence course. The bill also establishes two new core continuing education categories for real estate licensee safety, and financial literacy and planning.

The bill codifies two existing provisions of regulations promulgated by the New Jersey Real Estate Commission. First, the bill mandates that two hours of continuing education courses be taken in the topic of ethics. Second, the bill requires a written agreement defining the business affiliation between a broker and a broker-salesperson or salesperson and the terms under which the services of the broker-salesperson or salesperson have been retained by the broker. The bill provides that the business affiliation between a broker and a broker-salesperson or salesperson may be that of an employment relationship or independent contractor relationship.

Greenbaum Rowe Smith & Davis LLP
COUNSELORS AT LAW

# Alerts

## NJ Appellate Division Rules that Municipal Ordinance Restricting Ownership to Individuals Over 55 Violates Fair Housing Act and NJ Law Against Discrimination

*Greenbaum, Rowe, Smith & Davis LLP Client Alert*
8.7.24

**What You Need to Know**

- In a matter of first impression, the New Jersey Appellate Division recently ruled that a municipal ordinance restricting ownership in age-restricted communities to individuals over the age of 55 is invalid on the grounds that it violates, and is preempted by, the federal Fair Housing Act and the New Jersey Law Against Discrimination.
- The Court ruled that the ordinance improperly discriminates on the basis of familial status and improperly infringes on the well-established and constitutionally protected right to own and sell property.
- This is the first decision in the country to directly deal with the issue of whether age-restricted communities or municipalities can restrict ownership based upon the purchaser's age and shines a bright light on the need for age-restricted communities and municipalities that currently have such discriminatory age requirements to take immediate action to modify their rules or ordinances to eliminate those requirements.

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On July 31, 2024, the New Jersey Appellate Division issued its ruling in *New Jersey REALTORS® v. Township of Berkeley*, upholding a trial court's decision invalidating a

municipal ordinance requiring that the owners of units in age-restricted communities be 55 years of age or older. The Court ruled that the ordinance violated and was preempted by both the federal Fair Housing Act (FHA) and the New Jersey Law Against Discrimination (NJLAD). The Court also held that the requirement was arbitrary, capricious and unreasonable because it improperly infringed on the well-established and constitutionally protected right to own and sell property.

The dispute in this case dates back to March 29, 2022, when the Township of Berkeley enacted Ordinance No. 22-13-OA. The ordinance amended the Township's land use provisions to limit property ownership in age-restricted housing communities to individuals who are 55 and older. New Jersey REALTORS® filed a complaint against the Township seeking to have the ordinance declared invalid.

The trial court granted summary judgment in favor of New Jersey REALTORS®, finding that the ordinance violated the FHA and the NJLAD by restricting ownership and thus was preempted and invalid. The trial judge noted the significant "unintended consequences" of the ordinance, including preventing elderly owners from transferring title to their adult children for purposes of estate planning.

The Township appealed the trial court's decision, arguing that the ordinance was a valid exercise of the municipality's police powers and was neither invalidated nor preempted by the FHA or the NJLAD. The Appellate Division rejected the Township's arguments and upheld the trial court's decision.

Both the FHA and the NJLAD include a "housing for older persons" exemption to discrimination against families that allows age-restricted communities where 80% of the units have at least one resident who is 55 or older. There is no exemption in either law for age-restricted communities to require that owners be 55 or older.

Relying on the plain language of those statutes – as well as letters from the New Jersey Department of Community Affairs (DCA) to the Township and New Jersey REALTORS® and responses to comments by the DCA to inquiries made during the rule-making process for regulations implementing the NJLAD – the Appellate Division ruled that the Township cannot require, or permit, discrimination in the ownership of age-restricted housing by requiring that owners be 55 or older.

The Appellate Division also considered whether the ordinance was a valid exercise of the Township's police powers or an arbitrary, capricious and unreasonable act. The Court noted that although municipal ordinances are entitled to a presumption of validity, they must be necessary to address a legitimate public need. The Court determined that the Township's ordinance was arbitrary, capricious and unreasonable because it unreasonably and irrationally exceeded the public need and unreasonably infringed upon the well-established and constitutionally protected right to own and sell property.

The Appellate Division's decision in this matter is significant for numerous reasons. First, it protects the rights of adult children to purchase a home in their own name in an age-restricted community on behalf of parents who cannot afford to purchase the home, and then allow parents who are 55 or older to live there. Next, it similarly permits parents to transfer title to their home to their adult children for estate planning reasons. In addition, it allows a husband or wife who is under 55, whose spouse who was over 55 passes away, to continue to own their marital home instead of being forced to sell solely because they are under 55. Finally, the discriminatory age restriction on who could purchase a home in an age-restricted community limited the potential buyers for those homes and therefore artificially suppressed the value of homes in those communities, thereby damaging every homeowner in the community.

This is the first decision in the country to directly deal with the issue of whether age-restricted communities or municipalities can restrict ownership based upon the age of the purchaser. There are numerous age-restricted communities in New Jersey and around the country that have a requirement that owners be 55 or older, even though the law only allows them to require that 80% of the units be occupied by at least one person who is 55 or older. The decision sends a clear message to age-restricted communities, as well as to the municipalities where those communities are located, that they can no longer impose these discriminatory age restrictions on who can own property in those communities. As a result, any age-restricted communities and municipalities that have such discriminatory age requirements should immediately take steps to modify their rules or ordinances to eliminate this illegal requirement.

The authors of this Alert, **Barry S. Goodman** and **Conor J. Hennessey**, are partners in the firm's Litigation Department and Real Estate Brokerage Practice Group. Mr. Goodman successfully argued this case on behalf of New Jersey Realtors®, with Mr. Goodman of counsel and on the brief, and Mr. Hennessey on the brief. Please contact them with questions concerning this case or to discuss your specific business circumstances.

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# Discrimination Under Fair Housing Laws

BY **BARRY S. GOODMAN, ESQ.**
NEW JERSEY REALTORS® GENERAL COUNSEL

As a New Jersey Realtor®, it is important to stop and consider your own possible biases and make sure that you do not discriminate against anyone who is protected under fair housing laws. For example, can you advertise that a landlord does not accept Section 8 tenants? Should you use credit reports and background checks to screen tenants? Is it appropriate to show an Orthodox Jewish buyer homes in what many consider to be an Orthodox Jewish community?

Discrimination, whether intentional or unintentional, comes in many forms. Let's talk about who is protected and who is not protected and what can be done under the New Jersey Law Against Discrimination ("LAD") and federal Fair Housing Act ("FHA").

## Law Against Discrimination

### What groups are protected under LAD?

In the real estate context, LAD prohibits landlords, sellers and real estate licensees from discriminating against people based upon race, creed, color, national origin, ancestry, marital status, civil union status, domestic partnership status, familial status, pregnancy or breastfeeding, sex, gender identity or affection, affectional or sexual orientation, disability, liability for service in the Armed Forces of the United States, nationality or source of lawful income used for a rental or mortgage payment.

### What is a source of lawful income?

As an example, although many landlords like to rent to tenants who are receiving Section 8 funds because they are comfortable that the rent will be paid, some landlords for some reason do not want to rent to Section 8 tenants. However, since Section 8 funds are a lawful source of income, a landlord cannot refuse to rent to a tenant solely because the tenant is receiving Section 8 funds. As a result, if you are representing a landlord, you cannot state or imply to a tenant, whether in advertising or otherwise, that the landlord does not want to rent to a tenant who is receiving Section 8 funds.

## Fair Housing Act

### What groups are protected under the FHA?

The FHA provides that it is unlawful to discriminate in the sale or leasing of dwellings based on race, color, religion, sex, familial status, national origin or disability.

### Are there exceptions to the FHA?

There are. The FHA generally does not apply to single-family houses that are sold or rented by an owner who does not own more than three-single family houses, does not reside in the house and was not the most recent resident prior to the sale. However, it applies if such an owner retains a real estate broker.

There also is the "Mrs. Murphy" exception if the owner lives in the building and there are no more than four families living there. In addition, private clubs and religious organizations typically are exempt, as are governmental maximum occupancy requirements.

One final exception is for housing for older persons, which is an exception from "familial status" protection and applies to housing developments for persons who are 55 years of age or older where 80 percent of the occupied units are occupied by at least one person who is 55 or older and for developments solely occupied by persons 62 years of age or older.

### This only applies to intentional discrimination, right?

Not really. The United States Supreme Court decided that the FHA not only can be violated if there is intentional discrimination but also if there is a "disparate impact" on one of the protected groups.

### What does disparate impact mean?

Let me give you an example. If a landlord directs you not to rent to anyone who has been convicted of a crime, that may seem to be an evenhanded approach to avoid any

discrimination. However, since African Americans are jailed at a rate nearly three times the general population, there would be a disproportionate impact on African Americans if all people who had a criminal record were excluded from consideration. Whether or not you use criminal background checks in evaluating a tenant, you therefore have to be very careful not to rely upon any one basis when you are deciding who is a viable tenant and should rely upon as many different criteria as you can.

### Could a licensee be charged with discrimination by showing homes to a family in a neighborhood where people from a similar background live?

Yes. That is known as steering and is prohibited under LAD and the FHA. You always should focus on the property and the physical amenities in the community, such as the schools, shopping, and proximity to highways and other transportation, not the people who live in the community, when recommending homes for a buyer.

### What about tenants who want to have an assistance animal live with them but the landlord has a strict no pet policy? How is that handled?

LAD and the FHA require that a landlord allow a tenant to have an assistance animal regardless of the landlord's policy concerning pets. An assistance animal can be a service animal, which must be trained to provide a service, like a seeing eye dog, or can be an animal that will do work, perform tasks, provide assistance and/or therapeutic emotional support for individuals with disabilities, which typically are called support animals. An animal that does not qualify as an assistance animal is subject to the landlord's policy concerning pets, including a no pet policy. A landlord may not charge a fee or deposit for an assistance animal but may charge the tenant for any damages that are caused by the assistance animal.

### Who enforces all of this?

In New Jersey, the New Jersey Division on Civil Rights enforces it and, on the federal level, the United States Department of Housing and Urban Development enforces it. Not only can the penalties they impose be severe but the New Jersey Real Estate Commission also could sanction you for violating LAD or the FHA, including taking away your real estate brokerage license.

### What advice can you give to licensees to adhere to these policies?

The most important suggestion I can give to you is that you should be very careful what you say and do. Your words and conduct have an impact on people, many of whom have suffered discrimination in their lives and may take your comments or what you do in the wrong way. Of course, any time a landlord or seller indicates a preference to deal with a person in any protected group different than a person in another group, let them know that you are not permitted to do that. If they persist, immediately get advice about how to handle the situation. ■

# DON'T FALL IN LOVE WITH LOVE LETTERS

*By: Barry S. Goodman, Esq.*[*]

It's a hot market and there are multiple offers on properties. What can your buyer do to make your buyer's offer stand out? Should your buyer submit a so-called "love letter" to the seller with personal information in order to make your buyer's offer more compelling? The seller wants as much information as possible before deciding which offer to accept. Should the seller consider love letters from buyers? What policy should a broker have regarding love letters?

Love letters have become very common so that a buyer can try to convince a seller to accept the buyer's offer based upon personalizing the offer. The buyer may include that the buyer can picture the buyer's children playing in the backyard. The buyer might indicate that the house is perfect because it is so close to a church, synagogue or mosque. The buyer also might indicate that she and her wife can see themselves relaxing in the family room.

Although love letters seem harmless on the surface, it almost is inevitable that such love letters will include personal information that will allow the seller to determine if the buyer is in a class that is protected under the Fair Housing Act ("FHA") or the New Jersey Law Against Discrimination ("LAD"). Although the seller may not consciously discriminate against any potential buyer based upon such information, there always is the possibility that this information may affect the seller's decision not to sell the property to a particular buyer. Of course, once the buyer has invested the emotional energy needed to provide a compelling love letter, the buyer has a vested interest in that home. If the buyer's offer is not accepted, the buyer may feel that it was because the seller was discriminating against the buyer because of the buyer's protected status and therefore file a discrimination complaint against the seller. The buyer undoubtedly will include the broker in the complaint.

Under the FHA, it is unlawful to discriminate in the sale or leasing of dwellings based on race, color, religion, sex, familiar status, national origin or disability. However, the FHA generally does not apply to single-family houses that are sold or rented by an owner who does not own more than three single-family houses, does not reside in the house and was not the most recent resident prior to the sale. However, the FHA does apply if such an owner retains a real estate broker.

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[*] Barry S. Goodman, Esq., a partner in the law firm of Greenbaum, Rowe, Smith & Davis LLP, is General Counsel for the New Jersey REALTORS®. He focuses his practice on real estate brokerage and other real estate-related matters, as well as business matters, corporate shareholders and partnership disputes, and municipal practice.

The LAD protects more groups against discrimination. It prohibits landlords, sellers and real estate licensees from discriminating against people based upon race, creed, color, national origin, ancestry, marital status, civil union status, domestic partnership status, familial status, pregnancy or breastfeeding, sex, gender identity or affection, affectional or sexual orientation, disability, liability for service in the Armed Forces of the United States, nationality or source of lawful income used for a rental or mortgage payment. However, the LAD has the same exception as the FHA for a single-family house that is sold or rented by an owner, except that the LAD's exception only is for an owner who does not own more than two single-family houses.

As a result of this potential for discrimination that could arise from love letters, the National Association of REALTORS® has provided the following best practices to protect you and your clients from fair housing liability:

1. Educate your clients about the fair housing laws and the pitfalls of buyer love letters.
2. Inform your clients that you will not deliver buyer love letters and advise others that no buyer love letters will be accepted as part of the MLS listing.
3. Remind your clients that their decision to accept or reject an offer should be based on objective criteria only.
4. If your client insists on drafting a buyer love letter, do not help your client draft or deliver it.
5. Avoid reading any love letters drafted or received by your client.
6. Document all offers received and the seller's objective reason for accepting an offer.

It therefore is strongly recommended that brokers develop an officewide policy that they will not accept buyers' love letters on behalf of a seller and that they will advise sellers not to consider love letters. A candid discussion should be held with sellers during the listing presentation and buyers when you begin working with them so that they know you will not accept or participate in drafting love letters because of the potential for discrimination that could result from a love letter.

# B

# NAR SETTLEMENT TIMELINE*

*As of June 24, 2024. Please refer to the settlement agreement for detailed information on deadlines.

**NAR encouraged all MLSs to implement the practice changes by August 17, 2024. All MLSs are required to implement the practice changes by September 16, 2024

**MAR 22**

NAR filed Notice of Settlement / withdrew pending motions and sought to stay litigation

**APR 23**

Preliminary Approval granted

**JUNE 18**

- Deadline for REALTOR® MLSs to execute Appendix B (to be included as a Released Party)
- Deadline for brokerages to execute Appendix C (to be included as a Released Party)
- Deadline for non-REALTOR® MLSs to execute Appendix D (to be included as a Released Party)

**~SEP**

Anticipated Motion in Support of Final Approval

**NOV 26**

Hearing for Final Approval


**MAR 15**

Settlement agreement signed

**APR 19**

Plaintiffs filed Motion for Preliminary Approval

**AUG 17**

- Plaintiffs issued class notice
- New NAR MLS Policy takes effect to implement practice changes
- Deadline for REALTOR® MLSs to implement policy changes pursuant to mandatory NAR policy**

**SEP 16**

Deadline for REALTOR® MLSs and opting-in non-REALTOR® MLSs to implement practice changes to be a Released Party under the settlement agreement

NATIONAL ASSOCIATION OF REALTORS®

# NAR SETTLEMENT FAQS

**Last Updated: September 5, 2024**

## TABLE OF CONTENTS



***Note: New or revised FAQs are noted with the date added or updated.***

# CHANGES IN RESIDENTIAL REAL ESTATE—QUICKSTART FAQ FOR CONSUMERS

*The following questions will help homebuyers and home sellers better understand the recent practice changes in residential real estate and what the changes mean for them. While these are intended to provide an overview, real estate transactions can take many forms. Additional detailed information can be found in subsequent FAQ sections.*

## Overview

1. In brief, what are the practice changes?
   - There are several practice changes following NAR's settlement agreement resolving claims brought by home sellers related to broker compensation.
   - Consumers can broadly think about the changes in two categories:
     - First, written buyer agreements are now required and must meet certain criteria. Buyers and their agents will need to reach an agreement regarding how the agent will be compensated for their services and put it in writing prior to touring a home. More details on those agreements are below.
     - Second, offers of compensation (when a seller or a seller's agent shares compensation with a buyer's agent) can no longer be shared on Multiple Listing Services (MLS). MLSs are local marketplaces used by both buyer and seller agents to share information about homes for sale. Offers of compensation are still an option but must be communicated off-MLS if a seller chooses to make an offer available.
   - What's important to know is these practice changes provide consumers on both sides of a residential transaction with additional choice and transparency. *(Added 9/5/24)*

2. When did these changes go into effect?
   - These changes went into effect on August 17, 2024. *(Added 9/5/24)*

3. Will I save money as a homebuyer or home seller because of these changes?
   - Nothing in NAR's policies (including the MLS Model Rule) increased costs for buyers or sellers, as NAR maintained throughout the litigation.
   - The practice changes preserve the choices consumers have regarding real estate services and compensation. *(Added 9/5/24)*

## For Home Sellers

4. How do the practice changes impact home sellers?
   - The practice changes empower consumers with additional choice and transparency when selling a home.
   - As a seller, you still have the choice of offering compensation to buyer agents. You may consider doing this as a way of marketing your home or making your listing more attractive to buyers.
   - Your agent must clearly disclose to you and obtain your approval for any payment or offer of payment that a listing agent will make to another agent acting for buyers.

- This disclosure must be made to you in writing in advance of any payment or agreement to pay another agent acting for buyers and must specify the payment amount or rate.
- If you choose to approve an offer of compensation, there are changes to how it can be communicated—your agent cannot include it on an MLS.
- Your agent can advertise your listing via off-MLS platforms such as social media, flyers, and websites.
- You as the seller can still offer buyer concessions on an MLS (for example, concessions for buyer closing costs).
- Compensation for your agent remains fully negotiable and is not set by law, and if your agent is a REALTOR®, they must abide by the REALTOR® Code of Ethics and have clear and transparent discussions with you about compensation.
- When finding an agent to work with, ask questions about compensation and understand what services you are receiving.
- Agents who are REALTORS® are here to help you navigate the home selling process and are ethically obligated to work in your best interest. *(Added 9/5/24)*

5. What is the value of an MLS?
   - MLSs have always provided significant value beyond communicating offers of compensation.
   - MLSs:
     - Enable comprehensive marketplaces: Local agents are incentivized to participate because it allows them to access an inventory of and widely advertise homes for sale.
     - Ensure reliable data access: MLSs are hubs of trusted, verified information where all participants have equitable access.
     - Create connections: Local MLSs create the largest opportunity for connections between real estate agents with properties to sell and those with consumers looking to buy.
     - Advance small business: Compiling housing information that is accessible to all businesses, in one place, allows smaller real estate brokerages to compete with larger ones.
     - Encourage entrepreneurship: Because of lower barriers to entry enabled by local MLSs, new market entrants can advance technology, consumer service, and other innovations. *(Added 9/5/24)*

6. Why would a seller choose to offer compensation to a buyer agent?
   - Offers of compensation can benefit both buyers and sellers.
   - For many prospective homebuyers, offers of compensation made by sellers help to reduce up-front costs, making professional representation in their home search more accessible.
   - This is particularly true for low-income and first-time homebuyers, as well as homebuyers from underserved communities.
   - Sellers also reap the benefits, as offers of compensation increase the potential buyer pool for their home and the likelihood that they will receive the best offer available for their property. *(Added 9/5/24)*

7. How will offers of compensation be communicated if agents can't use MLSs? Doesn't this just make agent compensation less transparent?
   - Offers of compensation could continue to be an option consumers can pursue off-MLS through negotiation and consultation with real estate professionals. And

sellers can offer buyer concessions on an MLS (for example—concessions that can be used for buyer closing costs).
- The settlement does not change the ethical duties that NAR members owe
- their clients.
- Agents who are REALTORS® still must abide by their duties under the Code of Ethics.
- Agents who are REALTORS® are always required to protect and promote the interests of their clients and treat all parties in a transaction honestly.
- Agents who are REALTORS® will continue to use their skill, care, and diligence to protect the interests of their clients.
- NAR remains dedicated to promoting transparency in the marketplace and working to ensure that consumers have access to comprehensive, equitable, transparent, and reliable property information, as well as the ability to have affordable professional representation in their real estate transactions. *(Added 9/5/24)*

## For Homebuyers

8. How do the practice changes impact homebuyers?
   - The settlement empowers consumers with additional choice and transparency when buying a home.
   - As part of the new practice changes, you will need to sign a written agreement with your agent before touring a home.
   - Before signing this agreement, you should ensure it reflects the terms you have negotiated with your agent and that you understand exactly what services and value will be provided, and for how much.
   - The buyer agreement must include four components concerning compensation:
     - A specific and conspicuous disclosure of the amount or rate of compensation the agent will receive or how this amount will be determined.
     - Compensation that is objective (e.g., $0, X flat fee, X percent, X hourly rate)—and not open-ended (e.g., cannot be "buyer broker compensation shall be whatever the amount the seller is offering to the buyer").
     - A term that prohibits the agent from receiving compensation for brokerage services from any source that exceeds the amount or rate agreed to in the agreement with the buyer; and,
     - A conspicuous statement that agent fees and commissions are fully negotiable and not set by law.
   - Written agreements apply to both in-person and live virtual home tours.
   - You do not need a written agreement if you are just speaking to an agent at an open house or asking them about their services.
   - The seller may agree to offer compensation to your agent. This practice is permitted but the offer cannot be shared on an MLS.
   - You can still accept concessions from the seller, such as offers to pay your closing costs.
   - Compensation for your agent remains fully negotiable and is not set by law, and if your agent is a REALTOR®, they must abide by the REALTOR® Code of Ethics and have clear and transparent discussions with you about compensation.
   - When finding an agent to work with, ask questions about compensation and understand what services you are receiving.
   - Agents who are REALTORS® are here to help you navigate the homebuying process and are ethically obligated to work in your best interest. *(Added 9/5/24)*

9. Does the settlement change access to mortgages for buyers?
   - No.
   - Under the settlement, buyers still have the same options when it comes to compensating their agents. That is, the listing agent can compensate the buyer agent, the seller can compensate the buyer agent, or the buyer can compensate their agent directly.
   - Buyers will still be able to get financing from Fannie Mae, Freddie Mac, and the FHA under these scenarios.
   - The FHA confirmed this in a letter after NAR sought to affirm our interpretation of existing guidance.
   - Likewise, Fannie Mae and Freddie Mac published explicit confirmations that commissions for buyer agents paid by the seller would not count against the buyer.
   - However, none of these agencies will allow the buyer to finance a commission into the mortgage at this time. *(Updated 7/8/24)*

10. What about VA loans and the prohibition on buyers paying commissions directly?
   - The Department of Veterans Affairs (VA) recently announced that it has temporarily lifted its ban on buyers paying for real estate agent representation. Veteran buyers now have more options, ensuring they can have professional access to representation in their home buying process. The VA's policy took effect on August 10, 2024.
   - The VA is evaluating the need for a formal rulemaking process on this issue.
   - NAR has strongly advocated for this change as we want to ensure veterans maintain access to the VA home loan program, which has been a significant tool in helping service members achieve the American dream of homeownership.
   - NAR recently submitted a letter to the VA urging them to make this revision to their policies. *(Updated 7/8/24)*

11. Can real estate commissions be financed?
   - No. Financing commissions is not feasible under the current structure of the residential mortgage finance system, and there is no clear short-term legislative or regulatory fix.
   - Banks would treat such a loan as a personal loan that would have higher rates and limit access to those loans to borrowers with better credit profiles. That personal loan would add to the buyers' liabilities and make it harder to qualify for the mortgage they are seeking.
   - Fannie Mae, Freddie Mac, and the FHA do not allow commissions to be added to the balance of the mortgage.
   - Several rules that make up the foundation of mortgage finance would need to be changed by the regulators and Congress to make this change.

12. What is NAR doing to promote access to financing for home buyers?
   - NAR is working with our partners in the lending community to gain greater clarity on guidance from the agencies and to maintain the steady flow of funding for closing home purchases.
   - NAR also continues to advocate for policies that could benefit potential homebuyers and expand opportunities for Americans to achieve homeownership.

13. Do I have to have an agent to purchase a property?
   - As always, the choice of whether to use a real estate professional is up to the buyer.

- However, buying a home is one of the largest financial transactions most people will ever undertake. Agents who are REALTORS® are a trusted source of advice and stand ready to help you navigate your homebuying journey and make the choices that work best for you.
- Agents who are REALTORS® can use their extensive experience to navigate difficult negotiations, write the best offer possible, and help buyers avoid common mistakes—all to ultimately help successfully close a transaction, saving you money and time.
- Agents who are REALTORS® are ethically obligated to work in your best interest and must abide by the REALTOR® Code of Ethics.
- For more information on how a REALTOR® can support your homebuying experience, watch clips from real homebuyers on facts.realtor. *(Added 9/5/24)*

14. Does this mean buyer agents are working for free?
    - No. Under the settlement, buyers still have the same options when it comes to compensating their agents. Compensation will continue to be negotiable and should always be negotiated between agents and the consumers they represent.
    - The types of compensation available for buyer agents will continue to take multiple forms, including but not limited to:
        - Fixed-fee commission paid directly by consumers
        - Concession from the seller
        - Portion of the listing agent's compensation *(Updated 9/5/24)*

15. How will buyer agents get paid now?
    - The types of compensation available for buyer brokers will continue to take multiple forms, depending on broker-consumer negotiations, including but not limited to:
        - Fixed-fee commission paid directly by consumers
        - Concession from the seller
        - Portion of the listing agent's compensation
        - Compensation will continue to be negotiable and should always be negotiated between agents and the consumers they serve.
    - Offers of compensation will continue to be an option consumers can pursue off-MLS through negotiation and consultation with real estate professionals. *(Updated 9/5/24)*

16. Can a buyer request the listing agent pay compensation to the buyer agent?
    - Yes.

17. Can buyers and buyer agents rely on an offer of compensation that was on an MLS prior to August 17?
    - If the sales contract was executed before the MLS policy change date on August 17, 2024, the buyer agent can rely upon the offer of compensation even if closing occurs after the date of the policy change.
    - If a sales contract was not executed before August 17, 2024, the offer on an MLS will not be valid and buyers and buyer agents may wish to protect themselves in writing with the listing agent or seller through a broker agreement or by including the offer of compensation in the sales contract.
    - MLSs may have updated their rules prior to August 17, 2024 and the same principles would apply to the relevant date. *(Updated 9/5/24)*

# CHANGES IN RESIDENTIAL REAL ESTATE—DETAILED FAQ FOR REAL ESTATE PROFESSIONALS

## SETTLEMENT OVERVIEW

### Key Settlement Details

18. Why did NAR enter into this settlement?
    - From the beginning of this litigation, we had two goals:
        - Secure a release of liability for as many of our members, associations, and MLSs as we could; and
        - Preserve the choices consumers have regarding real estate services and compensation.
    - This proposed settlement achieves both of those goals and provides a path for us to move forward and continue our work to preserve, protect, and advance the right to real property for all.

19. What are the key terms of the agreement?
    - Release of liability: The agreement, if granted final approval by the court, would release NAR, over one million NAR members, all state/territorial and local REALTOR® associations, all REALTOR® MLSs, and all brokerages with an NAR member as principal whose residential transaction volume in 2022 was $2 billion or below from liability for the types of claims brought in these cases on behalf of home sellers related to broker commissions.
        - NAR fought to include all members in the release and was able to ensure more than one million members are included.
        - Despite NAR's efforts, agents affiliated with HomeServices of America and its related companies are not released under NAR's settlement, nor are employees of the remaining corporate defendants named in the cases covered by this settlement. Many defendants have reached separate settlement agreements.
        - The agreement also provided a mechanism for nearly all brokerage entities that had a residential transaction volume in 2022 that exceeded $2 billion, and MLSs not wholly owned by REALTOR® associations to obtain releases.
        - Individual members and all brokerages with an NAR member as principal whose residential transaction volume in 2022 was $2 billion or below are released by the agreement and not required to opt in.
    - Compensation offers no longer allowed on MLSs: NAR has agreed to put in place a new rule prohibiting offers of compensation on an MLS. Offers of compensation could continue to be an option consumers can pursue off-MLS through negotiation and consultation with real estate professionals. And sellers can offer buyer concessions on an MLS (for example—concessions for buyer closing costs). This change went into effect on August 17, 2024.
    - Written agreements for MLS Participants acting for buyers: While NAR has been advocating for the use of written agreements for years, in this settlement we have agreed to require MLS Participants working with buyers to enter into written agreements with their buyers before touring a home. This change went into effect on August 17, 2024.
    - Settlement payment: NAR would pay $418 million over approximately four years. This is a substantial sum, and it will be incumbent on NAR to use our remaining

resources in the most effective way possible to continue delivering on our core mission. NAR will not change membership dues for 2024 or 2025 because of this payment.

- NAR continues to deny any wrongdoing: NAR has long maintained—and we continue to believe—that cooperative compensation and NAR's current policies are good things that benefit buyers and sellers. They promote access to property ownership, particularly for lower- and middle-income buyers who can have a difficult-enough time saving for a down payment. With this settlement, NAR is confident it and its members can still achieve all those goals. *(Updated 9/5/24)*

20. Did NAR admit that plaintiffs' allegations are true by settling?
    - No. The settlement makes clear that NAR continues to deny any wrongdoing in connection with the MLS cooperative compensation model rule (MLS Model Rule).
    - It has always been NAR's goal to resolve this litigation in a way that preserves consumer choice and protects our members to the greatest extent possible. This settlement achieves both of those goals.
    - This agreement significantly reduces liability nationwide for over one million NAR members, all state/territorial and local REALTOR® associations, REALTOR® MLSs, and all brokerages with an NAR member as principal that had a residential transaction volume in 2022 of $2 billion or below. Ultimately, continuing to litigate would have hurt members and their small businesses.
    - The agreement provides a path forward for our industry and NAR. *(Updated 9/5/24)*

21. Why was prohibiting the publication of compensation offers on an MLS part of the settlement?
    - While NAR has long maintained—and we continue to believe—that cooperative compensation and NAR's current policies are good things that benefit buyers and sellers, we also acknowledge that continuing to litigate would have hurt members and their small businesses, so have agreed to put in place a new rule prohibiting offers of compensation on an MLS.
    - This is consistent with NAR's long-maintained position that prohibiting all offers of cooperative compensation entirely would harm consumers and be inconsistent with real estate laws in the many states that authorize them.
    - We believe this agreement provides a path forward for our industry and NAR

22. What influenced NAR's decision to choose the legal path it did for the settlement?
    - NAR explored settling throughout the litigation and carefully considered all legal options. These included:
        - Appealing: A win on appeal would only have addressed the verdict in the Sitzer-Burnett case (not any of the copycat cases) and may only have resulted in a new jury trial, leaving members and consumers with continued uncertainty.
        - Chapter 11 reorganization: In theory, Chapter 11 would have enabled NAR to eliminate its own liabilities while pursuing an appeal of the Sitzer-Burnett verdict. But we believe that would have left members with continued uncertainty and potential liability risk. Chapter 11 would also have paused the litigation against NAR but not the other defendants in the cooperative compensation cases.
    - Ultimately, while NAR continues to believe that it is not liable for the home seller claims related to broker commissions and that we have strong arguments

challenging the Sitzer-Burnett verdict, we decided to reach this settlement to put claims to rest for over one million NAR members and other parties who would be released under the agreement. *(Updated 8//24)*

23. How quickly do you expect the settlement to be reviewed and/or approved by the court?
    - The court granted preliminary approval on April 24, 2024.
    - The practice changes set forth in the settlement agreement took effect on August 17, 2024. Class notice was also issued on August 17, 2024.
    - The settlement is subject to final court approval. The final approval hearing is scheduled to take place on November 26, 2024.
    - There are strong grounds for the court to approve this settlement because it is in the best interests of all parties and class members. *(Updated 9/5/24)*

## Who Is Covered

24. How do I know if I'm covered by the settlement?
    - If you are an NAR member as of the date of the class notice (August 17, 2024), you are covered by the settlement unless you are an employee of a remaining defendant (at the time of the settlement) in the *Gibson/Umpa* litigations (many of which have announced their own settlements) or you are associated with HomeServices of America or one of its affiliates. HomeServices of America announced its own settlement on April 26, 2024.
    - Individual NAR members and their brokerages with 2022 total transaction volume for residential home sales below $2 billion do not need to take any action to be covered by the settlement. *(Updated 9/5/24)*

25. Will I be covered by the settlement if I became a member shortly before the date of class notice? What if I dropped my membership shortly before the date of class notice?
    - To be covered by the settlement, you must be an NAR member as of the date of class notice (August 17, 2024).
    - You will not be covered by the settlement—regardless of prior membership length—if you resign your membership, if your membership is terminated, or if your membership becomes inactive prior to the date of class notice. *(Updated 9/5/24)*

26. Brokerages with an NAR member as principal whose residential transaction volume in 2022 was $2+ billion are not covered by the release. What about members affiliated with those brokerages?
    - Except for members affiliated with HomeServices of America and employees of the remaining corporate defendants named in the cases covered by this settlement, members affiliated with brokerages with an NAR member as principal whose transaction volume in 2022 was $2+ billion are covered by the release.
    - Individual members and all brokerages with an NAR member as principal with a residential transaction volume in 2022 of $2 billion or below are released from liability in the proposed settlement agreement. No further affirmative steps are required.

27. How does the settlement affect corporate brokerages and any brokerages that are carved out from the release?
    - The agreement provided a mechanism for nearly all brokerage entities that had a residential transaction volume in 2022 that exceeded $2 billion, and MLSs not wholly owned by REALTOR® associations to obtain releases efficiently if they choose to use it.
    - While we would have preferred to protect all industry players, ultimately NAR could not persuade the plaintiffs to include the largest brokerages, particularly given the significant settlements that other corporate defendants have already reached.
    - Individual members and all brokerages with an NAR member as principal whose residential transaction volume in 2022 was $2 billion or below are released from liability in the proposed settlement agreement. No further affirmative steps were required.

28. Why does the release of liability carve out some co-defendants and some of their affiliated agents?
    - NAR fought to include all members in the release and was able to ensure more than one million members were included.
    - Despite NAR's efforts, agents affiliated with HomeServices of America and its related companies are not released under the settlement, nor are employees of other corporate defendants named in the cases covered by this settlement (many of which have announced their own settlements). HomeServices of America announced its own settlement on April 26, 2024.
    - Plaintiffs would not agree to include these members and employees of the corporate defendants in the NAR's release.
    - NAR secured in the agreement a mechanism for nearly all brokerage entities that had a residential transaction volume in 2022 that exceeded $2 billion, and MLSs not wholly owned by REALTOR® associations to obtain releases efficiently if they chose to use it. *(Updated 9/5/24)*

29. How does the settlement affect state/territorial and local associations?
    - State/territorial and local associations did not need to opt-in to the settlement agreement. The agreement, if granted final approval, would release all state/territorial and local REALTOR® associations from liability for the types of claims brought in these cases on behalf of home sellers related to broker commissions.
    - State/territorial and local associations are required to comply with the practice changes agreed to in the settlement. *(Updated 9/5/24)*

30. Are institutes, societies, and councils affiliated with NAR included in the release in the settlement agreement?
    - Yes.

31. Does the fact that the release does not cover everybody mean that NAR has left large corporate brokerages and affiliated agents to fend for themselves?
    - Absolutely not. NAR fought to include as many people and companies in the release as possible and achieved a release for everyone it could. Over one million members are covered, as are tens of thousands of REALTOR® businesses.
    - However, plaintiffs would not agree to include everyone.

- Our options included reaching a settlement or continuing to appeal the Sitzer-Burnett verdict and litigate the related cases. The latter could have led to our filing for Chapter 11 protection, leaving all members, associations, MLSs, and brokerages exposed.
- The scope of the release makes clear that NAR looked out for its members.
- Those that are not released—the largest companies in our industry—were provided a mechanism to opt-in. Additionally, agents at brokerages that are not covered are among the more than one million members released as individuals. *(Updated 9/5/24)*

32. What is required for brokerages with residential transaction volume in 2022 that exceeded $2 billion to obtain releases?
    - Brokerages with residential transaction volume in excess of $2 billion are required to:
        - Have a Member as Principal on the Class Notice Date (August 17, 2024);
        - Have a Principal who was a Participant in any MLS at any time during the time period covered by the Settlement Class;
        - Have opted-in to the proposed Settlement Agreement by June 18, 2024 (and comply with the terms of the relevant opt-in agreement);
        - Comply with the relevant practice changes for five (5) years after the final judgment approving the proposed Settlement Agreement and the time for appeal of such judgment has run; and
        - Do not assert any claims against NAR, Member Boards, or REALTOR® MLSs based on any of the practice changes or on facts underlying the broker commission litigation or for seven (7) years after the Class Notice Date.
    - You should consult the Settlement Agreement for the controlling text of the requirements and consult your legal counsel with questions. (Updated *9/5/24*)

33. What is required for non-REALTOR® MLSs to obtain releases?
    - Non-REALTOR® MLSs are required to:
        - Have opted-in to the proposed Settlement Agreement by June 18, 2024 (and comply with the terms of the relevant opt-in agreement);
        - Implement the relevant practice changes beginning no later than thirty (30) days after the Class Notice Date (August 17, 2024); and
        - Not assert any claims against NAR, Member Boards, or REALTOR® MLSs based on any of the practice changes or on facts underlying the broker commission litigation or for seven (7) years after the Class Notice Date.
    - You should consult the Settlement Agreement for the controlling text of the requirements and consult your legal counsel with questions. (Updated *9/5/24*)

34. What is required for REALTOR® MLSs to obtain releases?
    - REALTOR® MLSs are required to:
        - Have opted-in to the proposed Settlement Agreement by June 18, 2024 (and comply with the terms of the relevant opt-in agreement);
        - Implement the relevant practice changes for seven (7) years after the Class Notice Date (August 17, 2024); and
        - Not assert any claims against NAR, Member Boards, or REALTOR® MLSs based on any of the practice changes or on facts underlying the broker commission litigation or for seven (7) years after the Class Notice Date.

- You should consult the Settlement Agreement for the controlling text of the requirements and consult your legal counsel with questions. (Updated *9/5/24*)

35. What happens if a non-REALTOR® MLS didn't opt-in to the proposed settlement agreement?
    - An MLS that did not opt-in would not be covered by the release of the proposed settlement agreement. *(Updated 9/5/24)*

## Class Notice

36. What is class notice?
    - Class notice is a court-approved process through which members of the "Settlement Class"—home sellers who sold a home on an MLS anywhere in the U.S. during the eligible date ranges and paid a commission to a real estate brokerage in connection with the sale of the home—will be informed about NAR's proposed settlement of the Sitzer-Burnett case.
    - Notices are distributed by mail and electronically. This began on August 17, 2024.
    - Class notice informs class members of their rights, options, and deadlines to exercise those rights and options under the proposed settlement. Watch NAR's video on what class notice means for REALTORS® here.
    - Consumers in your area may have already received a notice regarding separate settlements made by certain brokerage firms; however, this notice will be new and address NAR's settlement. *(Added 9/5/24)*

37. Does NAR run the class notice process?
    - It is important to underscore that NAR does not manage the class notice process and that the class notice process has been approved by the Court overseeing the settlement.
    - NAR members may nonetheless receive questions from consumers. NAR members should direct consumers to the settlement website (www.RealEstateCommissionLitigation.com) where they can find relevant information. You may also direct them to call the settlement administrator at 888-995-0207, for additional guidance. NAR members should refrain from further advising consumers on class notice. *(Added 9/5/24)*

38. Where can I send consumers for more information?
    - NAR members should direct consumers to the settlement website (www.RealEstateCommissionLitigation.com) where they can find relevant information. You may also direct them to call the settlement administrator at 888-995-0207, for additional guidance. *(Added 9/5/24)*

## Practice Changes & MLS Information

39. What MLS policies have changed?
    - The policy changes, agreed to by NAR leadership, were reviewed and updated with the changes as outlined below:
        - Eliminate and prohibit any requirement of offers of compensation on an MLS between listing brokers or sellers to buyer brokers or other buyer representatives.
        - Retain, and define, "cooperation" for MLS Participation.

- Eliminate and prohibit MLS Participants, Subscribers, and sellers from making any offers of compensation on an MLS to buyer brokers or other buyer representatives.
- Require an MLS to eliminate all broker compensation fields and compensation information on an MLS.
- Require an MLS to not create, facilitate, or support any non-MLS mechanism (including by providing listing information to an internet aggregator's website for such purpose) for Participants, Subscribers, or sellers to make offers of compensation to buyer brokers or other buyer representatives.
- Prohibit the use of MLS data or data feeds to directly or indirectly establish or maintain a platform of offers of compensation from multiple brokers or other buyer representatives. Such use must result with an MLS terminating the Participant's access to any MLS data and data feeds.
- Reinforce that MLS Participants and Subscribers must not, and MLSs must not enable the ability to filter out or restrict MLS listings that are communicated to customers or clients based on the existence or level of compensation offered to the cooperating broker or the name of a brokerage or agent.
- Require compensation disclosures to sellers, and prospective sellers and buyers.
- Require MLS Participants working with a buyer to enter into a written agreement with the buyer prior to touring a home.

40. How has the definition of an MLS Participant been changed?
    - The definition has been amended to remove any references to offers of compensation and to establish that a Participant has the duty to cooperate, which is to share information on listed property and to make property available to other brokers for showing to prospective purchasers and tenants when it is in the best interest of their clients.

41. Are all other MLS policies that were not amended still in effect?
    - Yes, all MLS policies will continue to be in effect and subject to enforcement by their local MLSs.

## Effective Date

42. The opt-in agreements in the appendices indicate that MLSs that opt in to the NAR settlement have until September 16, 2024, to implement changes. Why did NAR communicate August 17, 2024?
    - MLSs that opted into the settlement agreement have until September 16, 2024, to implement the necessary policy changes to be considered Released Parties under the settlement. However, in accordance with mandatory NAR policy, REALTOR® MLSs must implement the practice changes by August 17, 2024. If they do not, they will not be in compliance with NAR mandatory policy.
    - NAR recommended all MLSs opting into the settlement implement the practice changes by August 17, 2024. NAR's accelerated rule change process, during which it released the exact language of the practice changes in early May, gave MLSs over three months to implement the changes. *(Updated 9/5/24)*

43. Why is NAR putting the practice changes in place prior to receiving final approval?

- Our settlement requires NAR to implement the practice changes no later than the date of the class notice, which was issued on August 17, 2024. *(Updated 9/5/24)*

## REPRESENTING SELLERS

### Offers Of Compensation

44. What should listing brokers advise their clients about the prohibition of offers of compensation on an MLS?
    - Listing brokers should inform their clients that offers of compensation will no longer be an option on an MLS.
    - This change will not prevent offers of cooperative compensation off-MLS. And it will not prevent sellers from offering buyer concessions on an MLS (ex. concessions for buyer closing costs).
    - Compensation would continue to be negotiable and should always be negotiated between agents and the consumers they serve.

45. Won't prohibiting offers of compensation on an MLS raise fair housing issues?
    - This settlement allows compensation to remain a choice for consumers when buying or selling a home.
    - NAR continues to believe that offers of compensation help make professional representation more accessible, decrease costs for home buyers to secure these services, increase fair housing opportunities, and increase the potential buyer pool for sellers.
    - The settlement does not change the ethical duties that NAR members owe their clients.
    - REALTORS® are always required to protect and promote the interests of their clients and treat all parties in a transaction honestly (Article 1, COE).
    - NAR members will continue to use their skill, care, and diligence to protect the interests of their clients. *(Added 9/5/24)*

46. Does this prohibition affect the compensation amount paid to the listing broker?
    - No. Compensation would continue to be negotiable and should always be negotiated between agents and the consumers they represent, as NAR's policy has required for decades.

47. Are non-REALTOR® MLSs affected by the prohibition of publishing compensation offers on an MLS?
    - Only if they choose to opt into the proposed settlement. *(Updated 9/5/24)*

48. If a member is a Participant or Subscriber of an MLS that hasn't opted-in to the proposed settlement agreement and allows offers of compensation on the MLS, can the member make an offer of compensation on that MLS?
    - The practice changes only apply to MLSs that opted into the settlement.
    - NAR secured a mechanism for non-REALTOR® association owned MLSs to opt-in and be covered by the proposed settlement agreement. Those MLSs who opted-in by the June 18 deadline must comply with the practice changes, which includes prohibiting offers of compensation in their MLS, to be covered by the

release in the settlement. No MLS was required to opt-in to the settlement agreement.

- MLSs that did not opt-in are neither subject to the practice changes nor NAR's policies, and some may allow offers of compensation. The settlement agreement does not prohibit a member from participating in an MLS that did not opt in and that continues to allow offers of compensation. REALTORS® who make offers of compensation on a platform with multiple brokers should assess the risk of potential future liability and consult their local counsel.
- Regardless of whether the MLS opted into the proposed settlement, REALTORS® and REALTOR® MLS Participants and subscribers must not filter out or restrict MLS listings communicated to their customers or clients based on the existence or level of compensation offered to the buyer broker or other buyer representative assisting the buyer.
- The settlement also requires all REALTORS® acting for sellers to conspicuously disclose to sellers and obtain seller approval for any payment or offer of payment that a listing broker will make to another broker, agent, or other representative acting for buyers. All REALTORS® and MLS Participants working with sellers must also disclose in conspicuous language that broker commissions are not set by law and are fully negotiable. *(Updated 9/5/24)*

49. If the seller or the listing broker offers a bonus or financial incentive in addition to the offer of broker compensation, can the buyer broker accept the extra compensation?
    - The buyer broker may not receive compensation for brokerage services from any source that exceeds the amount or rate agreed to in the agreement with the buyer.

50. Does Standard of Practice 16-16 prohibit the negotiation of buyer broker compensation in a buyer's purchase offer?
    - No. A buyer can always ask their buyer broker to make it a term of an offer to purchase that the seller pay certain compensation to the buyer broker.
    - Standard of Practice 16-16 prohibits a REALTOR® from attempting to modify the terms of a listing agreement through the terms of an offer because the listing agreement is a contractual matter between the seller and the listing broker. However, the seller and the listing broker may independently choose to amend the listing agreement or take any other action they deem appropriate based on the seller's negotiations with the buyer. Standard of Practice 16-16 also prohibits a REALTOR® from delaying or withholding delivery of a buyer's offer while attempting to negotiate a buyer broker compensation.

51. What is NAR's position on making offers of compensation off-MLS?
    - NAR has long maintained—and we continue to believe—that offers of compensation benefit buyers and sellers.
    - They promote access to real property ownership, particularly for lower- and middle-income buyers who can have a difficult-enough time saving for a down payment.
    - With this settlement, NAR is confident it and its members can still achieve all those goals.
    - The settlement makes clear that NAR continues to deny any wrongdoing in connection with the MLS cooperative compensation model rule (MLS Model Rule). *(Updated 9/5/24)*

52. Can an MLS have a Yes/No Compensation Field?
    - No. The new MLS policies prohibit any information about compensation on an MLS.

53. Can a listing broker communicate offers of compensation on a broker website which has an IDX or VOW feed?
    - Yes, MLS Participants may augment MLS data or data feeds with offers of compensation to buyer brokers or other buyer representatives for only listings of their own brokerage.

54. Can an MLS Participant use or share their MLS data or data feeds to establish or maintain a platform for offers of compensation from multiple brokers and buyer brokers or other buyer representatives?
    - No, use of MLS data or data feeds to directly or indirectly establish or maintain a platform of offers of compensation from multiple brokers to buyer brokers or other buyer representatives is prohibited and will result in the MLS terminating that Participant's access to any MLS data and data feeds.

55. Can an MLS allow MLS listings to link to a listing broker's contact information (e.g., telephone number, broker's preferred communication method)?
    - Yes, an MLS may provide links or other information that allows brokers to contact each other. However, this may not be used to circumvent the prohibitions of (a) making offers of compensation on an MLS to cooperating brokers or other buyer representatives (either directly or through buyers) or (b) disclosing on an MLS broker compensation or total brokerage compensation (i.e., the combined compensation to both listing brokers and cooperating brokers).
    - For example, an MLS may not allow MLS listings to have an embedded link to a website which, with a single click on the MLS listing, would immediately display an offer of compensation. *(Updated 7/31/24)*

56. Can disputes about an offer of compensation still be arbitrated or mediated?
    - Yes, REALTORS® are bound to arbitrate or mediate pursuant to Article 17 of the Code of Ethics, and for MLS Participants who are non-REALTORS® they are bound to arbitrate or mediate pursuant to their MLS's local rules.

57. Does the prohibition of offers of compensation on the MLS mean that procuring cause will no longer be relevant to arbitration panels determining arbitration awards pursuant to Article 17 of the Code of Ethics or local MLS rules?
    - Procuring cause is a legal concept which exists in many states and long predates NAR and the Code of Ethics. While the number of cases with procuring cause at issue may decrease once offers of compensation are prohibited from the MLS, it will remain relevant.
    - After the practice changes take effect, offers of compensation may be communicated off-MLS, and buyer brokers may wish to protect themselves through an agreement with the listing broker or by including compensation in the sales contract. However, procuring cause may still be relevant to an arbitration award determination for contractual disputes.
    - For example, a buyer could enter into nonexclusive written agreements with multiple buyer brokerages, with each buyer brokerage confirming a compensation offer in writing from the listing broker or seller. In the event of a

compensation dispute, an arbitration panel would be tasked with determining which buyer brokerage was the procuring cause and therefore entitled to the compensation. *(Added 7/31/24)*

58. How does the REALTOR® Code of Ethics apply to offers of compensation off MLSs?
    - Offers of compensation may continue to be made off MLSs, in consultation between the real estate professional and the seller. With respect to offers of compensation, REALTORS® must continue to be guided by their ethical duties under the REALTOR® Code of Ethics, including that:
    - REALTORS® must always:
        - Article 1 – Protect and promote their client's interests
        - Article 3 – Ascertain compensation
        - Article 9 – Assure all real estate transaction agreements are in writing in clear and understandable language
        - Article 10 – provide equal professional services and comply with fair housing laws
        - Article 12 – Be honest and truthful in communications
    - As a reminder, pursuant to both Article 17 of the REALTOR® Code of Ethics and MLS policy, members are required to mediate (if their Board requires its members to mediate) and arbitrate contractual and compensation disputes.
    - These ethical rules continue to apply after, and are not changed by, the MLS practice changes required by the proposed class action settlement. *(Updated 9/5/24)*

## Written Listing Agreements

59. What additional provisions must be included in written listing agreements because of the practice changes?
    - All REALTORS® and MLS Participants working with sellers must disclose in conspicuous language that broker commissions are not set by law and are fully negotiable.
    - All REALTORS® and MLS Participants must include the disclosure in the listing agreement, if the listing agreement is not a government-specified form. If the listing agreement is a government-specified form, a separate disclosure would satisfy the requirement. *(Updated 9/5/24)*

60. Must a REALTOR® or MLS Participant acting for a seller obtain prior approval from the seller before an offer of compensation is made or compensation is paid to another broker, agent, or other representative acting for a buyer?
    - Yes. The practice changes require that REALTORS® and MLS Participant acting for sellers to conspicuously disclose to sellers and obtain seller approval for any payment or offer of payment that a listing broker will make to another broker, agent, or other representative acting for buyers.
    - The disclosure must be made to the seller in writing in advance of any payment or agreement to pay another broker, agent, or other representative acting for buyers and must specify the amount or rate of such payment. *(Updated 9/5/24)*

61. Should active listing or buyer agreements—meaning there is no accepted offer—entered into before the MLS policy changes went into effect on August 17, 2024, be amended to include a conspicuous disclosure that compensation is not set by law and is fully negotiable?

- All REALTORS® and MLS Participants must make this disclosure. Agreements active as of August 17, 2024, can either be amended or a separate disclosure can be provided to satisfy the requirement. *(Updated 9/5/24)*

62. Should active listing agreements entered into before the MLS policy changes went into effect on August 17, 2024, be amended to address the settlement agreement's prohibition on offers of compensation being communicated on an MLS?
    - If the listing agreement instructs the listing broker to make an offer of compensation without reference to an MLS, no change to the listing agreement is needed, as the listing broker can comply with that instruction without violating the MLS policy change.
    - But if the listing agreement specifies that offers of compensation be made on an MLS then the listing broker should work with the seller to amend the listing agreement before the MLS policy change is implemented, to make it clear the listing broker will not make an offer of compensation on an MLS and to determine whether the seller instructs the listing broker to make an offer of compensation outside of an MLS. *(Updated 9/5/24)*

63. Which pre-closing disclosure forms must include a conspicuous disclosures about the negotiability of commissions?
    - In addition to including the disclosure in the listing agreement and written buyer agreement, any pre-closing disclosure form that pertains to broker representation services must include (or, if the form is government-specified, be accompanied by) a conspicuous statement that broker commissions are not set by law and are fully negotiable. For example, a dual agency, subagency or designated agency disclosure form would need to include the required disclosure regarding the negotiability of commission. *(Added 8/6/24)*

## Concessions

64. Is there an NAR MLS policy about seller concessions?
    - No, MLSs will continue to have local discretion on seller concessions. This includes determining what local rules to have about seller concessions, except under the settlement an MLS must ensure that the seller concessions are not limited to or conditioned upon the retention of or payment to a cooperating broker, buyer broker, or other buyer representative.

65. Can an MLS have a Yes/No seller concession field that indicates whether a seller is offering any concession?
    - Yes, it is a matter of local discretion which may depend on an MLS's technological capabilities and what an MLS deems to be in the interests of its market.

66. Is an MLS required to have a seller concession field?
    - No, it is a matter of local discretion for each MLS.

67. If my MLS removes the compensation field, can I choose to publish my cooperative commission offer in the agent remarks?
    - No. The new rule would prohibit offers of compensation on an MLS.

68. Can MLSs allow decimal points to be used for seller concessions?

- Yes, it is a matter of local discretion which may depend on an MLS's technological capabilities and what an MLS deems to be in the interests of its market.

69. Will seller concessions communicated on an MLS be binding on the seller?
    - As a general matter, seller concessions usually aren't binding until they are established in an executed contract such as a listing agreement or a purchase contract.

70. Can the seller concession be a total sum or the percentage of the purchase price?
    - This is a matter of local discretion. But an MLS must ensure that the seller concessions are not limited to or conditioned upon the retention of or payment to a cooperating broker, buyer broker, or other buyer representative.

## REPRESENTING BUYERS

### Written Buyer Agreements

71. Do the written buyer agreement requirements apply to MLS Subscribers?
    - Yes, Subscribers must comply with all MLS rules and regulations, and Participants must ensure their compliance or they would be subject to the MLSs local enforcement and disciplinary action. *(Added 8/6/24)*

72. Who will be responsible for enforcing the written agreements and ensuring all parties follow this new practice change?
    - MLSs will be responsible for enforcing the rule regarding written agreements, like MLSs enforce other existing rules.

73. The practice change requiring written agreements with buyers is triggered by two conditions: it only applies to MLS Participants "working with" buyers and is triggered by "touring a home." What does it mean to be "working with" a buyer?
    - The "working with" language is intended to distinguish MLS Participants who provide full or limited brokerage representation or services for the buyer (including transaction brokerage)—such as identifying potential properties, arranging for the buyer to tour a property, performing or facilitating negotiations on behalf of the buyer, presenting offers by the buyer, or other services for the buyer —from MLS Participants who simply market their services or just talk to a buyer—like at an open house or by providing an unrepresented buyer access to a house they have listed.
    - If the MLS Participant is working only as an agent or subagent of the seller, then the Participant is not "working with the buyer." In that scenario, an agreement is not required because the participant is performing work for the seller and not the buyer.
    - Authorized dual agents, on the other hand, work with the buyer (and the seller).
    - A written buyer agreement is required prior to a buyer "touring a home." An MLS Participant "working with" a buyer can enter into the written buyer agreement at any point but must do so by no later than prior to the buyer "touring a home," unless state law requires a written buyer agreement earlier in time (See FAQ "What does it mean to tour a home?"). *(Updated 8/6/24)*

74. What does it mean to tour a home?

- Written buyer agreements are required before a buyer tours a home.
- Touring a home means when the buyer and/or the MLS Participant, or other agent, at the direction of the MLS Participant working with the buyer, enter the house. This includes when the MLS Participant or other agent, at the direction of the MLS Participant, working with the buyer enters the home to provide a live, virtual tour to a buyer not physically present.
- A "home" means a residential property consisting of not less than one nor more than four residential dwelling units.

75. Does the requirement for a written agreement with buyers mean that MLS Participants and buyers must enter into a written agency agreement?
    - No. MLS Participants and buyers will still be able to enter into any type of professional relationship permitted by state law.
    - NAR policy does not dictate:
        - What type of relationship the professional has with the potential buyer (e.g., agency, non-agency, subagency, transactional, customer).
        - The term of the agreement (e.g., one day, one month, one house, one zip code).
        - The services to be provided (e.g., ministerial acts, a certain number of showings, negotiations, presenting offers).
        - The compensation charged (e.g., $0, X flat fee, X percent, X hourly rate).

76. What does it mean to be "inconsistent with state or federal law or regulation"?
    - All MLS Participants working with a buyer must have a buyer written agreement prior to touring, unless state law requires an agreement earlier in time.

77. If an MLS Participant hosts an open house or provides access to a property, on behalf of the seller only, to an unrepresented buyer, will they be required to enter into a written agreement with those buyers touring the home?
    - No. In this case, since the MLS Participant is only working for the seller, and not the buyer, the MLS Participant does not need to enter into a written agreement with the buyer.

78. Are written buyer agreements required when listing agents talk with a buyer on behalf of a seller only or as subagents of the seller?
    - No. An agreement is not required because the participant is performing work for the seller and not the buyer.

79. Are written buyer agreements required when MLS Participants perform ministerial acts?
    - Yes. The obligation to enter into a written buyer agreement is triggered just prior to an MLS Participant taking a buyer to tour a home, regardless of what other acts the MLS Participant performs for the buyer.
    - An MLS Participant performing only ministerial acts—and who has not taken the buyer to tour a home—is not working with the buyer and therefore does not yet need to enter into a written buyer agreement. *(Updated 7/23/24)*

80. If an MLS Participant enters into a non-agency relationship with a buyer, is a buyer written agreement still necessary?

- Yes, regardless of whether it is an agency or non-agency relationship, the obligation is triggered once the MLS Participant works with and takes that buyer to tour a home.

81. Are written buyer agreements required in a dual agency scenario when a single agent works both for the seller and for the buyer?
    - Yes. If an MLS Participant is working as an agent for a buyer, a written agreement is required.

82. Are written buyer agreements required in a designated agency scenario, when a single broker works both for the seller and for the buyer, and designates an agent to represent the buyer?
    - Yes. If an MLS Participant is working as an agent for a buyer, a written agreement is required.

83. Do the written buyer agreement requirements change my state's disclosure requirements to an unrepresented buyer?
    - No, you must still comply with all your state and local legal requirements. MLS policies and rules are subject to state and local laws and regulations.

84. How will state laws affect the implementation of the practice change requiring written agreements with buyers?
    - Written buyer agreements will be required of all MLS Participants working with buyers prior to touring a home, unless state law requires a written buyer agreement earlier in time.

85. Will MLSs be required to get a copy of buyer written agreements?
    - No, an MLS is not required to receive a copy but can request it as a matter of their local enforcement.

86. MLS Participants may not receive compensation for services from any source that exceeds the amount or rate agreed to in the buyer agreement. Does this mean that brokerages can only have one agreement with the buyer?
    - No. The practice change empowers buyers and brokers to negotiate and agree to services and compensation that work for them. MLS Participants should work with consumers to ensure they fully understand the options available. Compensation continues to be negotiable and should always be negotiated between MLS Participants and the buyers with whom they work.
    - At times, a new or amended buyer agreement may be appropriate, and the buyer and broker may agree to amended terms. However, amended agreements must also meet the requirements of the practice changes. The practice changes must be implemented fully and in good faith in the service of promoting consumer empowerment, choice, and healthy competition.
    - NAR policy does not dictate:
        - What type of relationship the professional has with the potential buyer (e.g., agency, non-agency, subagency, transactional, customer).
        - The term of the agreement (e.g., one day, one month, one house, one zip code).
        - The services to be provided (e.g., ministerial acts, a certain number of showings, negotiations, presenting offers).

- The compensation charged (e.g., $0, X flat fee, X percent, X hourly rate). *(Updated 7/31/24)*

87. In the buyer agreement, can buyers and buyer brokers agree to a range of compensation?
    - No. Under the settlement, any compensation agreed to in the written buyer agreement must be objectively ascertainable and not open-ended.
    - For example, a written buyer agreement cannot have a commission that is "buyer broker compensation shall be whatever amount the seller is offering to the buyer" or "between X and Y percent."
    - Importantly, NAR policy will not dictate the amount of compensation agreed between buyers and buyer brokers (e.g., $0, X flat fee, X percent, X hourly rate). (Updated 7/15/24)

88. Should active buyer agreements entered into before the MLS policy change be amended to make sure any compensation is not open-ended and is objectively ascertainable?
    - Yes. MLS Participants working with a buyer after the effective date of the policy should take steps to ensure that the buyer has agreed to the necessary terms required by the settlement agreement.

89. Should active buyer agreements entered into before the MLS policy change be amended to remove any provision that authorizes the buyer broker to keep any offers of compensation exceeding the amount of compensation agreed with the buyer?
    - Yes. MLS Participants working with a buyer after the effective date of the policy should take steps to ensure that the buyer has agreed to the necessary terms required by the settlement agreement.

90. Does the settlement agreement's requirement of "objectively ascertainable" and "not open-ended" apply to listing agreements or the compensation sellers pay listing brokers?
    - No. Unlike the settlement agreement's requirements that compensation in buyer agreements be objectively ascertainable and not open-ended, listing agreements can be structured however the seller and listing broker agree, so long as the listing agreement complies with the law, pre-existing MLS policy, and "specifies the amount or rate of any payment" from the seller to the listing broker.

91. Which pre-closing disclosure forms must include a conspicuous disclosures about the negotiability of commissions?
    - In addition to including the disclosure in the listing agreement and written buyer agreement, any pre-closing disclosure form that pertains to broker representation services must include (or, if the form is government-specified, be accompanied by) a conspicuous statement that broker commissions are not set by law and are fully negotiable. For example, a dual agency, subagency or designated agency disclosure form would need to include the required disclosure regarding the negotiability of commission. *(Added 8/6/24)*

## Anti-Steering

92. What is NAR's policy on steering buyers based on the amount of broker compensation?
    - Under NAR's Code of Ethics, steering buyers based on the amount of broker compensation is prohibited.
    - REALTORS® MUST pledge themselves to protect and promote the interests of their client, putting their client's best interests before their own. A REALTOR® must never put broker compensation before their client's interests.
    - REALTORS® MUST be honest and truthful in their real estate communications and MUST NOT exaggerate, misrepresent, or conceal pertinent facts relating to the transaction, including facts about broker commissions.
    - If a REALTOR® does anything to put their own (or another broker's) compensation before her client's interests, they are violating this primary code of ethics and potentially violating the broker's fiduciary duties to their client (depending on the broker-buyer relationship and state law). *(Added 5/29/24)*

93. Does NAR's settlement address the theoretical possibility of steering?
    - Yes. In the agreement, NAR reaffirms its commitment to requiring that MLS Participants must not limit the listings their client sees because of broker compensation.
    - Written buyer agreements, required by the NAR practice changes that will be implemented on August 17, 2024, will also outline that MLS Participants may not receive compensation for brokerage services from any source that exceeds the amount or rate agreed to in the agreement with the buyer.
    - Since a broker working with a buyer cannot receive more compensation than the buyer has agreed to in that agreement, the amount of any offer of compensation is irrelevant to the buyer-broker's compensation.
    - Under these practice changes, NAR has eliminated any theoretical steering because a broker will not make more compensation by steering a buyer to a particular listing because it has a "higher" offer of compensation. *(Added 5/29/24)*

94. Can a broker tell a potential buyer the amount of broker commissions and explain who is paying those commissions?
    - Yes. In fact, REALTORS® must provide this information to potential buyers under NAR's Code of Ethics.
    - The NAR Settlement also requires that "to the extent that such a REALTOR® or Participant will receive compensation from any source, the agreement must specify and conspicuously disclose the amount or rate of compensation it will receive or how this amount will be determined." *(Added 5/29/24)*

95. Can a listing broker explain to a seller that the buyer will know who is paying the commissions?
    - Yes, Articles 2 and 12 of NAR's Code of Ethics apply equally to brokers working with sellers.
    - The listing broker should explain to her client the benefits and costs of the various types of marketing that can be done for a listing, and how potential buyers might respond to such marketing—including any buyer costs that the listing broker or seller may offer to pay.
    - A listing broker should inform the seller about costs the buyer will incur, how the buyer might react to those costs, and how the seller can market a house considering the buyer's costs; but a listing broker must not tell a seller that a

broker will steer buyers based on the amount that broker is compensated. *(Added 5/29/24)*

96. Appraisers often use MLS data as an accurate source of information for appraisal reports. How are the practice changes going to impact the appraisal process?
    - Appraisers need to know the details of the transactions they are analyzing, including the sales they consider as possible comparables.
    - Compensation paid on the subject property will remain readily available to the appraiser through analysis of the sales contract.
    - It is imperative that NAR members facilitate open lines of communication with appraisers. This includes answering and engaging their inquiries on what compensation was paid or will be paid at closing for a given transaction. *(Added 7/31/24)*

## Non-Filtering of Listings

97. Didn't the NAR MLS policies already include a policy about the non-filtering of MLS listings based on compensation?
    - Yes, Policy Statement 8.5 was enacted in 2021. It has only been amended for clarification purposes and to ensure consistency with the proposed settlement agreement.

98. What does it mean to "filter-out" a listing?
    - Filtering out listings means to remove listings or block MLS listings from being communicated to customers or clients based on the amount of compensation offered, the existence of an offer of compensation, or based on the listing firm or listing agent.
    - Participants have the duty to cooperate which is to share information on listed property and to make property available to other brokers for showing to prospective purchasers and tenants when it is in the best interest of their clients.

99. Is "ranking" or "sorting" different from "filtering out" listings?
    - Yes, "ranking" or "sorting" listings is the ability to organize a list of MLS listings in a particular order. Examples of criteria that may be used to rank or sort may be the property sales price, the number of bathrooms or bedrooms, the property location, etc. Ranking or sorting must not involve the removal or the blocking of MLS listings which prevent the communication of those listings to a client or customer.

100. Can an MLS have a function within its system that automatically pushes out emails to clients about available properties hitting the market and allows Participants or Subscribers to filter out listings based on the offer of compensation, listing firm or the listing agent?
    - Since offers of compensation may no longer be communicated on an MLS, it should not have any functionality related to broker compensation.
    - As for filtering based on listing firm or listing agent, just like the inability of Participants or Subscribers to withhold listings based on those criteria in IDX and VOW displays, MLSs cannot enable that same ability within other MLS functions that provide listing data to consumers.
    - An MLS must take appropriate action if it becomes aware that a Participant or Subscriber acts inconsistently with this MLS policy.

## ADDITIONAL SETTLEMENT DETAILS

### Transaction Brokerage

*These questions are intended to address how the practice changes impact transaction brokerage. Please review all FAQs for how the practice changes impact your specific circumstances.*

**101. Do transaction brokers have to obtain prior approval from a seller before an offer of compensation is made or paid to another broker, agent, or other representative acting for a buyer?**

- Yes. A transaction broker who provides brokerage representation or brokerage services to a seller must conspicuously disclose to the seller and obtain seller's approval for any payment or offer of payment that a listing broker or seller will make to another broker, agent, or other representative acting for buyers.
- The disclosure must be made to the seller in writing in advance of any payment or agreement to pay another broker acting for buyers and specify the amount or rate of any such payment. *(Added 8/8/24)*

**102. Does the written buyer agreement requirement apply to transaction brokers?**

- Yes. A transaction broker must have a written buyer agreement when they work with a buyer. The "working with" language is intended to distinguish MLS Participants who provide brokerage representation or services for the buyer — such as identifying potential properties, arranging for the buyer to tour a property, performing or facilitating negotiations on behalf of the buyer, presenting offers by the buyer, or other services for the buyer —from MLS Participants who simply market their services or just talk to a buyer—like at an open house or by providing an unrepresented buyer access to a house they have listed.
- A written buyer agreement is required prior to a buyer "touring a home." An MLS Participant "working with" a buyer can enter into the written buyer agreement at any point but must do so by no later than prior to the buyer "touring a home," unless state law requires a written buyer agreement earlier in time (See FAQ "What does it mean to tour a home?"). *(Added 8/8/24)*

**103. Is a transaction broker who facilitates a transaction for a buyer considered to be "working with" a buyer?**

- Yes. *(Added 8/8/24)*

**104. Is a written buyer agreement required if a transaction broker, who is facilitating a transaction for a seller, provides an unrepresented buyer with access to a home?**

- No. The transaction broker would not be considered working with a buyer in that situation and therefore a written buyer agreement would not be necessary unless required by state law. *(Added 8/8/24)*

**105. If a transaction broker is facilitating the transaction for both the seller and the buyer, is a written buyer agreement required prior to touring a home?**

- Yes. The MLS Participant is working with the buyer (and the seller), so a written buyer agreement is required. *(Added 8/8/24)*

**106. Do the practice changes affect any state disclosure requirements for transaction brokers?**

- No. You must still comply with state and local legal requirements. MLS policies and rules are always subject to state and local laws and regulations. *(Added 8/8/24)*

## Commercial Non-Residential Listings

107. What do these practice changes mean for commercial practitioners?
- The proposed settlement agreement—like the Sitzer-Burnett lawsuit and the copycat lawsuits—is focused on residential real estate transactions. That means most commercial transactions will not be affected.
- In many markets, commercial listings appear in commercial information exchanges (CIEs) and not multiple listing services (MLSs), and do not include an offer of compensation.
  The settlement prohibits offers of compensation on an MLS and requires MLS Participants working with buyers to enter into written agreements with their buyers. These practice changes will go into effect August 17, 2024.

108. Are commercial listing services that don't pull from an MLS subject to the practice change prohibiting offers of compensation on an MLS?
- No. That practice change prohibits offers of compensation on an MLS and it prohibits MLSs from allowing third parties to use MLS data to facilitate a platform for multiple brokerages to make offers of compensation.

109. Does the requirement to use a written agreement before showings apply to commercial transactions?
- No. The settlement and the practice changes it requires are focused on residential transactions, not commercial transactions, or leases.

110. If a commercial broker who is a REALTOR® has access to an MLS, but is showing a property on CIE or another platform that is not associated with an MLS, does the requirement to use a written agreement apply for that property?
- No. The settlement and the practice changes it requires are focused on residential transactions, not commercial transactions, or leases.

## Financing

111. What are interested party contributions?
- Fannie Mae, Freddie Mac, and the FHA specify limits on how much a seller or broker can contribute to the buyer to pay for services typically paid by the buyer. These payments are called interested party contributions (IPCs).

112. Is compensation paid by a seller or listing broker to a buyer broker considered an IPC?
- No. Cooperative compensation is considered a fee that is "customarily" or "traditionally" paid by the seller. The FHA, Fannie Mae, and Freddie Mac exclude these types of fees from the IPC calculation.

113. Does the NAR settlement change that? Is compensation paid by a seller or listing broker to a buyer broker now an IPC?

- The settlement would preserve the choices consumers have regarding real estate services and compensation. After the new rule goes into effect, on August 17, 2024, listing brokers and sellers can continue to offer compensation for buyer broker services, but communicating such offers is prohibited on an MLS.
- Based on our interpretation of current guidance from Fannie Mae, Freddie Mac, and the FHA, we do not expect compensation paid by a seller or listing broker to a buyer broker to become an IPC.

## NAR OPERATIONS

114. How will NAR fund the settlement?
- One of the critical advantages of this agreement is that NAR would be able to pay the settlement amount over time.
- We will determine how to allocate funds as they become due, working closely with our Finance Committee.

115. How does this settlement change NAR's value proposition? Why should real estate professionals continue to be NAR members after this news?
- We are confident that this agreement provides a path for NAR to move forward and continue our work to preserve, protect, and advance the right to real property for all.
- NAR fought to include all members in the release and was able to ensure more than one million members were included.
- We continue to deliver unparalleled value to, and advocacy on behalf of, REALTORS®, including through our learning opportunities and resources, research, and member tools.

116. Who at NAR signed off on the settlement and was the decision to settle subject to proper NAR governance procedures?
- The settlement was signed off by NAR's Leadership Team, in consultation with outside legal and financial experts, and in accordance with NAR's governance procedures.
- Throughout the settlement process, we engaged with a diverse range of members and considered their perspectives and interests while fighting to protect all industry players as best we could.
- As is common in negotiating a complex settlement, there is a need to maintain confidentiality and effectively navigate complex legal considerations, which restricted the extent of the information that NAR could share more broadly.

117. Why is NAR paying more to settle than the corporate defendants did?
- This settlement was heavily negotiated and is based on NAR's ability to pay.
- NAR has secured a release of liability for over one million NAR members, all state/territorial and local REALTOR® associations, all REALTOR® MLSs, and all brokerages with an NAR member as principal that had a residential transaction volume in 2022 of $2 billion or below.
- There are strong grounds for the court to approve this settlement because it is in the best interests of all parties and class members. *(Updated 9/5/24)*

118. Does the settlement affect NAR's ability to continue operating?

- We are confident that this agreement provides a path for us to move forward and continue our work to preserve, protect, and advance the right to real property for all.
- The settlement amount is a substantial sum, and it will be incumbent on NAR to use our remaining resources in the most effective way possible to continue delivering on our core mission.
- The Finance Committee and Strategic Planning Committee will remain critical in reviewing and providing guidance about NAR's operating budget to help ensure we will continue to deliver unparalleled value to and advocacy on behalf of REALTORS®, including through our learning opportunities and resources, research, and member tools.

119. Can NAR use reserves to pay for the settlement? If so, how much?
- This settlement was heavily negotiated, and the amount is based on NAR's ability to pay.
- One of the critical advantages of this agreement is that NAR would be able to pay the settlement amount over time.
- We will determine how to allocate funds as they become due, working closely with our Finance Committee.

120. Will there still be funds available for NAR's advocacy efforts?
- One of the critical advantages of this agreement is that NAR would be able to pay the settlement amount over time.
- The settlement amount is a substantial sum, and it will be incumbent on NAR to use our remaining resources in the most effective way possible to continue delivering on our core mission.
- The Finance Committee and Strategic Planning Committee will remain critical in reviewing and providing guidance about NAR's operating budget to help ensure we will continue to deliver unparalleled value to, and advocacy on behalf of, REALTORS®, including through our learning opportunities and resources, research, and member tools. *(Updated 9/5/24)*

121. Will NAR raise dues or levy an assessment on members to fund the settlement?
- NAR will not change membership dues for 2024 or 2025 because of this payment.

# C

# AGENCY EXPLAINED

**THERE ARE FIVE TYPES OF AGENCY ALLOWED IN THE STATE OF NEW JERSEY**

## SELLER'S AGENT

AS A SELLER'S AGENT OR SUBAGENT, I, AS A LICENSEE, REPRESENT THE SELLER AND ALL MATERIAL INFORMATION SUPPLIED TO ME BY THE BUYER WILL BE TOLD TO THE SELLER.

BROKER

SELLER'S AGENT

## BUYER'S AGENT

AS A BUYER'S AGENT, I, AS LICENSEE, REPRESENT THE BUYER AND ALL MATERIAL INFORMATION SUPPLIED TO ME BY THE SELLER WILL BE TOLD TO THE BUYER.

BROKER

BUYER'S AGENT

## DISCLOSED DUAL AGENT

AS A DISCLOSED DUAL AGENT, I, AS A LICENSEE, REPRESENT BOTH PARTIES, HOWEVER, I MAY NOT, WITHOUT EXPRESS PERMISSION, DISCLOSE THAT THE SELLER WILL ACCEPT A PRICE LESS THAN THE LISTING PRICE OR THAT THE BUYER WILL PAY A PRICE GREATER THAN THE OFFERED PRICE.

BROKER

SELLER'S AND BUYER'S AGENT

## TRANSACTION BROKER

AS A TRANSACTION BROKER, I, AS A LICENSEE, DO NOT REPRESENT EITHER THE BUYER OR THE SELLER. ALL INFORMATION I ACQUIRE FROM ONE PARTY MAY BE TOLD TO THE OTHER PARTY.

BROKER

WORKS WITH BUYER AND/OR SELLER

## DESIGNATED AGENT

DESIGNATED AGENCY, WHICH ENABLES A BROKERAGE TO APPOINT DIFFERENT AGENTS TO REPRESENT BOTH THE SELLER AND THE BUYER WITH FULL FIDUCIARY DUTIES AT THE CLIENTS REQUEST, IS NOW PERMISSIBLE.

BROKER

SELLER'S DESIGNATED AGENT

BUYER'S DESIGNATED AGENT

NEW JERSEY REALTORS®

[First Reprint]

# SENATE, No. 3192

# STATE OF NEW JERSEY

## 221st LEGISLATURE

INTRODUCED MAY 9, 2024

**Sponsored by:**
**Senator PATRICK J. DIEGNAN, JR.**
**District 18 (Middlesex)**
**Senator PAUL D. MORIARTY**
**District 4 (Atlantic, Camden and Gloucester)**
**Assemblyman ROY FREIMAN**
**District 16 (Hunterdon, Mercer, Middlesex and Somerset)**
**Assemblywoman ELIANA PINTOR MARIN**
**District 29 (Essex and Hudson)**
**Assemblyman JOHN DIMAIO**
**District 23 (Hunterdon, Somerset and Warren)**

**Co-Sponsored by:**
**Senator Turner, Assemblywomen Flynn, Reynolds-Jackson, Assemblyman Sampson, Assemblywomen Speight, Swain, Assemblymen Hutchison and Tully**

**SYNOPSIS**

"Real Estate Consumer Protection Enhancement Act."

**CURRENT VERSION OF TEXT**

As reported by the Assembly Budget Committee on June 26, 2024, with amendments.

**(Sponsorship Updated As Of: 6/28/2024)**

**AN ACT** concerning consumer rights in certain real estate transactions and amending P.L.2009, c.238 and supplementing [1]Title 45 of the Revised Statutes and[1] chapter 8 of Title 56 of the Revised Statutes.

**BE IT ENACTED** *by the Senate and General Assembly of the State of New Jersey:*

1. (New section) As used in P.L. , c. (C. ) (pending before the Legislature as this bill):

"Agency relationship" means the agency relationship created under P.L. , c. (C. ) (pending before the Legislature as this bill) between a real estate brokerage firm and a principal relating to the performance of real estate brokerage services.

"Agent" means a real estate brokerage firm, including affiliated brokers, broker-salespersons and salespersons who are duly licensed under [1]**[**P.L. , c. (C. ) (pending before the Legislature as this bill)**]** R.S.45:15-1 et seq.[1], that has an agency relationship with a principal.

"Brokerage firm" means a real estate brokerage firm, including real estate brokers, real estate broker-salespersons and real estate salespersons licensed or otherwise authorized to provide brokerage services in this State pursuant to chapter 15 of Title 45 of the Revised Statutes who are affiliated with the brokerage firm, unless the context requires the terms to be considered separately. In accordance with section 2 of P.L.1989, c.239 (C.45:15-16.28), "broker" also includes any broker, broker-salesperson or salesperson who performs within this State as an agent or employee of a subdivider any one or more of the services or acts as set forth in chapter 15 of Title 45 of the Revised Statutes.

"Brokerage services" means the rendering of services for which a real estate license is required under chapter 15 of Title 45 of the Revised Statutes.

"Brokerage services agreement" means a written agreement between a brokerage firm and principal that appoints a brokerage firm to represent the principal as an agent or work with a buyer or seller as a transaction broker. Broker services agreements include, but are not limited to, sale and rental listing agreements; buyer-lessee agency agreements; and transaction broker, dual agency and designated agency agreements.

"Buyer" means an actual or prospective purchaser in a real estate transaction, or an actual or prospective tenant in a real estate rental or lease transaction, as applicable.

"Buyer's agent" means a brokerage firm, including brokers, broker-salespersons and salespersons affiliated with the brokerage

**EXPLANATION – Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted in the law.**

**Matter underlined thus is new matter.**
**Matter enclosed in superscript numerals has been adopted as follows:**
**[1]Assembly ABU committee amendments adopted June 26, 2024.**

firm, that has an agency relationship and works only with the buyer in a real estate transaction, and to whom the brokerage firm and its brokers, broker-salespersons and salespersons owe fiduciary duties.

"Commercial real estate" means a fee title interest, possessory estate, or lease in real property located in the State of New Jersey, other than an interest in real property that is:

(1) improved with one single-family residential unit or one multifamily structure with four or fewer residential units;

(2) unimproved and the maximum permitted development is one to four residential units or structures under applicable zoning regulations;

(3) classified as farmland, timberland or other agricultural land for real estate tax assessment purposes;

(4) improved with single-family residential units, such as condominiums, townhouses, timeshares, or stand-alone houses in a subdivision that may be legally sold, leased or otherwise disposed of on a unit-by-unit basis;

(5) subject to an agreement that provides that the real estate should be considered residential; or

(6) within the definition in this section as of the date of its disposition.

"Confidential information" means information from or concerning a principal that, unless required to be disclosed by the brokerage firm pursuant to applicable law:

(1) is acquired by the brokerage firm during the course of an agency relationship with the principal;

(2) is information that, as advised by the principal to the brokerage firm, the principal reasonably expects to be kept confidential or that the brokerage firm otherwise knows is confidential;

(3) would, if disclosed, operate to the detriment of the principal, except that the information may be disclosed if authorized by the principal; and

(4) the principal personally would not be obligated to disclose to the other party.

"Designated agent" means, in any transaction where the buyer's agent and the seller's agent are affiliated with the same brokerage firm or are the same broker, broker-salesperson or salesperson, the broker, broker-salesperson or salesperson who has been designated by the brokerage firm, including but not limited to by a broker or managing broker of the brokerage firm, to solely represent the buyer as the buyer's agent and another broker, broker-salesperson or salesperson who has been designated by the brokerage firm, including but not limited to a broker or managing broker of the brokerage firm, to solely represent the seller as the seller's agent in a particular real estate transaction.

"Disclosed dual agent" means a brokerage firm, including brokers, broker-salespersons and salespersons affiliated with the

brokerage firm, that has an agency relationship and is working for both the buyer and seller in the same transaction.

"Material information" means the existence or non-existence of information:

(1) to which a reasonable person would attach importance in deciding whether or how to proceed with a transaction; or

(2) that the agent knows or has reason to know that the recipient of the information regards or is likely to regard as important in deciding whether or how to proceed, although a reasonable person would not so regard it.

"Principal" means a buyer or a seller who has an agency relationship with a brokerage firm.

"Real estate transaction" or "transaction" means an actual or prospective transaction involving a purchase, sale, option, or exchange of any interest in real property, or a lease or rental of real property. For purposes of P.L. , c. (C. ) (pending before the Legislature as this bill), a prospective transaction does not exist until a written offer has been signed by at least one party.

"Seller" means an actual or prospective seller in a real estate transaction, or an actual or prospective landlord in a real estate rental or lease transaction, as applicable.

"Seller's agent" means a brokerage firm, including brokers, broker-salespersons and salespersons affiliated with the brokerage firm, that has an agency relationship and works only with the seller in a real estate transaction, and to whom the brokerage firm and its brokers, broker-salespersons and salespersons owe fiduciary duties.

"Transaction broker" means a brokerage firm, including brokers, broker-salespersons or salespersons affiliated with the brokerage firm, that works with a buyer or a seller, or both, in a real estate transaction without representing either party and has no agency relationship and owes no fiduciary duties to either party to the transaction.

2. (New section) [1]**[**A**]** In addition to the duties provided for under current law, a[1] brokerage firm, including its brokers, broker-salespersons and salespersons, when acting as a buyer's agent, seller's agent, disclosed dual agent or designated agent, owes the following duties to the brokerage firm's principal and to all parties in a transaction, which may not be waived:

a. [1]to strictly comply with the laws of agency and the principles governing fiduciary relationships;

b.[1] to exercise reasonable skill and care;

[1]**[**b.**]** c.[1] to deal honestly and in good faith;

[1]**[**c.**]** d.[1] unless otherwise directed in writing by the principal, to present all written offers and counteroffers in a timely manner in accordance with applicable law, and to provide written confirmation of receipt to the other party or its agent or transaction broker of each and every written offer or counteroffer as soon as reasonably

practicable, regardless of whether the property is subject to an existing contract for sale or the buyer is already a party to an existing contract to purchase another property;

[1][d.] e.[1] where the principal is the seller in a residential real estate transaction, to obtain a signed property condition disclosure statement that is provided for in section 1 of P.L.1999, c.76 (C.56:8-19.1), with it being required that the seller provide to the brokerage firm the statement with the information filled in and signed by the seller and, if the seller is not represented by a brokerage firm or working with a brokerage firm that is a transaction broker, then the seller shall be required to provide the statement to the buyer [1][prior to there being a binding sales contract, and] before the buyer becomes obligated under any contract for the purchase of the property;

f.[1] to disclose all existing material information known by [1][the seller's agent and not apparent or readily ascertainable to a buyer] a real estate broker, real estate broker-salesperson, or real estate salesperson acting on behalf of the brokerage firm or which a reasonable effort to ascertain the information would have revealed to their principal and when appropriate to any other party to the transaction[1] concerning the physical condition of the property that is for sale[1][. This subsection shall not be construed to imply any duty to investigate matters that the brokerage firm has not agreed to investigate, except as otherwise required by law][1];

[1][e.] g.[1] to provide an accounting to the principal as necessary in a timely manner for all money and property received from or on behalf of any party to the transaction;

[1][f.] h.[1] in a residential real estate transaction, to provide the consumer information statement in the form required by the New Jersey Real Estate Commission and obtain a signed acknowledgment of receipt of same by the party. The statement shall be included as part of the brokerage services agreement. The statement shall be provided to:

(1) any party to whom the broker renders real estate brokerage services as soon as reasonably practical but no later than at the time the party signs a brokerage services agreement; and

(2) any party not represented by a brokerage firm in a transaction before the party signs an offer or as soon as reasonably practical thereafter;

[1][g.] i.[1] to disclose in writing as soon as reasonably practical but no later than at the time the brokerage firm's principal signs a brokerage service agreement:

(1) whether the brokerage firm is acting as the buyer's agent, the seller's agent, a disclosed dual agent, a designated agent, or a transaction broker. The disclosure shall be set forth in a separate paragraph titled "Agency Disclosure" in a brokerage services agreement prepared by the brokerage firm between the principal and

the brokerage firm or in a separate writing titled "Agency Disclosure" signed by the principal; and

(2) the terms of compensation, if any, offered by a party or the brokerage firm to another brokerage firm representing a different party; and

[1][h.] j.[1] to undertake a reasonable effort to obtain material information concerning the condition of every property for which the brokerage firm accepts an agency relationship or is retained to market as a transaction broker, and concerning the financial qualifications of every person for whom the brokerage firm submits an offer to the brokerage firm's principal, provided that the broker, broker-salesperson or salesperson at the brokerage firm who undertakes the reasonable efforts shall not be held to a standard of a licensed property inspector unless that broker, broker-salesperson or salesperson is separately licensed as a property inspector.

3. (New section) a. A brokerage firm, including brokers, broker-salespersons and salespersons affiliated with the brokerage firm, that performs real estate brokerage services for a buyer is a buyer's agent unless:

(1) a brokerage firm, including brokers, broker-salespersons and salespersons affiliated with the brokerage firm, represents the seller pursuant to a brokerage services agreement between the brokerage firm and the seller, in which case the brokerage firm, including the brokers, broker-salespersons and salespersons, is a seller's agent;

(2) a brokerage firm, including brokers, broker-salespersons and salespersons affiliated with the brokerage firm, represents the seller pursuant to a brokerage services agreement between the brokerage firm and the seller, and the brokerage firm, including the same broker, broker-salesperson or salesperson or a different broker, broker-salesperson or salesperson affiliated with the same brokerage firm in a residential real estate transaction or otherwise represents the buyer in a commercial real estate transaction, represents the buyer pursuant to a brokerage services agreement between the brokerage firm and the buyer, in which case the brokerage firm, including the broker, broker-salesperson, salesperson or brokers, broker-salespersons or salespersons, as applicable, is a disclosed dual agent;

(3) the brokerage firm, including a broker, broker-salesperson or salesperson affiliated with the brokerage firm, has agreed to work with the buyer pursuant to a brokerage services agreement between the brokerage firm and the buyer in a residential real estate transaction or otherwise represents the buyer in a commercial real estate transaction as a transaction broker; or

(4) the broker, broker-salesperson or salesperson affiliated with the brokerage firm is the seller or one of the sellers.

b. (1) In a residential real estate transaction, a brokerage firm shall enter into a brokerage services agreement with the buyer

before, or as soon as reasonably practical after, the firm commences rendering real estate brokerage services to, or on behalf of, the buyer. A brokerage services agreement shall not be required between a brokerage firm and a buyer in a commercial real estate transaction.

(2) The brokerage services agreement shall include the following:

(a) the term of the brokerage services agreement, including, if applicable, the period after the termination of the agreement that the brokerage firm will be protected as provided in the agreement with regard to any properties that a broker, broker-salesperson or salesperson from the brokerage firm introduced to the buyer during the term of the agreement;

(b) that the brokerage firm is appointed as an agent for the buyer;

(c) if the agency relationship is exclusive or nonexclusive;

(d) if the buyer consents to the brokerage firm acting as a disclosed dual agent or designated agent, which, if consent is granted, shall be in the brokerage services agreement or another document requiring separate initialization or signature by the buyer and include an acknowledgment from the buyer that a disclosed dual agent shall not advocate terms favorable to one principal to the detriment of the other principal;

(e) if the buyer consents, as demonstrated by initialization or signature, to the broker or a managing broker for the brokerage firm, or a broker, broker-salesperson or salesperson appointed by the broker or managing broker, being an agent for the buyer to act as a disclosed dual agent in a transaction in which the same broker, broker-salesperson or salesperson or different brokers, broker-salespersons or salespersons, as applicable, affiliated with the brokerage firm represent different parties; **[[and]]**

(f) the brokerage firm's compensation [[, how the compensation will be calculated,]] and if the compensation is to be shared with another brokerage firm that may have a brokerage relationship with another party to the transaction[[; and]]

[[(g) a disclosure expressly stating that broker compensation is fully negotiable and not set by law]].

c. A brokerage firm may work with a party in separate transactions pursuant to different or the same agency relationships, including, but not limited to, representing a party in one transaction and at the same time representing that party in a different transaction, if the broker complies with P.L. c. (C. ) (pending before the Legislature as this bill) in establishing the relationships for each transaction, even if the other transaction is a related transaction.

4. (New section) a. [1][Unless additional duties are agreed to in writing signed by a buyer's agent or other authorized representative of the brokerage firm] In addition to the duties provided for under current law[1], the duties of a buyer's agent [1][are limited to] shall include[1] the following, which may not be waived, except as expressly set forth in paragraphs (4) and (5) of this subsection:

(1) to be loyal to the buyer by taking no action that is adverse or detrimental to the buyer's interest in a transaction [1]and to exercise primary devotion to the buyer's interests[1];

(2) to timely disclose to the buyer any [1]actual or potential[1] conflicts of interest [1]which the buyer's agent may reasonably anticipate[1];

(3) to advise the buyer to seek expert advice on matters relating to the transaction that are beyond the agent's expertise;

(4) to not disclose confidential information from or about the buyer, except under subpoena, court order or otherwise as provided by law, or as expressly authorized by the buyer, even after termination of the agency relationship; [1][and][1]

(5) unless otherwise agreed to in writing, to make a good faith and continuous effort to find a property for the buyer, except that a buyer's agent is not obligated to seek additional properties to purchase while the buyer is a party to an existing contract to purchase that is no longer subject to the attorney-review period, if applicable[1]; and

(6) any additional duties that are agreed to in writing signed by a buyer's agent or other authorized representative of the brokerage firm[1].

b. (1) The showing of a property in which a buyer is interested to other prospective buyers by a buyer's agent shall not breach the duty of loyalty to the buyer or create a conflict of interest.

(2) The representation of or acting as a transaction broker with more than one buyer by a brokerage firm, including different brokers, broker-salespersons or salespersons affiliated with the brokerage firm, in competing transactions involving the same property does not breach the duty of loyalty to the buyer or create a conflict of interest.

5. (New section) a. A brokerage firm, including brokers, broker-salespersons and salespersons affiliated with the brokerage firm, that performs real estate brokerage services for a seller is a seller's agent unless:

(1) a brokerage firm, including brokers, broker-salespersons and salespersons affiliated with the brokerage firm, represents the buyer pursuant to a brokerage services agreement between the brokerage firm and the buyer in a residential real estate transaction or otherwise represents the buyer in a commercial real estate

transaction, in which case the brokerage firm, including the brokers, broker-salespersons and salespersons, is a buyer's agent;

(2) a brokerage firm, including brokers, broker-salespersons and salespersons affiliated with the brokerage firm, represents the buyer pursuant to a brokerage services agreement between the brokerage firm and the buyer in a residential real estate transaction or otherwise represents the buyer in a commercial real estate transaction, and the brokerage firm, including the same broker, broker-salesperson or salesperson or a different broker, broker-salesperson or salesperson represents the seller pursuant to a brokerage services agreement between the brokerage firm and the seller, in which case the brokerage firm, including the broker, broker-salesperson or salesperson or brokers, broker-salespersons or salespersons, as applicable, is a disclosed dual agent;

(3) the brokerage firm, including a broker, broker-salesperson or salesperson affiliated with the brokerage firm, has agreed to work with the seller pursuant to brokerage services agreement between the brokerage firm and the seller as a transaction broker; or

(4) the broker, broker-salesperson or salesperson affiliated with the brokerage firm is the buyer or one of the buyers.

b. (1) A brokerage firm shall enter into a brokerage services agreement with the seller before, or as soon as reasonably practical after, it commences rendering real estate brokerage services to, or on behalf of, the seller.

(2) The brokerage services agreement shall include the following:

(a) the term of the brokerage services agreement, including, if applicable, the period after the termination of the agreement that the brokerage firm will be protected as provided in the agreement with regard to any properties that a broker, broker-salesperson or salesperson from the brokerage firm introduced to the seller during the term of the agreement;

(b) the brokerage firm is appointed as an agent for the seller;

(c) if the agency relationship is exclusive or nonexclusive, and shall include an option for the seller to select if the relationship is exclusive or nonexclusive;

(d) if the seller consents to the brokerage firm acting as a disclosed dual agent or designated agent, which, if consent is granted, shall be in the brokerage services agreement or in another document requiring separate initialization or signature by the seller and include an acknowledgment from the seller that a disclosed dual agent shall not advocate terms favorable to one principal to the detriment of the other principal;

(e) if the seller consents, as demonstrated by initialization or signature, to the broker or a managing broker for the brokerage firm, or a broker, broker-salesperson or salesperson appointed by the broker or managing broker, being an agent for the seller to act as a disclosed dual agent in a transaction in which the same broker,

broker-salesperson or salesperson or different brokers, broker-salespersons or salespersons, as applicable, affiliated with the brokerage firm represent different parties;

(f) the brokerage firm's compensation[1], how the compensation will be calculated,[1] and if the compensation will be shared with another brokerage firm that may have a brokerage relationship with another party to the transaction; and

(g) whether a notice on the property to be sold will be circulated in a [1][Multiple Listing Service] database established to provide data about properties for sale, such as a multiple listing service,[1] of which the brokerage firm is a member, except that the seller's agent shall not submit any notice to the service stating whether the seller authorized the sharing of the compensation of the seller's agent with cooperating sub-agents, transaction brokers, or the buyer's agents, or the amount of the shared compensation to any service that prohibits an offer from being displayed.

c. A brokerage firm may work with a party in separate transactions pursuant to different or same agency relationships, including, but not limited to, representing a party in one transaction and at the same time representing that party in a different transaction, if the broker complies with P.L. , c. (C. ) (pending before the Legislature as this bill) in establishing the relationships for each transaction, even if the other transaction is a related transaction.

6. (New section) a. [1][Unless additional duties are agreed to in writing signed by a seller's agent or other authorized representative of the brokerage firm] In addition to the duties provided for under current law[1], the duties of a seller's agent [1][are limited to] shall include[1] the following, which may not be waived, except as expressly set forth in paragraphs (4) and (5) of this subsection:

(1) to be loyal to the seller by taking no action that is adverse or detrimental to the seller's interest in a transaction [1]and to exercise primary devotion to the seller's interests[1];

(2) to timely disclose to the seller any [1]actual or potential[1] conflicts of interest [1]which the seller's agent may reasonably anticipate[1];

(3) to advise the seller to seek expert advice on matters relating to the transaction that are beyond the agent's expertise;

(4) not to disclose any confidential information from or about the seller, except under subpoena, court order or otherwise as provided by law, or as expressly authorized by the seller, even after termination of the agency relationship; [1][and][1]

(5) unless otherwise agreed to in writing, to make a good faith and continuous effort to find a buyer for the property, except that a seller's agent is not obligated to seek additional offers to purchase the property while the property is subject to an existing contract for

sale that is no longer subject to the attorney-review period, if applicable[1]; and

(6) any additional duties that are agreed to in writing signed by a seller's agent or other authorized representative of the brokerage firm[1].

b. (1) The showing of properties not owned by the seller to prospective buyers or the listing of competing properties for sale by a seller's agent does not breach the duty of loyalty to the seller or create a conflict of interest.

(2) The representation of or acting as a transaction broker with more than one seller by a brokerage firm, including different brokers, broker-salespersons or salespersons affiliated with the brokerage firm, in competing transactions involving the same buyer does not breach the duty of loyalty to the seller or create a conflict of interest.

7. (New section) a. A brokerage firm, including its brokers, broker-salespersons and salespersons, may act as a disclosed dual agent only with the informed consent of both parties to the transaction as set forth in brokerage services agreements signed by the buyer and the seller, respectively, in a residential real estate transaction or otherwise in writing in a commercial real estate transaction.

b. [1][Unless additional duties are agreed to in writings signed by a disclosed dual agent or an authorized representative of the brokerage firm and each of the parties] In addition to the duties provided for under current law[1], the duties of a disclosed dual agent [1][are limited to] shall include[1] the following, which may not be waived, except as expressly set forth in paragraphs (4), (5) and (6) of this subsection:

(1) to take no action that is adverse or detrimental to either party's interest in a transaction;

(2) to timely disclose to both parties any [1]actual or potential[1] conflicts of interest [1]which the disclosed dual agent may reasonably anticipate[1];

(3) to advise both parties to seek expert advice on matters relating to the transaction that are beyond the disclosed dual agent's expertise;

(4) not to disclose any confidential information from or about either party, except under subpoena, court order or otherwise as provided by law, or as expressly authorized by the party, even after termination of the agency relationship;

(5) unless otherwise agreed to in writing with the seller, to make a good faith and continuous effort to find a buyer for the property, except that a disclosed dual agent is not obligated to seek additional offers to purchase the property while the property is subject to an existing contract for sale that is no longer subject to the attorney-review period, if applicable; [1][and][1]

(6) unless otherwise agreed to in writing with the buyer, to make a good faith and continuous effort to find a property for the buyer, except that a disclosed dual agent is not obligated to seek additional properties to purchase while the buyer is a party to an existing contract to purchase that is no longer subject to the attorney-review period, if applicable[1]; and

(7) any additional duties that are agreed to in writings signed by a disclosed dual agent or an authorized representative of the brokerage firm and each of the parties[1].

c. Notwithstanding any provision of chapter 15 of Title 45 of the Revised Statutes or any other law, rule, or regulation to the contrary, including but not limited to, subsection i. of R.S.45:15-17, a broker, broker-salesperson or salesperson acting as a disclosed dual agent in a real estate transaction shall be deemed to be acting in the same capacity with the buyer and the seller as a dual agent and may receive compensation through its brokerage firm from either or both the buyer and seller provided that the sources and amounts of compensation are disclosed in writing to the buyer and the seller.

d. (1) The showing of properties not owned by the seller to prospective buyers or the listing of competing properties for sale by a disclosed dual agent does not constitute action that is adverse or detrimental to the seller or create a conflict of interest.

(2) The representation of or acting as a transaction broker with more than one seller by different brokers, broker-salespersons or salespersons licensed with the same brokerage firm in competing transactions involving the same buyer does not constitute action that is adverse or detrimental to the seller or create a conflict of interest.

e. (1) The showing of property in which a buyer is interested to other prospective buyers or the presentation of additional offers to purchase property while the property is subject to a transaction in which a disclosed dual agent is involved does not constitute action that is adverse or detrimental to the buyer or create a conflict of interest.

(2) The representation of or acting as a transaction broker with more than one buyer by the brokerage firm, including different brokers, broker-salespersons or salespersons affiliated with the brokerage firm, in competing transactions involving the same property does not constitute action that is adverse or detrimental to the buyer or create a conflict of interest.

8. (New section) a. In a transaction in which a different broker, broker-salesperson or salesperson is designated as a designated agent by a brokerage firm, including but not limited to by the broker or a managing broker affiliated with the brokerage firm, the broker, broker-salespersons or salespersons, as applicable, shall be designated agents. Each designated agent shall solely represent the party with whom the designated agent has an agency relationship.

(1) For the purposes of designated agency, the seller's designated agent and the buyer's designated agent are not dual agents and owe fiduciary duties solely to their respective principals.

(2) In order for a designated agency relationship to take effect, the brokerage firm shall enter into a written designated agency agreement that may be incorporated into the brokerage services agreement with each of the parties in a residential real estate transaction or otherwise in a written agreement with each of the parties in a commercial transaction that includes the informed, written consent of each of parties to the transaction.

b. Notwithstanding any provision of chapter 15 of Title 45 of the Revised Statutes or any other law, rule, or regulation to the contrary, including but not limited to subsection i. of R.S.45:15-17, a broker-salesperson or salesperson acting as a designated agent in a real estate transaction shall be deemed to be acting in the same capacity with the buyer and the seller as a designated agent and may receive compensation through its brokerage firm from either or both the buyer and the seller provided that the sources and amounts of compensation are disclosed in writing to the buyer and the seller.

9. (New section) a. A brokerage firm, including brokers, broker-salespersons and salespersons affiliated with the brokerage firm, that has been engaged as a transaction broker by a buyer, a seller, or both, shall not act as an agent for and shall not represent any party in the transaction; shall not promote the interest of one party over the interest of the other party; and shall not be required to keep any information confidential.

b. '[Unless additional duties are agreed to in writings signed by the transaction broker or other authorized representative of the brokerage firm] In addition to the duties provided for under current law', a transaction broker's duties '[are limited to] shall include' the following:

(1) to perform the terms of any brokerage service agreement made with any party to the transaction;

(2) to ensure, when working with a seller, that the brokerage service agreement states whether a notice on the property to be sold will be circulated in a '[Multiple Listing Service] database established to provide data about properties for sale, such as a multiple listing service,' of which the brokerage firm is a member, except that the seller's agent shall not submit any notice to the service stating whether the seller authorized the sharing of the compensation of the seller's agent with cooperating sub-agents, transaction brokers, or the buyer's agents, or the amount of the shared compensation to any service that prohibits an offer from being displayed;

(3) to treat all parties honestly and act in a competent manner;

(4) to locate qualified buyers for a seller or suitable properties for a buyer;

(5) unless otherwise directed in writing by the principal, to present all written offers and counteroffers in a timely manner in accordance with applicable law, and to provide written confirmation of receipt to the other party or its agent or transaction broker of each and every written offer or counteroffer as soon as reasonably practicable, regardless of whether the property is subject to an existing contract of sale or the buyer is already a party to an existing contract to purchase another property;

(6) to keep the parties fully informed regarding the transaction;

(7) to communicate and work with all parties in an effort to arrive at an acceptable agreement without providing advice to any party on how to gain an advantage at the expense of the other party;

(8) to advise the parties to seek expert advice on matters relating to the transaction; [1][and][1]

(9) to manage the transaction and perform tasks to facilitate the closing of the transaction[1]; and

(10) any additional duties that are agreed to in writings signed by the transaction broker or other authorized representative of the brokerage firm[1].

c. The showing of alternate properties not owned by the seller to a buyer shall not breach any duties or create a conflict of interest.

d. The showing of a property in which a buyer is interested to other prospective buyers shall not breach any duties or create a conflict of interest.

10. (New section) a. The agency or transaction broker relationships established pursuant to this chapter shall continue until the earliest of the following:

(1) completion of performance by the brokerage firm;

(2) expiration of the term agreed upon by the parties;

(3) termination of the relationship by mutual agreement of the parties; or

(4) termination of the relationship by written notice from either party to the other as provided in the brokerage services agreement, if applicable, except that a termination does not otherwise affect the contractual rights of either party.

b. If the agency or transaction broker relationship is being terminated pursuant to paragraphs (3) or (4) of subsection a. of this section, written confirmation of termination shall be required for the termination to take effect. Written confirmation of termination shall not be required for the termination to take effect pursuant to paragraphs (1) or (2) of subsection a. of this section.

c. Except as otherwise agreed to in writing, a brokerage firm shall owe no further duty or other responsibility after termination of the agency or transaction broker relationship, other than the duty:

(1) to provide an accounting to its principal as necessary in a timely manner for all moneys and property received from or on behalf of any party to the transaction; and

(2) to not disclose confidential information if there was an agency relationship, except under subpoena, court order or otherwise as provided by law, or as expressly authorized by the applicable party.

d. With respect to the termination of disclosed dual agent relationships, absent a termination by expiration or fulfillment by a completed closing, brokerage services agreements between a disclosed dual agent and a buyer and a seller shall otherwise only be terminated in writing signed by the buyer or seller, as applicable, with confirmed delivery to the disclosed dual agent.

11. (New section) a. In any real estate transaction, a brokerage firm's compensation may be paid by one or more of the following: the seller; the buyer; a third party; or by sharing the compensation between brokerage firms. Agreements on compensation shall be in writing signed by the seller or buyer, as applicable.

b. An agreement to pay or payment of compensation shall not establish an agency relationship between the party who paid the compensation and the brokerage firm.

c. A seller may agree that a seller's agent's or transaction broker's brokerage firm may share with another brokerage firm the compensation paid by the seller, provided that this type of agreement is in writing and signed by the seller.

d. A buyer may agree that a buyer's agent's or transaction broker's brokerage firm may share with another brokerage firm the compensation paid by the buyer, provided that this type of agreement is in writing and signed by the buyer.

e. Notwithstanding any provision of chapter 15 of Title 45 of the Revised Statutes or any other law, rule, or regulation to the contrary, including but not limited to subsection i. of R.S.45:15-17, a brokerage firm may be compensated by more than one party for real estate brokerage services in a real estate transaction regardless of the agency or transaction broker relationship the brokerage firm has with the parties.

f. A brokerage firm may receive compensation based upon a flat fee arrangement, a percentage of the purchase price or **'[**some**]'** other method **'**permitted by law**'**, all of which shall be a commission payment for any real estate brokerage services rendered, without breaching any duty to the buyer or seller.

g. To receive compensation for rendering real estate brokerage services from any party, firm or third party, a brokerage firm shall have a written brokerage services agreement with the buyer or the seller, as applicable, in a residential real estate transaction and a written brokerage services agreement with the seller but not with the buyer in a commercial real estate transaction containing the following:

(1) the terms of compensation, including:

(a) the amount the principal agrees to compensate the brokerage firm;

(b) the principal's consent, if any, and any terms of the consent, to compensation sharing between brokerage firms and parties sharing the payment of the compensation; and

(c) the principal's consent, if any, and any terms of consent, to compensation of the brokerage firm by more than one party; and

(2) in a brokerage services agreement with a buyer, if there is no agreement or offer or a limited offer by any other party or brokerage firm to pay compensation to the brokerage firm, if the buyer will pay the difference between the offer and the compensation the buyer has agreed is due to the buyer's agent and, if not, the buyer's agreement as to how to proceed in this situation, including, but not limited to, directing the buyer's agent not to introduce the buyer to properties where the seller is not offering compensation or is offering less compensation to the buyer's agent than the buyer agreed is due to the buyer's agent.

h. A brokerage firm may receive compensation, which shall be deemed to be the payment of a commission, without a brokerage services agreement for the provision of a broker's price opinion; comparative market analysis; or a referral by one firm to another firm if the referring firm provided no real estate brokerage services in the transaction.

12. (New section) a. A principal shall not be liable for an act, error or omission by an agent or transaction broker of the principal arising out of their relationship:

(1) unless the principal participated in or authorized the act, error or omission.

(2) except to the extent that the principal benefited from the act, error or omission, in which case the principal's liability shall be limited to the monetary amount of the benefit unless some form of punitive damages are awarded.

b. A brokerage firm shall not be liable for information that is to be disclosed by a seller in a property condition disclosure statement that is provided for in section 1 of P.L.1999, c.76 (C.56:8-19.1) or otherwise by law or that the brokerage firm requested the seller to provide and was not provided to the brokerage firm[1]; provided a real estate broker, real estate broker-salesperson, or real estate salesperson acting on behalf of the brokerage firm made reasonable efforts to ascertain all material information concerning the physical condition, including but not limited to making inquiries to the seller about any physical conditions that may affect the property and performing a visual inspection of the property to determine if there are any readily observable physical conditions affecting the property, and made disclosure of such information to appropriate parties to a transaction as required by law[1].

13. (New section) Unless otherwise agreed to in writing, a principal may not be charged with knowledge or notice of any facts known by a brokerage firm representing or working with the principal that are not actually known by the principal [1][and a]. A[1] brokerage firm representing or working with the principal may not be charged with knowledge or notice of any facts known by the principal that are not actually known by the brokerage firm[1]; provided a real estate broker, real estate broker-salesperson, or real estate salesperson acting on behalf of the brokerage firm made reasonable efforts to ascertain all material information concerning the physical condition, including but not limited to making inquiries to the seller about any physical conditions that may affect the property and performing a visual inspection of the property to determine if there are any readily observable physical conditions affecting the property[1].

14. (New section) a. At any residential property showing that is generally open to the public, a sign shall be posted at the entrance or at a sign-in sheet clearly advising prospective buyers that the brokerage firm hosting the real estate open house represents the seller only and has no relationship with the prospective buyer, except if the buyer does not have an exclusive buyer agency agreement with another brokerage firm and agrees to the seller's agent becoming a disclosed dual agent or designated agent.

b. For the avoidance of doubt and to ensure uniformity at public real estate open houses across the State, the sign shall clearly read: "ATTENTION PROSPECTIVE PURCHASERS - PLEASE READ THIS SIGN CAREFULLY. This is to advise you that the agent who is conducting this Open House REPRESENTS THE SELLER AND IS REQUIRED BY LAW TO PROMOTE THE INTERESTS OF THE SELLER. ANY INFORMATION YOU GIVE THIS AGENT IS NOT CONSIDERED CONFIDENTIAL under New Jersey law and could be disclosed to the Seller of this property. You, as the Buyer, are entitled to have someone represent you as a Buyer's Agent if you are interested in this property. The duties of a Buyer's Agent include helping you evaluate the property, prepare an offer on the property and negotiate in your best interests. If you, as the Buyer, are already exclusively represented by a Buyer's Agent, you are required to disclose this representation on the sign-in sheet. If you, as the Buyer, are not already exclusively represented by a Buyer's Agent, please be advised that the Open House agent is not precluded from being a disclosed dual agent or designated agent and can enter into any relationship with you as explained in the Consumer Information Statement."

15. (New section) [1][Notwithstanding the provisions of P.L. , c. (C. ) (pending before the Legislature as this bill), the] The[1] New Jersey Real Estate Commission may promulgate regulations [1]pursuant to the "Administrative Procedure Act,"

P.L.1968, c.410 (C.52:14B-1 et seq.) to effectuate the purposes of P.L. , c. (C. ) (pending before the Legislature as this bill), including regulations[1] to address other types of agency or business relationships for real estate brokerage firms.

16. Section 27 of P.L.2009, c.238 (C.45:15-16.2e) is amended to read as follows:

27. a. Not less than 50 percent of the continuing education courses of study that a broker, broker-salesperson or salesperson are required to complete as a condition for license renewal shall be comprised of one or more of the following core topics:

(1) Agency;

(2) Disclosure;

(3) Legal issues;

(4) Ethics, which shall not be less than two hours;

(5) Fair housing;

(6) Rules and regulations;

(7) Real estate licensee safety;

(8) Financial literacy and planning; and

(9) Any other core topics that the New Jersey Real Estate Commission may prescribe by rule.

In no event shall the commission require that courses in these core topics comprise more than 60 percent of the total continuing education hours required for the renewal of any license.

b. In the case of continuing education courses and programs, each hour of instruction shall be equivalent to one credit.

c. Notwithstanding the provisions of subsection a. of this section, the commission shall require that the continuing education courses of study that a broker, broker-salesperson or salesperson are required to complete as a condition for license renewal shall be comprised of at least one hour on the core topic of fair housing and housing discrimination during each biennial license term.

d. Notwithstanding the provisions of subsection a. of this section, the commission shall require that a continuing education course on agency be completed by a broker, broker-salesperson and salesperson as a condition for license renewal during each biennial license term.

(cf: P.L.2019, c.177, s.2)

[1]17. The rights, remedies, and prohibitions accorded by the provisions of P.L. , c. (C. ) (pending before the Legislature as this bill), are hereby declared to be in addition to and cumulative of any other right, remedy, or prohibition accorded by the common law or statutes of the United States or of this State, and nothing herein shall be construed to deny, abrogate, or impair any such common law or statutory right, remedy, or prohibition.[1]

[1][17.] 18.[1] This act shall take effect on August 1, 2024.

New Jersey Administrative Code
Title 11. Insurance
Chapter 5. Real Estate Commission (Refs & Annos)
Subchapter 7. Prohibited Activities

N.J.A.C. **11:5–7.1**

**11:5–7.1** Prohibition against licensees receiving dual compensation for dual representation in the sale or rental transaction

Effective: February 21, 2023
Currentness

(a) Real estate licensees are prohibited from receiving compensation from both a seller and a buyer for representing both seller and buyer in the same real estate sales transaction. This prohibition applies even when the dual agency has been fully disclosed by the licensee to both parties.

(b) Real estate licensees are prohibited from receiving compensation from both a landlord and a tenant for representing both the landlord and the tenant in the same rental transaction. This prohibition applies even when the dual agency has been fully disclosed by the licensee to both parties.

(c) Within the meaning of this section, the phrases "sales transaction" and "rental transaction" do not include any related transactions whether or not they are contingencies in the contract or lease. For example, where there is a mortgage contingency in a contract of sale, the mortgage loan is a related transaction between the buyer and lender; it is not the same transaction as the sale.

(d) A licensee who represents only one party to a sale or rental transaction may receive the entire compensation for such representation from either party or a portion of that compensation from both parties to the transaction, provided that where a licensee prepares a contract or lease full written disclosure of the agency relationship and of the compensation arrangement is made to both parties to the transaction in the contract or lease. Where a licensee does not prepare the contract or lease, but seeks compensation from a party whom he or she does not represent, that licensee's agency relationship and proposed compensation arrangement shall be disclosed to all parties in a separate writing prior to execution of the contract or lease.

(e) A licensee who represents any party to a sale or rental transaction may receive compensation from either party for providing actual services in related transactions, provided that the licensee discloses the related services, sources and amounts of compensation in writing to the parties to the sale or rental transaction. Where the related services to be provided by the licensee are mortgage financing services provided to the buyer for compensation or reimbursement, the written disclosures must comply with N.J.A.C. 11:5–6.7. The broker shall maintain records of such related transactions including all required written disclosures, which records shall be available to the Commission for inspection pursuant to N.J.A.C. 11:5–5.5.

(f) Except as provided at (g) below, when providing mortgage financing services related to the purchase or sale of a one to six family residential dwelling, a portion of which may be used for non-residential purposes, located in New Jersey:

1. A real estate broker shall not solicit or receive compensation or reimbursement pursuant to (e) above greater than the expense amount permitted at closing by rule of the Department of Banking and Insurance unless licensed as a mortgage broker or mortgage banker by the Department of Banking and Insurance pursuant to the Consumer Finance Licensing Act, N.J.S.A. 17:11C–1 et seq.; and

2. A real estate referral agent, salesperson or broker-salesperson shall not solicit or receive any compensation or reimbursement pursuant to (e) above from any person other than his or her employing real estate broker unless licensed as a residential mortgage broker or mortgage banker or a mortgage loan originator by the Department of Banking and Insurance pursuant to the New Jersey Residential Mortgage Lending Act, N.J.S.A. 17:11C–51 et seq.

(g) Any real estate licensee who is individually employed as a mortgage solicitor by a licensed mortgage banker or mortgage broker and registered in compliance with applicable law and the rules of the Department of Banking and Insurance may solicit and accept compensation from his or her licensed mortgage employer for providing mortgage services in residential mortgage transactions.

**Credits**

Adopted by R.1992 d.232, effective June 1, 1992. Amended by R.1992 d.468, effective November 16, 1992; R.1998 d.497, effective October 5, 1998; R.2012 d.006, effective January 3, 2012. Technical changes made by 55 N.J.R. 302(a) R.2023, effective February 21, 2023.

**CHAPTER EXPIRATION DATE**

<Chapter 5, Real Estate Commission, expires on January 24, 2030.>

Current through amendments included in the New Jersey Register, Volume 56, Issue 8, dated April 15, 2024. Some sections may be more current, see credits for details.

N.J.A.C. **11:5–7.1**, NJ ADC **11:5–7.1**

End of Document

State of New Jersey
DEPARTMENT OF BANKING AND INSURANCE
OFFICE OF THE COMMISSIONER
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PHIL MURPHY
*Governor*

TAHESHA L. WAY
*Lt. Governor*

JUSTIN ZIMMERMAN
*Acting Commissioner*

**BULLETIN NO. 24-11**

**TO:** **REAL ESTATE LICENSEES AND OTHER INTERESTED PARTIES**

**FROM:** **JUSTIN ZIMMERMAN, ACTING COMMISSIONER**

**RE:** **CHANGES TO THE NEW JERSEY REAL ESTATE BROKER AND SALESPERSON ACT BY P.L. 2024, c.32: LICENSEE BUSINESS RELATIONSHIPS (INCLUDING DESIGNATED AGENCY); CONSUMER INFORMATION STATEMENT; BROKERAGE SERVICE AGREEMENTS; PROPERTY CONDITION DISCLOSURE STATEMENT; BROKER COMPENSATION; SIGNAGE AT SHOWINGS; AND NEW CONTINUING EDUCATION REQUIREMENT**

P.L. 2024, c.32 ("Act") was signed into law on July 10, 2024 and becomes effective on August 1, 2024. The Act supplements the New Jersey Real Estate Broker and Salesperson Act, N.J.S.A. 45:15-1 to -42. Pending the promulgation of regulations, the New Jersey Real Estate Commission ("Commission") is issuing this bulletin to provide guidance to real estate licensees regarding requirements of the Act.

Specifically, the Act makes the following changes to current law: codifies the different types of permitted business relationships between real estate brokerage firms and principal, and the obligations applicable to each; creates a new type of agency relationship, called designated agency, necessitating changes to the text of the Consumer Information Statement as required by N.J.A.C. 11:5-6.9; requires that brokerage firms enter into a brokerage services agreement in all residential real estate transactions and when working with a seller in commercial real estate transactions[1]; mandates that licensees obtain a signed property condition disclosure statement (which is promulgated by the New Jersey Division of Consumer Affairs) from the seller in

[1] "Commercial real estate" means a fee title interest, possessory estate, or lease in real property located in the State of New Jersey, other than an interest in real property that is: (1) improved with one single-family residential unit or one multifamily structure with four or fewer residential units; (2) unimproved and the maximum permitted development is one to four residential units or structures under applicable zoning regulations; (3) classified as farmland, timberland or other agricultural land for real estate tax assessment purposes; (4) improved with single-family residential units, such as condominiums, townhouses, timeshares, or stand-alone houses in a subdivision that may be legally sold, leased or otherwise disposed of on a unit-by-unit basis; (5) subject to an agreement that provides that the real estate should be considered residential; or (6) within the definition in this section as of the date of its disposition. P.L. 2024, c.32, s.1

residential real estate transactions; permits broker compensation by more than one party in a transaction involving dual agency and/or designated agency; mandates signage at all residential property showings; and imposes a new continuing education requirement (which must be met for the next license renewal in June 2025).

Real Estate Brokerage Business Relationships, Including Designated Agency

The Act defines five different business relationships available to consumers when working with a real estate brokerage firm[2] and sets forth the corresponding duties owed to parties to a real estate transaction by the brokerage firm. In addition to codifying the four business relationships currently existing (i.e., buyer's agent, seller's agent, disclosed dual agent, and transaction broker), the Act adds a new type of agency relationship, called designated agency. The business relationship between a brokerage firm and its principal should be established in the brokerage services agreement or a separate writing, signed by the principal. In the absence of an affirmative designation of a business relationship, the Act deems a brokerage firm that performs brokerage services on behalf of a buyer or seller, to be a buyer's agent or seller's agent, respectively, by default. See, P.L. 2024, c.32, s.3.a; s.5.a.

The Act provides that all brokerage firms have the following duties, regardless of which business relationship is utilized:

- To deal competently, honestly and fairly with all parties to a transaction. See, P.L. 2024, c.32, s.2.c.; s.9.b(3).
- To present all written offers and counteroffers in a timely manner and provide written confirmation of receipt to the other party, its agent or transaction broker, regardless of whether the property is subject to a contract of sale, unless otherwise directed by the principal, in writing. P.L. 2024, c.32, s.2.d.; s.9.b(5).
- To advise the buyer or seller, as appropriate, to seek expert advice on matters relating to the transaction beyond the brokerage firm or individual licensee's expertise. P.L. 2024, c.32, s.4.a(3); s.6.a(3); s.7.b(3); s.9.b(8).
- To undertake a reasonable effort to obtain material information concerning the condition of every property for which the brokerage firm accepts an agency relationship or is retained to market as a transaction broker, and concerning the financial qualifications of every person for whom the brokerage firm submits an offer to the brokerage firm's principal. P.L. 2024, c.32, s.2.j; s.12.b; s.13.
- To disclose all existing material information known by the agent acting on behalf of the brokerage firm, or which a reasonable effort to ascertain the information would have revealed, to the principal and when appropriate to any other party to the transaction. P.L. 2024, c.32, s.2.f; s.12.b.
- Any additional duties agreed to in the brokerage services agreement or other writing signed by the brokerage firm or individual licensee. P.L. 2024, c.32, s.4.a(6); s.6.a(6); s.7.a(7); s.9.b(10).

[2] The term "brokerage firm" includes the individual licensed real estate brokers, broker-salespersons and salespersons associated with the firm, unless the context requires the terms to be considered separately. See, P.L. 2024, c.32, s.1.

The creation of an agency relationship gives rise to fiduciary duties owed by licensees to the party the licensee represents in a real estate transaction. N.J.A.C. 11:5-6.4(a). The law governing agency relationships and fiduciary duties owed by a licensee to its principal arise primarily from court-made law, or common law. The Act adds to these requirements but does not limit, or in any way impair, existing legal duties at common law. P.L. 2024, c.32, s.17.

Under the Act, there are four brokerage business relationships that create an agency relationship between a licensee and a buyer or seller of real estate[3]: (1) seller's agent; (2) buyer's agent; (3) disclosed dual agent; and (4) designated agent, which is newly created by the Act. See, P.L. 2024, c.32, s.1. In these four types of agency relationships, duties owed by brokerage firms to their principals include:

- To act as fiduciaries, bound by the duty of loyalty and must disclose any actual or potential conflicts of interest to their principal that the agent may reasonably anticipate in a timely manner. P.L. 2024, c.32, s.2.a; s.4.a(1); s.6.a(1).
- To not disclose any confidential information from or about their principal, except under subpoena, court order or otherwise as provided by law, or as expressly authorized by the principal, even after termination of the relationship. P.L. 2024, c.32, s.4(a)4; s.6(a)4; s.7(b)4.
- To provide an accounting to their principal as necessary for all money and property received from or on behalf of any party to the transaction. P.L. 2024, c.32, s.2.g.

Sellers' and buyers' agents work exclusively on behalf of their principal in a real estate transaction and owe fiduciary duties exclusively to the party they represent. P.L. 2024, c.32, s.2.a; s.4.a(1); s.6.a(1). The Act provides that sellers' and buyers' agents must be loyal to their principal by exercising primary devotion to the interests of the principal; and taking no action adverse or detrimental to their principal's interests. Ibid.

Disclosed dual agents represent both buyer and seller and act as a fiduciary to both parties in the same transaction. P.L. 2024, c.32, s.1. Brokerage firms acting as a disclosed dual agent are prohibited from prioritizing one party's interests over the other's and may not take any action that is detrimental to the interests of either party. See, P.L. 2024, c.32, s.7.b(1). Accordingly, disclosed dual agents are prohibited from disclosing confidential information regarding either side of the transaction, except under subpoena, court order or otherwise as provided by law, or as expressly authorized by a buyer or seller, even after termination of the relationship. P.L. 2024, c.32, s.7.b(4). A brokerage firm must obtain the informed consent of both parties to the transaction in order to act as a disclosed dual agent. P.L. 2024, c.32, s.7.a.

Designated agency entails a transaction in which a brokerage firm designates different individual licensees affiliated with the firm to solely represent the buyer as the buyer's agent and another to solely represent the seller as the seller's agent. P.L. 2024, c.32, s.1. Each designated agent solely represents, and has an agency relationship with, the party whom they have been designated to represent. See, P.L. 2024, c.32, s.8.a. For the purposes of designated agency, the seller's designated agent and the buyer's designated agent are not dual agents and owe fiduciary duties solely to their respective principals. P.L. 2024, c.32; s.8.a(1). However, in transactions

[3] The terms buyer and seller include tenants and landlords, unless the context requires them to be considered separately. See, P.L. 2024, c.32, s.1.

involving designated agency, the brokerage firm (other than those individual licensees that are designated to represent the buyer and seller) acts in the capacity of disclosed dual agent. See, P.L. 2024, c.32, s.1; s.7.a. In order for a designated agency relationship to take effect, the brokerage firm must obtain the informed written consent of both parties to the transaction. P.L. 2024, c.32, s.8.a(2).

The fifth brokerage business relationship under the Act is transaction broker. P.L. 2024, c.32, s.1; s.9.a. A transaction broker renders real estate brokerage services without creating an agency relationship between the brokerage firm and buyer or seller of real estate; and thus, does not owe fiduciary duties to the parties to a transaction. Ibid. A brokerage firm that has been engaged as a transaction broker by a buyer, a seller, or both, may not promote the interests of one party over the interest of the other; and is not required to keep any information confidential. Ibid. Transaction brokers serve as manager of the real estate transaction, keeping parties fully informed and performing tasks to facilitate the closing of the transaction. P.L. 2024, c.32, s.9.b.

Consumer Information Statement

N.J.A.C. 11:5-6.9 requires that real estate licensees supply information regarding their working relationship with parties to a residential real estate transaction. Licensees are required to verbally inform buyers and sellers in residential real estate transactions of the different types of brokerage business relationships and deliver a copy of the Consumer Information Statement ("CIS"), prior to working with them in residential real estate transactions. See, N.J.A.C. 11:5-6.9(e). The CIS is an informational document that summarizes the various business relationships and accompanying legal duties to help ensure that buyers and sellers make informed decisions regarding business relationships with brokerage firms.

The Act requires brokerage firms to provide buyers and sellers with the CIS and obtain a signed acknowledgement of receipt in certain contexts. P.L. 2024, c.32, s.2.h. Furthermore, the CIS must be included as part of the brokerage services agreement. Ibid. Brokerage firms must deliver the CIS to any party to whom the firm renders real estate brokerage services as soon as reasonably practical but no later than at the time the party signs a brokerage services agreement; and to any party not represented by a brokerage firm in a transaction before the party signs an offer or as soon as reasonably practical thereafter. Ibid. The Act does not require brokerage firms to obtain a signed acknowledgment of receipt of the CIS from an unrepresented buyer as a precondition to view a property (i.e. at an open house).

The required text of the CIS is set forth in N.J.A.C. 11:5-6.9(h). Because of the addition of the designated agency business relationship, the Commission is issuing a revised CIS form under cover of this bulletin, attached hereto as **Appendix A**, which must be used by real estate licensees in lieu of the text set out at N.J.A.C. 11:5-6.9(h). The Commission is working to promulgate regulations to conform its rules to the requirements of the Act, including the addition of designated agency and the codification of an updated CIS.

Until such time that the Commission promulgates regulations implementing the Act, real estate licensees must utilize the form attached hereto as **Appendix A** whenever use of the CIS is required by the Act or the Commission's regulations.

Brokerage Services Agreement

The Act requires brokerage firms to enter into a written agreement, called a brokerage services agreement ("BSA"), with the buyer or seller, as applicable, in all residential real estate transactions, and with sellers in commercial real estate transactions. See, P.L. 2024, c.32, s.3.b; s.5.b.; s.11.g. BSAs include, but are not limited to, sale and rental listing agreements; buyer-lessee agency agreements; and transaction broker, dual agency and designated agency agreements. P.L. 2024, c.32, s.1. The Act requires brokerage firms to obtain a BSA, signed by appropriate parties, "before, or as soon as reasonably practical after, the firm commences rendering real estate brokerage services on behalf of" such parties. P.L. 2024, c.32, s.3.b; s.5.b. A BSA is not required when the services provided by a brokerage firm are limited to providing a broker's price opinion, comparative market analysis, or a referral by one firm to another if the referring firm provided no real estate brokerage services in the transaction. P.L. 2024, c.32, s.11.h.

In the BSA, brokerage firms must disclose the type of business relationship it has with the principal. P.L. 2024, c.32, s.2.i(1). The disclosure shall be set forth in a separate paragraph titled "Agency Disclosure" in the BSA.[4] Ibid. Additionally, the Act requires that the CIS be included as part of the agreement. P.L. 2024, c.32, s.2.h. If the brokerage firm has an agency relationship with the principal, the agreement must specify whether the agency is exclusive or non-exclusive. P.L. 2024, c.32, s.3b(2)(c); s.5.b(2)(c). BSAs must also contain the written consent of the principal to the brokerage firm acting as disclosed dual agent or designated agent, as applicable, in residential real estate transactions. P.L. 2024, c.32, s.7.a.; s.8.a(2).

BSAs must specify the term of the agreement and set forth the amount of the brokerage firm's compensation as well as how it will be calculated. P.L. 2024, c.32, s.3.b(2)(a), (f); s. 5.b(2)(a), (f). If applicable, the BSA must include the principal's consent, if any, to the brokerage firm acting as a disclosed dual agent or designated agent, and the principal's consent, if any, to their agent acting as a disclosed dual agent and any terms of consent, including if the compensation will be shared with another brokerage firm that may have a brokerage relationship with another party to the transaction. to compensation sharing between brokerage firms, parties sharing the payment of the compensation and compensation of the brokerage firm by more than one party. P.L. 2024, c.32, s.3.b(2)(d)-(f); s.5.b(2)(d)-(f). If the principal is a seller, the BSA must include whether a notice on the property will be circulated in any databases, such as a multiple listing service.[5] P.L. 2024, c.32, s.5.b(2)(g). However, the Commission is eliminating the requirement in N.J.A.C. 11:5-6.9(k)(1)(iii) for brokerage firms working with sellers to state the amount of compensation sharing on any databases, such as a multiple listing service, and is working to promulgate conforming regulations. If the principal is a buyer, the BSA must specifically address how to proceed in the event that there is no offer, or a limited offer by any other party to pay

[4] The Act provides that this disclosure may also be accomplished in a separate written document titled "Agency Disclosure" that is signed by the principal. Ibid.

[5] Licensees are prohibited from submitting any notice regarding the existence or amount of any commission sharing authorized by the seller in any service that prohibits the display of such offers. P.L. 2024, c.32, s.5.b(2)(g); s.9.b(2).

compensation to the brokerage firm.[6] P.L. 2024, c.32, s.11.g(2). BSAs are required to include a disclosure expressly stating that broker compensation is fully negotiable and not set by law. P.L. 2024, c.32, s.3.b(2)(g); s.5.b(2)(g).

Property Condition Disclosure Statement

The Act requires that a brokerage firm obtain a signed property condition disclosure statement that is provided for in N.J.S.A 56:8-19.1 ("PCDS") from the seller in a real estate transaction. P.L. 2024, c.32, s.2.e. In real estate transactions where the seller is not represented or working with a brokerage firm, the Act states that such a seller shall be required to provide the PCDS to the buyer before the buyer becomes obligated under any contract for the purchase of the property. Ibid. The PCDS is promulgated by the New Jersey Division of Consumer Affairs and set forth at N.J.A.C. 13:45A-29.1(d).

Brokerage Firm Compensation

The Act provides that a brokerage firm may be compensated by more than one party for real estate brokerage services in a real estate transaction regardless of the agency or transaction broker relationship the brokerage firm has with the parties. P.L. 2024, c.32, s.11.e. In any real estate transaction, a brokerage firm's compensation may be paid by one or more of the following: the seller; the buyer; a third party; or by sharing the compensation between brokerage firms. P.L. 2024, c.32, s.11.a. A brokerage firm may receive compensation based upon a flat fee arrangement, a percentage of the purchase price, or other method permitted by law, all of which are considered to be a commission. P.L. 2024, c.32, s.11.f.

In order to receive compensation for rendering real estate brokerage services a brokerage firm must have a written brokerage services agreement with the buyer or the seller, as applicable, in a residential real estate transaction and a written brokerage services agreement with the seller, but not with the buyer, in a commercial real estate transaction. P.L. 2024, c.32, s.11.g. As summarized above, the agreement must specify the terms of compensation and include the principal's consent, if applicable, to arrangements involving the sharing of compensation among brokerage firms or payment by multiple parties. Ibid.

Residential Property Showing Signage

At any residential property showing that is generally open to the public, the Act requires that real estate licensees post a sign either at the entrance or at a sign-in sheet that shall clearly read exactly as follows:

> ATTENTION PROSPECTIVE PURCHASERS - PLEASE READ THIS SIGN CAREFULLY. This is to advise you that the agent who is conducting this Open House REPRESENTS THE SELLER AND IS REQUIRED BY LAW TO

[6]Specifically, the BSA must address if the buyer will pay the difference between the compensation offer of another party and the compensation the buyer has agreed is due to the buyer's agent and, if not, the buyer's agreement as to how to proceed in this situation, including, but not limited to, directing the buyer's agent not to introduce the buyer to properties where the seller is not offering compensation or is offering less compensation to the buyer's agent than the buyer agreed is due to the buyer's agent. P.L. 2024, c.32, s.11.g(2).

PROMOTE THE INTERESTS OF THE SELLER. ANY INFORMATION YOU GIVE THIS AGENT IS NOT CONSIDERED CONFIDENTIAL under New Jersey law and could be disclosed to the Seller of this property. You, as the Buyer, are entitled to have someone represent you as a Buyer's Agent if you are interested in this property. The duties of a Buyer's Agent include helping you evaluate the property, prepare an offer on the property and negotiate in your best interests. If you, as the Buyer, are already exclusively represented by a Buyer's Agent, you are required to disclose this representation on the sign-in sheet. If you, as the Buyer, are not already exclusively represented by a Buyer's Agent, please be advised that the Open House agent is not precluded from being a disclosed dual agent or designated agent and can enter into any relationship with you as explained in the Consumer Information Statement.

[P.L. 2024, c.32, s.14.]

New Continuing Education Requirement

The Act amends N.J.S.A. 45:15-16.2e to require that real estate licensees complete at least one continuing education course in the topic area of "agency" as a condition for license renewal during each biennial license term. P.L. 2024, c.32, s.16. The Commission will enforce this requirement as part of the next upcoming license renewal cycle. **All individual real estate broker, broker-salesperson and salesperson licensees will be required to submit proof that at least one out of the 12 continuing education credits completed was in the core topic area of "agency" as a condition for license renewal for the 2025-2027 biennial license term.**

The Act may be found here: 3192_R1.PDF (state.nj.us). The Commission intends to promulgate regulations to implement the provisions of the Act in the near future. Brokerage firms are again reminded to utilize the form attached hereto as **Appendix A** whenever use of the CIS is required by the Act or the Commission's regulations.

All questions regarding this bulletin may be directed to: realestate@dobi.nj.gov.

08/01/2024
Date

Justin Zimmerman
Acting Commissioner

JR REC CIS Bulletin 2024/Bulletins

# D

NEW JERSEY REALTORS®

# LEAD PAINT LAW

## THE *issue*

Lead paint is hazardous and can prove harmful to children, leading to differentiated health issues. For more than two decades, New Jersey Realtors has consistently advocated for common-sense lead remediation to protect the children of the state while also protecting the rights of private property owners. Lead paint was banned in 1977, so when talking about lead we focus on homes built prior to 1978—of which there are more than 1.1 million in New Jersey, many of which are concentrated in poorer, minority, urban communities.

## THE *history*

NJ Realtor®s has been engaged on this issue for almost 20 years. The original bill was introduced in 2003 by Sen. Ron Rice and over the years we've worked with many legislators and gubernatorial administrations to ensure that this legislation did not have a detrimental impact on the housing market. In February of 2020 Sen.Teresa Ruiz introduced S1147 which would require that a lead paint inspection take place before the sale of a home or tenant turnover. With our apprehensions about the negative effect on the time it may take to close a sale, and the costs that may be incurred, we reached out to the sponsor of the bill to try and come up with a compromise that would result in a more friendly process towards reaching the goal of remediation.

The bill was later substituted with new language that removed the original time-of-sale requirement. The substitution requires lead inspection once there was tenant turnover at a residence or within two years of the bill's effect date, the need for an inspection would be triggered, and $3.9 million dollars was put aside for grants that property owners would be able to apply for to address the lead-based hazards in the home. The bill also helps to address the lack of lead inspectors in the state by requiring that towns who have a dedicated inspection agency to provide the inspection of the necessary properties. The bill also calls for the Department of Community Affairs to develop materials and a seminar that will be given to relevant stakeholders, like Realtors®, so that they know what is going to be required of them

NEW JERSEY REALTORS®

in the process, and what they can do to help address the issues of lead in homes. The bill was signed by Gov. Murphy on July 22, 2021, and the contents of the bill will go into effect one year from the signing date. This bill will help New Jersey move towards having healthier places to live in, without having property owners incur thousands of dollars in remediation costs.

## THE law

Since Gov. Murphy signed S1147 on July 22, 2021, it is now law. The contents are as follows:

- requires lead inspection once there was tenant turnover at a residence or within two years of the bill's effect date, the need for an inspection would be triggered,
- $3.9 million dollars was put aside for grants that property owners would be able to apply for to address the lead-based hazards in the home.
- Addresses the lack of lead inspectors in the state by requiring that towns who have a dedicated inspection agency to provide the inspection of the necessary properties
- calls for the Department of Community Affairs to develop materials and a seminar that will be given to relevant stakeholders, like Realtors®, so that they know what is going to be required of them in the process, and what they can do to help address the issues of lead in homes.
- The bill was signed by Gov. Murphy on July 22, 2021, and the contents of the bill will go into effect one year from the signing date.

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|---|---|---|---|
| The Lead Inspections required upon tenant turnover or within two years of date of law. | $3.9 million set aside for grants to help property owners subsidize lead remediation. | Towns with dedicated inspection agencies will have to provide necessary property inspections. | DCA will provide training and materials to relevant stakeholders. |

# How does this affect you and your landlords?

This is critical information for your business and you will need to be educated on the nuances of the new law. Once the Department of Community Affairs creates guidelines and trainings, they will be available here. If you have specific questions, you can always reach the Government Affairs Department at 609-341-7100.

**From: "New Jersey Real Estate Brokerage Law" (2022 ed.) by Barry S. Goodman**

## Section 22-4:7 Use of Criminal Records by Landlords in New Jersey

In June 2021, New Jersey enacted the Fair Chance in Housing Act,[1] which became effective on January 18, 2022. The purpose of the Act is to deal with studies that showed that ex-convicts often are unable to find stable housing and, as a result, recidivism becomes more likely and the public safety is diminished.

Under the Act, a housing provider[2] is prohibited from requiring an applicant "to complete any housing application that includes any inquiries regarding an applicant's criminal record prior to the provision of a conditional offer,"[3] which is "an offer to rent or lease a rental dwelling unit to an applicant that is contingent on a subsequent inquiry into the applicant's criminal record, or any other eligibility criteria the housing provider may lawfully utilize."[4] A housing provider also cannot make any oral or written inquiry regarding an applicant's criminal record prior to making a conditional offer.[5]

Before accepting any application fee, a housing provider is required to disclose in writing to the applicant whether or not the housing provider is using any eligibility criteria that includes the review and consideration of criminal history, as well as that the applicant may provide evidence demonstrating inaccuracies in the applicant's criminal record or evidence of rehabilitation or mitigating factors.[6]

There also are restrictions on the use of criminal records to evaluate applicants and to use a criminal record as a basis to withdraw an offer. A housing provider is prohibited, before or after the issuance of a conditional offer, from evaluating an applicant based upon following criminal records: (1) arrests or charges that did not result in a criminal conviction; (2) expunged convictions; (3) convictions that were erased through an executive pardon; (4) vacated and otherwise legally nullified convictions; (5) juvenile adjudications of delinquency, and (6) records that have been sealed.[7]

After a conditional offer has been made to an applicant, a housing provider only may consider a criminal record in the applicant's history that (1) resulted in a conviction for murder, aggravated sexual assault, kidnapping, arson, human trafficking, sexual assault in violation of N.J.S.A. 2C:14-2, causing or permitting a child to engage in a prohibited sexual act or in the simulation of such an act in violation of N.J.S.A. 2C:24-4(b)(3), or any crime that resulted in lifetime registration in a sex offender registry; (2) is for an indictable offense of the first degree that was issued, or if the conviction resulted in a prison sentence that concluded, within the six years immediately preceding the issuance of the conditional offer; (3) is for an indictable offense of the second or third degree that was issued, or if the conviction resulted in a prison sentence that concluded, within the four years immediately preceding the issuance of the conditional offer; or (4) is for an indictable offense of the fourth degree that was issued, or if the conviction resulted in a

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[1] N.J.S.A. 46:8-52 to 64.
[2] A "housing provider" is defined as "a landlord, an owner, lessor, sublessor, assignee, or their agent, or any other person receiving or entitled to receive rents or benefits for the use or occupancy of any rental dwelling unit." N.J.S.A. 46:8-54.
[3] N.J.S.A. 46:8-55(a)(1). The Act includes an exception to this prohibition providing that "a housing provider may consider whether an applicant has ever been convicted of drug-related criminal activity for the manufacture or production of methamphetamine on the premises of federally assisted housing, and whether the applicant is subject to a lifetime registration requirement under a State sex offender registration program." Id.
[4] N.J.S.A. 46:8-54.
[5] N.J.S.A. 46:8-55(a)(2).
[6] N.J.S.A. 46:8-55(b).
[7] N.J.S.A. 46:8-56(a).

prison sentence that concluded, within one year immediately preceding the issuance of the conditional offer.[8]

A housing provider may withdraw a conditional offer based upon an applicant's criminal record only if the provider determines, by a preponderance of all the evidence, "that the withdrawal is necessary to fulfill a substantial, legitimate and nondiscriminatory interest."[9] If the housing provider withdrawals a conditional offer, the housing provider is required to provide the applicant with written notification that includes the specific reason or reasons for the withdrawal of the offer and an opportunity for the applicant to appeal his or her denial by providing evidence to the housing provider that demonstrates inaccuracies in the applicant's criminal record or evidence of rehabilitation or other mitigating factors.[10]

The housing provider also is required to perform an individualized assessment of the application that was submitted in light of the following factors: (1) the nature and severity of the criminal offense; (2) the applicant's age when the criminal offense occurred; (3) how much time has elapsed since the criminal offense occurred; (4) any information provided by the applicant or on behalf of the applicant with regard to the applicant's rehabilitation and good conduct since the criminal offense occurred; (5) the degree to which the criminal offense, if it reoccurred, would negatively impact the safety of the housing provider's other tenants or property, and (6) whether the criminal offense occurred on or was connected to a property that was rented or leased by the applicant.[11]

Within thirty days after the housing provider's notice of withdrawal of the conditional offer, the applicant can request that the housing provider provide the applicant with a copy of all information that the housing provider relied upon in considering the application, including criminal records. This information has to be provided by the housing provider free of charge within ten days after receipt of a timely request.[12]

In addition, a housing provider is prohibited from advertising that the housing provider will not consider any applicant who has been arrested or convicted of one or more crimes or offenses, except for drug-related criminal activity for the manufacture or production of methamphetamine on the premises of federal assisted housing and if the applicant is subject to a lifetime registration requirement under a State sex offender registration program.[13] A housing provider also cannot, unless required by law, distribute or disseminate an applicant's criminal record to any person who is not expected to use the criminal record to evaluate the applicant in a manner consistent with the Act for purposes that are inconsistent with the Act.[14] In addition, a housing provider is prohibited from requiring an applicant to submit to a drug or alcohol test, or to request that the applicant consent to obtaining information from a drug abuse treatment facility.[15]

A housing provider who complies with Act "shall be immune from liability in any civil action arising as a result of the landlord's decision to rent to individuals with a criminal record or who were otherwise convicted of a criminal offense, or as a result of a landlord's decision to not engage in a criminal background screening."[16]

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[8] N.J.S.A. 46:8-56(b).
[9] N.J.S.A. 46:8-56(c)(1).
[10] N.J.S.A. 46:8-56(c)(2).
[11] N.J.S.A. 46:8-56(c)(3).
[12] N.J.S.A. 46:8-56(d).
[13] N.J.S.A. 46:8-58(a).
[14] N.J.S.A. 46:8-58(c).
[15] N.J.S.A. 46:8-60.
[16] N.J.S.A. 46:8-59(a).

# E

Greenbaum Rowe Smith & Davis LLP
COUNSELORS AT LAW

# Barry S. Goodman

**PARTNER**

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*Being a lawyer allows me to fulfill my desire to help people while constantly being challenged to keep up with changing laws, many of which I have had the good fortune to mold through cases I have handled and my drafting of legislation and regulations. I could not be more pleased to be able to counsel my clients about their business and personal issues in an attempt to avoid problems and, when necessary, advocate for them in lawsuits and before regulatory agencies.*

Mr. Goodman focuses his practice in commercial litigation, with a particular concentration in real estate and real estate brokerage issues. His experience also encompasses municipal law, antitrust suits, and corporate shareholder and partnership disputes. Throughout his career, a number of Mr. Goodman's cases have resulted in published opinions that set precedents in New Jersey.

Mr. Goodman is approved by the State of New Jersey Department of Banking and Insurance Real Estate Commission as a New Jersey Real Estate Continuing Education Instructor. He lectures frequently to the real estate brokerage community and other industry organizations throughout the state, and has written extensively on topics related to real estate brokerage law.

**HONORS & AWARDS**

- Recipient of the Middlesex County Bar Association Lawyer Achievement Award (2010)

## Departments

Litigation

Real Estate

## Practice Groups

Real Estate Brokerage

## Education

Rutgers University School of Law, Newark, J.D., 1977

Rutgers College, B.A., *cum laude*, 1973

## Bar Admissions

New Jersey, 1978

U.S. District Court, District of New Jersey, 1978

U.S. Supreme Court, 1984

U.S. Court of Appeals, Third Circuit, 1986

## Clerkships

Former law clerk to The Honorable Eugene L. Lora, Presiding Judge, New Jersey Appellate Division (1977-1978)

- Recipient of the Rutgers University Alumni Meritorious Service Award (2006)
- Listed in *The Best Lawyers in America©* (a trademark of Woodward/White, Inc.) in the Appellate Practice, Litigation-Real Estate and Commercial Litigation practice areas (2012 – present)
- Selected by *Best Lawyers®* (a trademark of Woodward/White, Inc.) as 2016 Woodbridge "Lawyer of the Year" in Litigation - Real Estate
- Listed in *New Jersey Super Lawyers* (a Thompson Reuters business) in the Real Estate practice area (2011 – present)
- Martindale-Hubbell® Peer Review Rated AV® Preeminent (a trademark of Internet Brands, Inc.) (1988 – present)
- Listed in *Benchmark Litigation* (published by Euromoney Institutional Investor PLC) as a Local Litigation Star - New Jersey in the Antitrust and General Commercial practice areas (2013 – present)
- Listed in *Marquis Who's Who in America* (published by Marquis Who's Who LLC) (2001 – present)
- Following law school graduation, honored with the Eli Jarmel Memorial Prize for public interest litigation

*A description of the standard or methodology on which the accolades are based can be found HERE. No aspect of this advertisement has been approved by the Supreme Court of New Jersey.*

**REPRESENTATIVE MATTERS**

- *Conley v. Guerrero* (2017), in which the New Jersey Supreme Court held that an attorney who sends a notice of disapproval of a residential sales contract prepared by a real estate licensee to the broker(s) during the three-day attorney-review period must send it by email, fax, overnight mail or personal delivery
- *Timber Glen Phase III, LLC v. Township of Hamilton* (2015), in which the Appellate Division held that a municipality does not have the authority under the Licensing Act to impose licenses and licensing fees for residential apartment units that provide tenancies for 175 days or more
- *Zaman v. Felton* (2014), in which the New Jersey Supreme Court held that, where a real estate licensee purchases a house that is in foreclosure with the seller having the right to buy back the property and continue to live there through a lease, the transaction may create an equitable mortgage but it is not subject to *In re: Opinion 26* or the Consumer Fraud Act
- *In re: Opinion 26* (1995), in which the New Jersey Supreme Court held that buyers and sellers of residential real estate can receive assistance from real estate and title agents during the closing process, as has been the practice in South Jersey, and do not have to retain a lawyer as has typically been done in North Jersey
- *RE/MAX v. Wassau* (2000), in which the New Jersey Supreme Court held that real estate salespeople are employees for purposes of workers' compensation

- *H.I.P. v. K. Hovnanian* (1996), in which Mr. Goodman successfully represented a developer regarding an advocacy group's claims that a development did not comply with the Fair Housing Act
- *Mortgage Bankers Association of NJ v. NJ Real Estate Commission* (1995), in which Mr. Goodman served as lead counsel. Following a 12-year court battle, the Appellate Division ultimately held that real estate licensees can receive a fee for providing mortgage-related services
- *Reyes v. Egner* (2010), in which the Appellate Division held that a broker for a short-term summer rental is not liable to a tenant who was in the unit for nine days and then fell where a step was higher than the construction code permitted and there was no required handrail on the steps, and the broker therefore is not subject to the same duty to warn visitors as a broker in an open house situation
- *Exit A Plus Realty v. Zuniga* (2007), in which the Appellate Division held that real estate listing agreements are not automatically void, but are only voidable based upon the equities of the case if a real estate licensee violates the Real Estate Licensing Act
- *CBTR v. Twin Rivers Homeowners' Association* (2007), in which the New Jersey Supreme Court held that homeowners' associations' policies regarding expressional activities will be upheld if they are reasonable but may be subject to constitutional scrutiny if they are unreasonable
- *Danvers Motor Co. v. Ford Motor Co.* (2005), in class action antitrust suit, the United States Third Circuit Court of Appeals held that dealers challenging Ford's nationwide incentive and satisfaction program stated particularized harm by alleging payments against their will and relinquishing control of dealership operations to satisfy constitutional standing requirements
- *New Jersey Association of REALTORS® v. New Jersey Department of Environmental Protection* (2004), in which the Appellate Division held that a regulation requiring deed notices concerning environmentally contaminated sites be sent to the Association for distribution by its members to the public was void ab initio because it violated the New Residential Off-Site Conditions Disclosure Act
- *Gordon Development Group v. Bradley* (2003), in which the Appellate Division held that there only is one attorney-review period for both the buyer and the seller in a residential real estate transaction in New Jersey that begins when the fully executed contract has been delivered to both the buyer and the seller
- *Danvers Motor Co. v. Ford Motor Co.* (2002), in which the United States District Court held that class action antitrust plaintiffs must have particularized injuries to have Article III standing under the United States Constitution
- *Inter-City Tire and Auto Center v. Uniroyal* (1988), in which Mr. Goodman successfully defended a distributor in an antitrust suit who allegedly had conspired to monopolize a certain market and fix prices
- *G&W v. Borough of East Rutherford* (1995), in which Mr. Goodman prevailed before the Appellate Court in an antitrust action precluding his client from competing for business in a certain municipality
- *Liberty Lincoln Mercury, Inc. v. Ford Marketing Corp.* (1993), in which the United States District Court held that an automobile dealers association can participate in case as amicus curiae if the individual

dealership that was a party in the lawsuit was not adequately represented by counsel and the association will not be an advocate for one of the parties

- *State v. Arace Brothers* (1989), in which Mr. Goodman represented a trade association and certain individual defendants against allegations by the Attorney General that over the course of 25 years, the defendants had allocated public contracts among themselves in violation of the Antitrust Act
- *New Jersey v. T.L.O.* (1985), in which the United States Supreme Court rendered a landmark decision circumscribing the scope of searches and seizures in public schools
- *The Hospital Center at Orange v. Cook* (1981), in which the Appellate Division held that a hospital is barred from suing indigent patient for fees where the hospital failed to advise a patient she was eligible to apply for free medical care under a federal program for which the hospital already had received funding

**UNIQUELY NJ**

- General Counsel, New Jersey REALTORS®
- General Counsel and past President, United Way of Hunterdon County
- Vice Chairman, Hunterdon Medical Center Board of Trustees
- Board of Trustees, Hunterdon Healthcare System; Member, Executive Committee; Chair, Strategic Planning Committee; Member, Committee on Trustees; former Chair, Quality Committee
- Member, New Jersey State Bar Association; Real Property Trust and Estate Law Section, Civil Trial Bar Section, Antitrust Law Special Committee
- Member, Federal Bar Association of the State of New Jersey
- Member, Middlesex County Bar Association
- Member, Hunterdon County Bar Association
- Member, New Jersey Institute of Local Government Attorneys
- Former Chair, Interest on Lawyers' Trust Accounts (IOLTA) Fund of the Bar of New Jersey
- Former member, New Jersey Supreme Court Professional Responsibility Rules Committee
- Former Trustee, Trial Attorneys of New Jersey
- Past President, Rutgers-Newark Law School Alumni Association

**MORE ACTIVITIES & EXPERIENCE**

- Member, American Bar Association; Litigation Section, Real Property, Trust and Estate Law Section

**PUBLICATIONS & ALERTS**

Author, ***New Jersey Real Estate Brokerage Law***
*(New Jersey Law Journal Books, 2011-2017)*

Contributor, 2017 Real Estate Update: Trending Issues & Topics of Interest
*Greenbaum, Rowe, Smith & Davis LLP Client Alert*, March 2017

Author, A Question of Security
*New Jersey Realtor®*, April 2016

Author, Are You Ready for the New Statewide Sales Contract?
*New Jersey REALTOR®*, November/December 2015

Author, New Jersey REALTORS® Prevails In Case Limiting Municipal Licensing Fees
*New Jersey REALTOR®*, October 2015

Author, What Do I Have To Disclose About a Property Affected by Superstorm Sandy?
*New Jersey REALTOR®*, August 2013

Author, Does a Broker's Failure to Have a Written Commission Agreement Doom Its Commission Claim Under the Statute of Frauds?
*New Jersey Lawyer*, December 2012

Author, Are You Complying With The Americans With Disabilities Act?
*New Jersey REALTOR®*, January/February 2012

Author, Clarifying the Muddy Waters Concerning CMA's BPOs and Appraisals
*New Jersey REALTOR®*, September 2011

Author, What Duty Do You Have To Inspect Seasonal Rentals?
*New Jersey REALTOR®*, June 23, 2011

Author, Marketing Through Social Media: Do You Understand the Risks?
*New Jersey REALTOR®*, April 2010

Author, Rebates For Buyers: Are They Right For You?
*Designated REALTOR® Update*, Winter/Spring 2010

Author, Lead Paint Disclosures: Watch Out For The Traps!
*New Jersey REALTOR®*, May 2009

Author, Maneuvering Through The Attorney-Review Minefield
*The Middlesex Advocate*, November 2008

Author, Opinion 26 Revisited
*New Jersey REALTOR®*, July 2008

Author, Does A Violation Of The Licensing Law Void A Listing Agreement?
*New Jersey REALTOR®*, November/December 2007

Author, Why Are Seller Disclosure Statements Important To You, Buyers And Sellers?
*New Jersey REALTOR®* , June 2007

Author, Beware The Sellers' Bonus
*New Jersey REALTOR®*, October 2006

Author, Twin Rivers: Why The Appellate Division Got It Wrong
*New Jersey Lawyer Magazine*, October 2006

Author, Megan's Law: To Disclose Or Not To Disclose?
*New Jersey REALTOR®*, September 2006

Author, Promotions in New Jersey: Be Careful What You Offer!
*New Jersey REALTOR®*, October 2005

Author, Are You In Compliance With Recent Identity Theft Regulations?
*New Jersey REALTOR®*, September 2005

Author, What To Do If The Listing Broker Offers A Minimal Commission
*New Jersey REALTOR®*, May 2005

Author, Are Seller Disclosure Statements Right For You?
*New Jersey REALTOR®*, August 2004

Co-Author, Twin Rivers Was a 'Fundamental Test Case' For Applying Constitutional Limits to a Homeowner Association. And the Association Won.
*Common Ground*, July/August 2004

Author, Does the State Constitution Apply To the Governance of Homeowners Associations?
*Community Trends*, July 23, 2004

Author, NJAR Wins Lawsuit Voiding DEP Regulation
*New Jersey REALTOR®*, May 2004

Author, Court Decisions on Attorney Review Will Affect Your Practice
*New Jersey REALTOR®*, October 2003

Author, Maneuvering Through the Attorney Review Minefield
*New Jersey REALTOR®*, August 2001

Author, What Rights Do Real Estate Brokers Have To Assert A Lien To Protect Their Commissions?
*New Jersey REALTOR®*, August 2000

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# Conor J. Hennessey
**PARTNER**

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*The most important aspect of my job is to guide clients through the stressful and often confusing litigation process. At the start of every case, I work closely with the client to determine a reasonable outcome that will work for them, and to then set a course to achieve that goal.*

Mr. Hennessey concentrates his practice in commercial litigation involving real estate transactions, real estate brokerage law, business disputes, commercial contract actions, consumer fraud act claims, and professional malpractice cases. His practice also encompasses high stakes personal injury cases involving premises liability and medical malpractice.

In the specialized area of real estate brokerage law, Mr. Hennessey has significant experience including the litigation and mediation of business disputes on behalf of brokerages and claims brought against real estate licensees. He represents brokers and salespersons before the New Jersey Real Estate Commission and local real estate boards and provides guidance to clients on general brokerage issues. He has been involved in matters brought before the New Jersey Supreme Court, the New Jersey Appellate Division, and the Office of Administrative Law with broad-based impacts on New Jersey's real estate brokerage industry.

*Results may vary depending on your particular facts and legal circumstances.*

## Departments

Litigation

## Practice Groups

Real Estate Brokerage

## Education

Rutgers University School of Law - Newark, J.D., 2016

Rutgers University, B.A., 2012

## Bar Admissions

New Jersey, 2017

New York, 2017

U.S. District Court, District of New Jersey, 2017

## Clerkships

Former law clerk to The Honorable James R. Paganelli, Superior Court of New Jersey, Essex County (2016-2017)

## REPRESENTATIVE MATTERS

*Results may vary depending on your particular facts and legal circumstances.*

- *Sullivan Grantor Retained Income Tr. v. Max Spann Real Estate & Auction Co.* (2022), a published decision in which the New Jersey Supreme Court found that the attorney review requirement applicable to broker-prepared contracts for the sale of real property does not apply to "without reserve" auctions
- *Kennedy v. Weichert Co. (*2023), a published decision in which the New Jersey Appellate Division found that the ABC Test is inapplicable to fully commissioned real estate licensees for purposes of the New Jersey Wage Payment Act
- Assisted in drafting appellate briefs which resulted in the Appellate Division upholding the trial court's grant of summary judgment in a matter involving a trip and fall on public property
- Assisted in drafting appellate briefs which resulted in the Appellate Division upholding the trial court's grant of summary judgment in respect to a New Jersey municipality's denial of reimbursement for health insurance premiums
- Assisted in the representation of nursing home facilities in connection with 8-figure settlement of multiple COVID-related wrongful death claims and ongoing representation with 42 consolidated employee claims

## UNIQUELY NJ

- New Jersey State Bar Association

## MORE ACTIVITIES & EXPERIENCE

- While attending law school, Mr. Hennessey was an Associate Editor of the *Rutgers Business Law Review*
- As a legal intern during law school, Mr. Hennessey gained experience in the areas of local government law, commercial law, real estate law and personal injury litigation

## PRESENTATIONS & SPEAKING ENGAGEMENTS

Presenter, NAR Settlement & the New Real Estate Consumer Protection Act
Sponsor: *New Jersey Institute for Continuing Legal Education*, September 23, 2024

Presenter, Real Estate Broker Commission Settlement
Sponsor: *Mercer County Bar Association*, June 27, 2024

Presenter, Presentation on the NAR Settlement Agreement
Sponsor: *North Central Jersey Association of Realtors® Brokers Meeting*, May 14, 2024

Panelist, 2024 Real Estate Conference
Sponsor: *New Jersey Institute for Continuing Legal Education*, April 18, 2024

Panelist, 2023 Community Association Law Summit
Sponsor: *New Jersey Institute for Continuing Legal Education*, November 15, 2023

Panelist, 2023 Real Estate Conference
Sponsor: *New Jersey Institute for Continuing Legal Education*, April 19, 2023

**PUBLICATIONS & ALERTS**

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October 19, 2020

# Protect Your Right to an **Equitable Lien**

BY **BARRY S. GOODMAN, ESQ.**

A dispute has arisen about the seller paying your commission for securing the buyer. Have you taken the steps necessary to ensure that your right to an equitable lien will be fully enforceable?

## Cases Interpreting A Broker's Right to an Equitable Lien

Equitable liens for brokers were created by the court in 1987 because the transaction never would have closed but for the efforts of the broker. An equitable lien, which does not get recorded, attaches to the property from the date the sales contract is signed and then, at closing, to the closing funds. In deciding whether or not to create an equitable lien, courts look at such factors as if there is any contractual provision in the listing agreement, sales contract or lease providing for such a lien, the custom and practice of the industry, and the conduct of the parties.

Courts have refined the parameters of an equitable lien over the years. For example, the New Jersey Supreme Court held that a broker was not entitled to an equitable lien on rents received by the buyer of property that had tenants procured by the broker where the commission agreement did not provide for a lien and the buyer did not assume responsibility to pay the commissions in the sales contract. In addition, the broker did not provide any evidence that it was the custom and practice regarding commercial leases for a broker to have any right to encumber rent payments after the closing.

Another court held that an equitable lien is valid against judgment creditors who record a lien after the equitable lien becomes effective. However, a broker's equitable lien is not superior to liens that were recorded before the date the equitable lien became effective. Another decision provided that a bona fide buyer takes title free of any equitable lien. A federal court also noted that a broker's equitable lien does not attach to the funds that the buyer will use to purchase the property.

Finally, a court recently held that a broker was not entitled to an equitable lien on funds at the closing where the funds had been released to a lender pursuant to a recorded mortgage. The court indicated that there was nothing in the listing agreement that the proceeds at the closing would be security for payment of the commission and that the lender was not unjustly enriched by having been paid at the closing.

## Conclusion

As a result, in order to protect the right to an equitable lien, a broker should include in the listing agreement that the broker has a right to an equitable lien for the commission. Wording along the following lines is suggested:

> Owner agrees that Broker will have an equitable lien for Broker's commission on the property beginning when a sales contract is signed and then on the proceeds at the closing. If the property is leased, then Broker will have an equitable lien on rental payments for any commissions due to Broker and, if the property is then sold, on the proceeds at the closing for any commissions then due. If Owner sells the property, Owner will include in the sales contract that buyer will assume all obligations under this Agreement, it being agreed that this Agreement will be binding on Owner's successors and assigns.

Finally, where there is a possible dispute about the broker being paid its commission at the closing, it is recommended that the broker confirm in writing to the parties and whoever is closing title that the broker has an equitable lien on the proceeds and expects to be paid at the closing or, at the very least, that the commission will be held in escrow. If the commission is released to another party, whoever released the funds may be liable to pay the commission. ■

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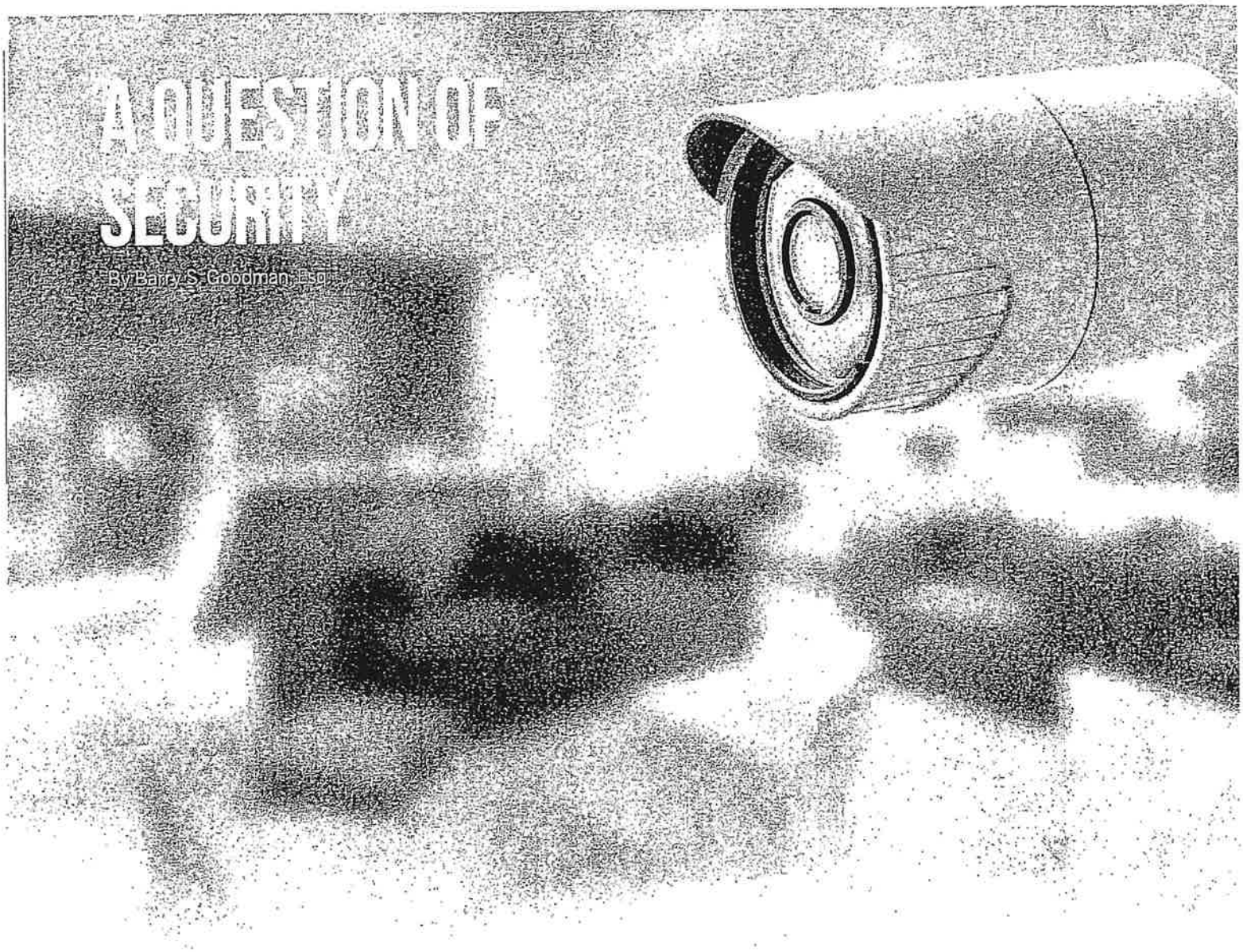
# A QUESTION OF SECURITY

By Barry S. Goodman, Esq.



You have just listed a house for sale or lease that has a security camera or other video or audio taping equipment, often called "nanny cams." What responsibility do you have to disclose the existence of the security camera system to potential buyers or tenants who lease the house? Can the seller record conversations between buyers and their agents when they walk through the house? Can the landlord have the security camera system working after the tenant has taken occupancy? Do the buyers and tenants have any right to an expectation of privacy not to be recorded?

It is extremely important for you and the property owner to know what can and cannot be done when there are security camera systems in the house. In deciding what to do, it is important to distinguish between potential buyers who are walking through the house and tenants who have moved in.

## Potential Buyers Walking Through The House

A seller who has a security camera system in the house likely would want to keep it on when potential buyers and buyer's agents are walking through.

However, the security system may very well record conversations between a buyer and the buyer's agent about an interest in purchasing the house, including possibly how much the buyer would be willing to pay. The question therefore arises whether or not the security system has to be disclosed to the buyer and the buyer's agent.

The New Jersey Real Estate Commission informally has taken the position that the listing agent does not have a duty to disclose there is a security camera system in place. However, if the listing agent is asked about a security system, they must, of course, provide an honest response.

In addition, if the listing agent becomes a disclosed dual agent, the listing agent in all likelihood has a fiduciary duty to the buyer to disclose there is a security camera system that would be videotaping and/or recording conversations. As a result, if there is any possibility the listing agent will become a disclosed dual agent, the listing agent should discuss with the seller when the listing agent obtains informed consent to disclosed dual agency that the security system will have to be disclosed. In fact, it is recommended they discuss simply disclosing the use of the security camera system to all buyers as part of a marketing strategy since a security system likely would increase the value of the house.

## Use Of Security Cameras Where the Property Is Leased To Tenants

Although the same rules would apply to potential tenants who are walking through a property, once a tenant moves into the property, there are vastly different privacy expectations that the tenant understandably would have. Use by the landlord of a security camera system inside, and possibly outside, the house after the tenant has moved in likely would violate the tenant's privacy rights and subject the landlord to civil damages and possibly even criminal charges.

As a result, if there are security cameras on the property, they should be disabled and not used during the term of the tenancy, unless only the tenant has the use of the security system. In light of the potentially serious implications of improperly using a security camera during the tenancy, New Jersey Realtors® has added the following provision to its lease.

**SECURITY CAMERAS:**

**❑ Applicable ❑ Not Applicable**

*If there are any security cameras on the Property, including but not limited to what often are called "nanny cams" or other video or audio taping equipment, the Landlord represents that the security cameras will be disabled and not functioning during the Term of this Lease unless only the Tenant has the use of the security system and neither the Landlord nor any other party has access to or the use of it. The Landlord acknowledges that any use or access to the security system by the Landlord or any other party during the tenancy may constitute an invasion of privacy of the Tenant and subject the Landlord to civil damages and criminal charges.*

## What to Remember

Although there typically does not appear to be a duty to disclose to buyers and buyer's agents that there is a security camera system in the house, it probably would be in your best interest and in the best interest of the seller to disclose its existence. However, when the property is being rented, care should be taken to ensure the security camera system is not improperly used by the landlord during the term of the tenancy. ■

Barry S. Goodman, Esq., a partner in the law firm of Greenbaum, Rowe, Smith & Davis, LLP, focuses his practice on real estate brokerage and other real estate-related matters, as well as antitrust suits and corporate shareholders' and partnership disputes. He is the General Counsel for New Jersey Realtors®.

# Clarifying the Muddy Waters Concerning CMAs, BPOs and Appraisals

By: Barry S. Goodman, Esq.

Although you have prepared Comparative Market Analyses (CMAs) for buyers and sellers, lenders may have recently asked you to prepare Broker Price Opinions (BPOs) or even appraisals. Can you, as a real estate licensee, prepare BPOs or appraisals? What is the difference between CMAs, BPOs and appraisals? How does the NATIONAL ASSOCIATION OF REALTORS® (NAR) Code of Ethics affect your ability to prepare CMAs, BPOs or appraisals for other parties?

Although CMAs, BPOs and appraisals can be useful tools for buyers, sellers and lenders, you must understand what rights you have to prepare them in New Jersey. This article therefore will provide you with some background and guidelines for clarifying the muddy waters in which you must operate if you want to provide CMAs, BPOs or appraisals.

## Regulations Governing CMAs

The New Jersey Real Estate Commission (NJREC) specifically allows real estate licensees to provide CMAs[1]. Although the NJREC does not define a CMA, one definition is that CMAs "are used to help establish a realistic price range for homes. A CMA usually includes a review of comparable properties in the immediate area currently on the market or that have recently sold[2]."

After clearly stating that a CMA is not an appraisal, the NJREC's regulations require that every CMA must provide a disclaimer as follows:

> Any written comparative market study or analysis (CMA) provided by a licensee to a consumer shall include a statement indicating that the CMA is not an appraisal and should not be considered the equivalent of an appraisal. The said statement shall appear in print as large as the predominant size print in any writing reporting the results of the CMA[3].

Thus, there can be no question that real estate licensees in New Jersey are permitted to prepare CMAs for consumers as long as the licensee includes the required statement in the CMA.

## Preparation of BPOs

Although neither the NJREC's regulations nor any other regulations or statutes in New Jersey specifically use the term "BPOs," federal law does. Under the Dodd-Frank Wall Street Reform and Consumer Protection Act, BPO is defined as:

> an estimate prepared by a real estate broker, agent, or sales person that details the probable selling price of a particular piece of real estate property and provides a

> varying level of detail about the property's condition, market, and neighborhood, and information on comparable sales, but does not include an automated valuation model, as defined in Section 1125(c).[4]

Dodd-Frank allows lenders to consider BPOs prepared by real estate licensees but prohibits lenders from using BPOs as the primary basis to determine the value of a piece of property for the purpose of loan origination for a residential mortgage loan secured by the property if the purchase is a consumer's principal dwelling.[5] Thus, Dodd-Frank makes it clear that, under federal law, lenders can use BPOs prepared by real estate licensees under certain circumstances.

It should be noted that, although BPOs historically were prepared for lenders, while CMAs historically were prepared for buyers and sellers, that distinction recently has become blurred. The reality is that CMAs nationally are increasingly being referred to as BPOs.

### Limitations on the Preparation of Appraisals

Under the New Jersey Real Estate Appraisers Act, appraisals[6] typically only can be prepared by licensed or certified appraisers. More specifically, the Appraisers Act prohibits any person who is not certified from referring to any appraisal or other valuation that he or she performs on real estate as a "certified appraisal" and, similarly, if the person is not licensed as an appraiser, from describing such an appraisal or other valuation as a "licensed appraisal[7]."

However, the Appraisers Act specifically provides that it shall not "be construed to preclude a person not licensed or certified pursuant to this act from giving or offering to give, for a fee or otherwise, counsel and advice on pricing, listing, selling and use of real property, directly to a property owner or prospective purchaser if the intended use of the counsel or advice is solely for the individual knowledge of or use by the property owner or prospective purchaser[8]." Thus, not only can such advice be provided by real estate licensees but it can be used by the property owner or prospective purchaser for whatever purpose he or she deems appropriate.

Significantly, the Appraisers Act permits lenders to use "appraisals" that have not been prepared by certified or licensed appraisers under certain circumstances:

> A State or federally chartered bank, savings bank or savings and loan association may obtain and use appraisals made by a person who is not certified or licensed pursuant to [the Real Estate Appraisers Act] in any circumstance where the underlying transaction is a federally related transaction for which federal law and regulation do not require that a certified or licensed appraiser be used[9].

Since appraisals can be considered by lenders under such circumstances, it certainly would appear that CMAs and BPOs prepared by real estate licensees also can be considered by those lenders as long as no federal law or regulation requires that a certified or licensed appraiser be used. As noted above, one example of such a requirement would be under the Dodd-Frank Law, which does not permit BPOs to be used as the primary basis for a lender making certain loans. Indeed, real estate licensees may very well be better off not preparing any "appraisals," as opposed to CMAs or BPOs, for a lender in order to avoid violating any federal or other laws of which they are unaware.

### NAR's Code of Ethics

Article 11 of NAR's Code of Ethics prohibits REALTORS® from undertaking "to provide specialized professional services concerning a type of property or service that is outside their field of competence unless they engage the assistance of one who is competent on such types of property or service, or unless the facts are fully disclosed to the client." Standard of Practice 11-1 then explains that REALTORS® are permitted to provide opinions of value or price to third parties provided certain information is included as follows:

When REALTORS® prepare opinions of real property value or price, other than in pursuit of a listing or to assist a potential purchaser in formulating a purchase offer, such opinions shall include the following unless the party requesting the opinion requires a specific type of report or different data set:

1) identification of the subject property
2) date prepared
3) defined value or price
4) limiting conditions, including statements of purpose(s) and intended user(s)
5) any present or contemplated interest, including the possibility of representing the seller/landlord or buyers/tenants
6) basis for the opinion, including applicable market data
7) if the opinion is not an appraisal, a statement to that effect.

Thus, subject to applicable laws, REALTORS® are permitted to provide such opinions or value of price as long as they have the necessary competence, which could include but is not necessary limited to: knowledge of the market place where the property is located, experience with the property type that is being evaluated, and adequate access to necessary information concerning comparable prices or values. As a result, NAR now has a "Broker Price Opinion Resource (BPOR)" certification for REALTORS® who prepare BPOs.

## Practical Tips

Although the NJREC's regulations only refer to CMAs and not to BPOs, it is strongly recommended that, if a real estate licensee prepares a BPO, the licensee should include the CMA statement required by the NJREC advising that the BPO is not an appraisal and should not be considered the equivalent of an appraisal. If the BPO is being prepared for a lender online, such language can be placed in the comment section of the BPO before it is sent to the lender

In addition, under the Real Estate Licensing Act, all payments for real estate related services provided by salespersons must be made to the broker. As a result, salespersons are not permitted to receive any payment directly for providing BPOs, CMAs or appraisals.

Finally, an issue has arisen whether or not a real estate licensee should provide appraisers with BPOs, CMAs or comparable sales or prices that the licensee has prepared. Real estate licensees have a fiduciary duty to their clients to provide such analyses or opinions to an appraiser whenever it is deemed to be in the best interest of their clients. Certainly, this could include where there is a "fly by" appraisal by an appraiser who is not familiar with the area, resulting in an appraisal that does not reflect the true value of the property. Although it is then up to the appraiser whether or not to use this additional information, a thorough appraiser would most likely want to have as much relevant information available in order to ensure that the appraisal is as accurate as possible.

## Conclusion

Real estate licensees therefore are allowed under certain circumstances to prepare CMAs, BPOs and even appraisals. However, caution should be exercised not to provide such price or value opinions in circumstances that are not permitted under state law, federal law and NAR's Code of Ethics. ▣

**Barry S. Goodman, Esq., a partner in the law firm of Greenbaum, Rowe, Smith, & Davis LLP, focuses his practice on real estate brokerage and other real estate-related matters, as well as antitrust suits and corporate shareholders' and partnership disputes. He is the General Counsel for the New Jersey Association of REALTORS®.**

Barry S. Goodman, Esq.

[1] See N.J.A.C. 11:5-6.1(m)3.

[2] NAR's Instructor and Student Manual entitled "BPOs: The Agent's Role in the Evaluation Process," at p. 109, quoting http://www.mrktusa.com/glossary.htm.

[3] N.J.A.C. 11:5-6.1(m)3.

[4] H.R. 4173 at §1126(b).

[5] H.R. 4173 at §1126(a).

[6] The NJREC defines "appraisal" as used in its regulations as having "its technical meaning as a study and analysis by an appraiser authorized by law to perform appraisals of New Jersey real estate to ascertain fair market value by using a process in which all factors that would fix price in the market place must be considered." N.J.A.C. 11:5-6.1(m)3. In addition, "appraisal" is defined in the Real Estate Appraisers Act as meaning "an unbiased analysis, opinion or conclusion relating to the nature, quality, value or utility of specified interest in, or aspects of, real estate. An appraisal may be classified by subject matter into either a valuation or an analysis. A 'valuation' means an estimate of the value of real estate or real property and an 'analysis' means a study of real estate or real property other than a valuation." N.J.S.A. 45:14F-2.

[7] N.J.S.A. 45:14F-21a, b.

[8] N.J.S.A. 45:14F-21c.

[9] N.J.S.A. 45:14F-21f.

**Featured EDITORIAL**

# WHAT RIGHTS DO REAL ESTATE BROKERS HAVE TO ASSERT A LIEN TO PROTECT THEIR COMMISSIONS?

*by Barry S. Goodman, Esq.*

The closing is fast approaching and the sellers have just indicated that they do not believe you have earned a commission. As a result, even though you have an executed listing agreement, the sellers have instructed the title agent or attorney who will handle the closing not to pay your commission or place any money in escrow with regard to your commission. What rights do you, as a licensed real estate broker, have to place a lien on the closing proceeds so that your commission will be paid or, at the very least, put in escrow until the dispute has been resolved?

## General Background Concerning Liens

The general rule in most states, including New Jersey, is that a listing agreement between the broker and seller is for personal services and does not "run with the land or, more appropriately, with title to the land."[1] In fact, brokers in New Jersey and virtually all other states have no statutory right to file a lien to ensure that their commission is paid.[2]

Courts in New Jersey therefore have focused on whether or not brokers have an equitable lien on the property or the proceeds from the sale of the property to protect their commissions. An equitable lien is "a right of a special nature in a fund (or property) and constitutes a charge or encumbrance upon the fund" or property.[3] The New Jersey Supreme Court has explained that, generally, "(the) theory of equitable liens has its ultimate foundation...in contracts, express or implied, which either deal with or in some manner relate to specific property, such as a tract of land..."[4]

In determining whether or not a broker has the right to assert an equitable lien, the overriding issue is whether or not the parties intended for the broker to have such a lien. In rendering their decision, Courts will look at such factors as whether or not there is any contractual provision in the listing agreement, sales contract or lease providing for such a lien, the custom and practice of the industry, the conduct of the parties (including correspondence between the parties), etc.

## Equitable Liens On The Property and Sales Proceeds

The key case in New Jersey dealing with a broker's right to an equitable lien to protect its commission is Cohen v. Estate of Sheridan.[5] In Cohen, liens on the property exceeded the purchase price. The buyers therefore filed suit seeking a declaration by the Court that the commissions due to the listing and selling brokers were not a lien on the property that had to be satisfied so that the buyers could receive clear title. The Court rejected the buyers' position and held that the brokers had an equitable lien on the property until closing and on the funds due to the seller at closing, stating that the broker is entitled to the protection of an equitable lien on the property of the seller until closing (to protect against any unscrupulous activity on the part of the seller) and, at closing, to an equitable lien on the fund due to the seller.[6]

## Equitable Liens Regarding Leases

Subsequent to Cohen, the New Jersey Supreme Court was faced with whether or not a broker had the right to assert an equitable lien on rent payments due under commercial leases for a shopping center. The case, VRG Corp. v. GKN Realty Corp.,[7] involved a commission agreement that provided for the broker, VRG, to be paid its commission in an amount "equal to six (6%) percent of each monthly gross base rental payment under the initial term of such lease." When the shopping center was sold, the seller filed for bankruptcy and the new owner, GKN, refused to pay any further commissions to VRG.

The Court examined several factors to determine whether or not the parties intended for the broker to have an equitable lien on the rent payments. For example, the Court found that the commission agreement did not provide for such a lien but only provided that the broker would be paid at the rate of six (6%) percent of the rental payments. In addition, the broker had demanded that the remainder of its commission be paid at the closing, which undermined its claim that it believed that it had an equitable lien on the rent payments. Furthermore, the sales contract did not provide for GKN to assume responsibility for payment of the commissions. Finally, there was no evidence that it was customary practice regarding commercial leases for the broker to have a right to encumber rent

*continued on page 8*

## What Rights Do Brokers Have

*continued from page 6*

payments. As a result, the Court held that VRG had no right to an equitable lien on the rent payments.

### Other Issues Relating to Brokers' Liens

Other cases have refined the scope of a broker's right to an equitable lien. In one case, it was held that an equitable lien under a listing agreement is valid against subsequent judgment creditors.[8] Another Court held that a broker's equitable lien is not superior to previously recorded liens, including by way of example, mortgages and mechanics' liens.[9] Similarly, a Court held that a bonafide purchaser who perfects title to the property takes the title free of any equitable lien by the broker.[10] A federal court also noted that a broker's equitable lien does not attach to the funds that the buyer ultimately will use to purchase the home.[11]

### Conclusion

Thus, absent a showing that the parties intended otherwise, real estate brokers in sales transactions have an equitable lien on the property until closing and on the proceeds to be paid to the sellers at the closing. Similarly, brokers may have an equitable lien on rent proceeds if the broker can demonstrate that the parties intended that there should be such a lien.

As a result, where an attorney or title agent who is closing the title fails to pay the broker's commission from the closing proceeds (or put the money in escrow if there is a dispute), the person handling the closing (and his/her company or firm) may be liable for the commission, especially where the broker has provided written notice of its right to an equitable lien on those proceeds. It therefore is in the best interest of the person handling the closing to place any amount in dispute concerning the commission in escrow pending resolution of the dispute.

It therefore is recommended that listing agreements provide in clear and unambiguous terms that the broker has an equitable lien on the property to be sold and on the proceeds from the sale of the property and/or the rent payments, which will be paid before the seller/landlord receives any money. Brokers may want to provide written notice to the attorney or title agent closing title of their right to an equitable lien, and certainly should provide such a notice if there is any question whether or not the sellers intend to pay their commission.

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1. Barlowe Burke, Jr., Law of Real Estate Brokers § 6.2, at 6:8 n1 (2d ed. 1992).
2. See In re L.D. Patella Construction Corp., 114 B.R. 53, 58-59 (Bkrcy. D.N.J. 1990). See also N.J.S.A. 46:16-1 (statute lists all documents relating to a real estate closing, including sales contracts, that are recordable but does not include listing agreements); N.J.S.A. 46:16-2 (instruments affecting title to real estate are recordable).
3. In re Hoffman, 63 N.J. 69, 77 (1973).
4. VRG Corp. v. GKN Realty Corp., 135 N.J. 539, 546 (1994), quoting John N. Pomeroy, Treatise on Equity Jurisprudence § 1234, at 695 (Spencer W. Symons 5th ed. 1941).
5. 218 N.J. Super. 565 (Ch. Div. 1987).
6. d. at 570 (citation omitted).
7. 135 N.J. 546 (1994).
8. In re L.D. Patella Construction Corp., 114 B.R. 53, 58 (Bkrcy. D.N.J. 1990).
9. Burke v. Hoffman, 28 N.J. 467 (1958).
10. Bridge v. Midlantic National Bank, 18 F 3d 195 (3d Cir. 1994).
11. Batt v. Scully, 168 B.R. 541, 550 (D.N.J. 1994). No reported New Jersey cases have dealt with a broker's right to assert an equitable lien where the broker is a buyer broker.

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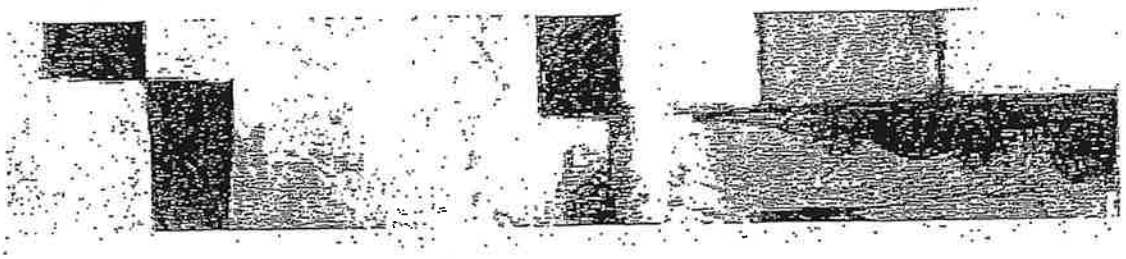

# ARE YOU IN COMPLIANCE WITH RECENT IDENTITY THEFT REGULATIONS?

**By Barry S. Goodman, Esq.**
*This article appeared in the August 2005 issue of New Jersey REALTOR® magazine.*

Have you ever taken a social security number on a sales contract to prequalify a buyer or as part of a lease application? How about driver's license numbers? Credit or debit card information? Bank account numbers? Under recently enacted federal and State laws, such information now is regulated for all businesses, including real estate brokers. As a result, if you ever take such personal information, you must be aware of your legal obligations for the proper disposal of the information and what you have to do if there ever is an unauthorized access to the information. You also will have to carefully safeguard the use of Social Security Numbers ("SSNs").

## Background

As we all know, identity theft is becoming a major problem. Victims can have their good names and credit ruined and spend years trying to repair the damage that was done to their credit histories.

As a result, on the federal level, the Fair and Accurate Credit Transactions Act of 2003 ("FACTA") was passed empowering the Federal Trade Commission ("FTC") to promulgate rules concerning the proper disposal of personal financial information. As a result, the FTC has created the "Disposal Rule," which became effective on June 1, 2005.

Similarly, the New Jersey Legislature now has passed the Identity Theft Prevention Act, which will become effective January 1, 2006.[1] This Act not only deals with the disposal of personal financial information but also imposes notice requirements if there is a breach of security and sets forth specific restrictions on the use of SSNs.[2]

## Disposal of Consumer Credit Information

Under the federal Disposal Rule, any person or entity, which would include a real estate broker, who maintains or possesses information taken from consumer reports for a business purpose must properly dispose of such information. A broker therefore cannot simply throw documents, disks or other material containing personal credit information into the garbage.

The FTC, while acknowledging that there is no such thing as "perfect destruction," has required that businesses must take "reasonable measures" when disposing of consumer information. Examples that the FTC has provided of proper disposal include (1) burning, pulverizing or shredding papers; (2) deleting or erasing electronic media; and (3) using document disposal companies.

New Jersey's Identity Theft Prevention Act follows the federal Disposal Rule but adds some wrinkles. The Act defines acceptable means of destruction as including "shredding, erasing or otherwise modifying the personal information in those records to make it unreadable, undecipherable or nonreconstructable through generally available means," which essentially follows the federal requirements. However, New Jersey has expanded the definition of what consumer information must be properly destroyed once the record no longer is needed. Such personal consumer information includes any records that contain an individual's first name (or first initial) and last name linked with any one or more of the following:

1. social security number;

2. driver's license number or State identification number; or

# N.J.A.C. 11:5-6.1



This file includes all Regulations adopted and published through the New Jersey Register, Vol. 49 No. 20, October 16, 2017

New Jersey Administrative Code TITLE 11. INSURANCE CHAPTER 5. REAL ESTATE COMMISSION SUBCHAPTER 6. NEW JERSEY PROPERTY-LIABILITY INSURANCE GUARANTY ASSOCIATION ASSESSMENT PREMIUM SURCHARGE

## § 11:5-6.1 Advertising rules

**(a)** Unless otherwise set forth herein, subsections (b) through (o) below shall apply to all categories of advertising including all publications, radio or television broadcasts, all electronic media including E-mail and the Internet, business stationery, business cards, business and legal forms and documents, and signs and billboards.

**1.** Individuals operating as sole proprietors and licensed as employing brokers shall conspicuously display on the exterior of their maintained place of business their name and the words "Licensed Real Estate Broker".

**2.** Firms licensed as corporate or partnership brokers shall conspicuously display on the exterior of their maintained place of business their regular business name and the name of the individual licensed as their broker of record and the words "Licensed Real Estate Broker".

**(b)** All advertising of any licensed individual, partnership, firm, or corporate broker shall include their regular business name which for the purposes of these rules, shall mean the name in which that individual, partnership, firm or corporation is on record with the Commission as doing business as a real estate broker. All advertising by a referral agent, a salesperson or a broker-salesperson shall include the name in which they are licensed and the regular business name of the individual, partnership, firm or corporate broker through whom they are licensed. If such advertisements contain a reference to the licensed status of the person placing the ad, their status as a referral agent, a salesperson or a broker-salesperson must be indicated through inclusion of a descriptive term as provided in (e) below. A referral agent or salesperson may not indicate in any advertisement or otherwise that he or she is licensed as a broker-salesperson.

**1.** In all advertisements which contain the name of a referral agent, a salesperson or a broker-salesperson, the regular business name of the individual, partnership, firm or corporate broker through whom that person

# Does a Broker's Failure to Have a Written Commission Agreement Doom Its Commission Claim Under the Statute of Frauds?

by Barry S. Goodman

You are about to close on the sale of commercial real estate for your client when a real estate broker suddenly appears, making a claim for a commission. Although your client, the seller, advises you that he talked to the broker, he does not recall whether they confirmed in writing that the broker would be paid a commission for introducing the seller to the buyer.

In New Jersey, under the statute of frauds, does the agreement have to be in writing for the real estate broker to have a valid commission claim? Is the broker entitled to be paid a commission if there only was an oral understanding concerning the payment of a commission? Can a broker avoid the statute of frauds by claiming the seller tortiously interfered with the broker's right to earn a commission? If there was no agreement concerning the amount of commission to be paid, can the broker sue for *quantum meruit*?

Whether you handle real estate transactions or represent real estate brokers, the answers to these questions are critical in determining if a broker has the right to payment where there is a dispute concerning whether the broker satisfied the requirements to claim a commission under the statute of frauds.

## Requirements of the Statute of Frauds

The statute of frauds in New Jersey requires that a real estate broker must memorialize in writing any agreement to be paid a commission for the sale of real estate in order for the agreement to be enforceable. N.J.S.A. 25:1-16, which is the section in the statute of frauds dealing with real estate brokers, has three provisions that govern whether or not a real estate broker is entitled to be paid a commission.

Under N.J.S.A. 25:1-16(b), a real estate broker who acts as an agent or broker on behalf of a buyer or seller regarding the transfer of an interest in real estate, which includes any lease interest for less than three years, is entitled to be paid a commission only if the broker's authority is "given or recognized in a writing signed by a principal or the principal's authorized agent" before or after the property is transferred, and the "writing states either the amount or the rate of commission."[1]

The only exception to Section 16(b) is where a broker acts pursuant to an oral agreement that falls within the requirements of N.J.S.A. 25:1-16(d). Under Section 16(d), a broker who acts pursuant to an oral agreement with a principal is entitled to be paid a commission if two requirements are met. First, the broker must serve the principal with a written notice stating that "its terms are those of the prior oral agreement including the rate or amount of commission to be paid" within five days after making the oral agreement with the principal and before the transfer or sale of the real estate. Second, the broker must either effect the transfer or sale, or in good faith enter into "negotiations with a prospective party who later effects a transfer or sale" before the principal provides the broker with any written rejection of the oral agreement between the parties.

Finally, N.J.S.A. 25:16(e) sets forth the specific requirements for service of the notice by a real estate broker under the statute of frauds. The notice must "be served either personally, or by registered or certified mail, at the last known address of the person to be served."

## Courts Usually Require Strict Compliance

Courts in New Jersey generally have held that, "[t]o the extent a broker wishes to rely on the protections of the statute of frauds to claim entitlement to a commission, he or she must strictly comply with the statute's requirements."[2] As a result, in order for a real estate broker to claim a commission based upon any contractual theory, the broker must adhere to the strict requirements of the statute of frauds.

In one case, *C&J Colonial Realty v. Poughkeepsie Savings Bank*,[3] the Appellate Division held that a series of correspondence between the broker and the owner concerning the commission was insufficient to satisfy the statute of frauds because there never was a clear understanding regarding the amount of the commission to be paid or the basis of the payment. Under


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that the plaintiff [the broker] expected to be paid."[12] Under these circumstances, the broker would be entitled to the reasonable value of the services it provided.

## Conclusion

Whether you are handling a real estate transaction in which a broker is making a claim for a commission or you are representing a real estate broker, it is important to first analyze whether or not the broker has a writing that satisfies the statute of frauds. If not, you will have to determine if the broker has any independent tort or *quantum meruit* claim for the commission.

Correctly analyzing these issues will prevent problems at the closing, or allow you to provide proper advice to any real estate broker you represent who claims to be entitled to a commission.

## Endnotes

1. For purposes of N.J.S.A. 25:1-16(b), "the interest of a mortgagee or lienor is not an interest in real estate," and therefore this section of the statute of frauds is inapplicable to such a mortgagee or lienor.
2. *Coldwell Banker Commercial/Feist & Feist Realty Corp. v. Blancke P.W. L.L.C.*, 368 N.J. Super. 382, 396 (App. Div. 2004).
3. *C&J Colonial Realty, Inc. v. Poughkeepsie Savings Bank, FSB*, 355 N.J. Super. 444 (App. Div. 2002).
4. *See, e.g., R.A. Intile Realty Co. Inc. v. Raho*, 259 N.J. Super. 438 (Law Div. 1992); *Myers v. Buff*, 45 N.J. Super. 318 (App. Div. 1957).
5. *See Coldwell Banker Commercial/Feist & Feist Realty Corp. v. Blancke P.W. L.L.C.*, 368 N.J. Super. 382, 391 (App. Div. 2004); *R.A. Intile Realty Co. Inc. v. Raho*, 215 N.J. Super. 438 (Law Div. 1992).
6. *National Newark & Essex Bank v. Housing Auth. of the City of Newark*, 75 N.J. 497 (1978).
7. *Coldwell Banker Commercial/Feist & Feist Realty Corp. v. Blancke P.W. L.L.C.*, 368 N.J. Super. 382 (App. Div. 2004).
8. *Coldwell Banker Commercial/Feist & Feist Realty Corp. v. Blancke P.W. L.L.C.*, 368 N.J. Super. 382 (App. Div. 2004).
9. *McCann v. Biss*, 65 N.J. 301 (1974).
10. *Louis Schlesinger Co. v. Wilson*, 22 N.J. 576 (1956).
11. *Weichert Co. Realtors v. Ryan*, 128 N.J. 427 (1992).
12. *Weichert Co. Realtors v. Ryan*, 128 N.J. 427, 438 (1992).

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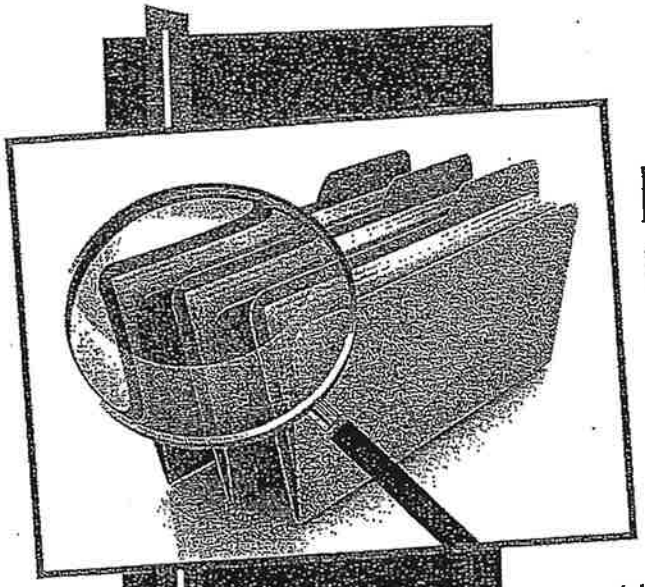

# Lead Paint Disclosures: Watch Out for the Traps!

By Barry S. Goodman, Esq.

An investigator from the U.S. Environmental Protection Agency (EPA) walks into your office and says, "Give me all of your closing files for the last year and, if any of them have any lead paint disclosure violations, we're going to fine you $11,000 for each violation." You quickly start to wonder: Is it a problem that the seller signed the Lead-Based Paint Disclosure (the Disclosure) after the buyer? What about the listing I had when the bank owned the property and refused to sign a Disclosure? Was it okay that, as a buyer's agent, I had the buyer sign the Disclosure blank? Was there anything special I had to do regarding the house I listed with lead paint that had renovations? Does the Disclosure have to be in all of my rental files, too?

*EPA investigators have aggressively been going into offices, including those in many areas of New Jersey, without notice and reviewing files for violations. All brokers and salespersons must make sure that they dot their i's and cross their t's concerning lead paint issues or face significant sanctions, including jail, for each violation.*

EPA investigators have aggressively been going into offices, including those in many areas of New Jersey, without notice and reviewing files for violations. All brokers and salespersons must make sure that they dot their i's and cross their t's concerning lead paint issues or face significant sanctions, including jail, for each violation. Below is a typical conversation I might have with a broker or salesperson concerning compliance with these rules.

## THE REASONS FOR DISCLOSURE

**Q:** *Why do I have to provide Disclosures concerning lead paint?*

**A:** Because Congress passed the Residential Lead-Based Paint Hazardous Reduction Act of 1992, (the Act), also known as Title X, to protect people, especially children, from exposure to lead that was in paint, dust and soil. The Act directed the EPA and U.S. Department of Housing and Urban Development to issue regulations requiring disclosure of certain information about lead-based paint and lead-based paint hazards in residential sales and leasing transactions for housing built before January 1, 1978. The regulations, which became effective in 1996, include most private housing, public housing, housing receiving federal assistance and federally-owned housing.

**Q.** *Are there any types of housing that are not affected by this Act?*

**A.** There are. These exceptions include dwellings where the sleeping area is not separated from the living area, such as lofts, efficiencies and studios; residential leases of 100 days or less, such as vacation homes and short-term rentals; housing designated for the elderly or handicapped, unless children under the age of six reside or are expected to reside there; rental units that have been inspected by a certified inspector and found to be free of lead-based paint; sales at foreclosure; and renewal leases where disclosure already has been made and no new information is available.

**Q.** *Does the Act apply to mobile homes, manufactured homes or timeshares?*

**A.** The short answer is "yes." The Act applies to them even if it is known or believed that they do not contain any lead-based paint unless, of course, one of the exceptions applies, such as a lease of 100 days or less.

## Real Estate Agents' Responsibilities

**Q.** *Isn't it the sellers' or landlords' responsibility to comply with the Act?*

**A.** Of course. However, it is your responsibility as their agent to inform them of their obligations under the Act. In addition, you can be responsible if they fail to comply.

**Q.** *What if they withhold information from me?*

**A.** You will not be responsible for information they withhold from you.

**Q.** *I understand the Disclosure has to be provided to the buyer/tenant. Do I have to provide them with the original of the Disclosure signed by the seller/landlord?*

**A.** No. You can provide them with a copy executed by the seller or landlord. Just make sure the seller or landlord signs the Disclosure before it is given to the buyer or tenant.

## Sellers' or Lessors' Responsibilities

**Q.** *Since I have to inform sellers and lessors about their responsibilities under the Act and make sure they comply, what do they have to do?*

**A.** There are five specific things that a seller or lessor must do:

1. Disclose all known lead-based paint and lead-based paint hazards, as well as all reports they have about lead on the property;
2. Provide buyers/tenants with the EPA pamphlet entitled "Protect Your Family From Lead In Your Home;"
3. Include the required warning language concerning lead in the sales contract or lease, and provide the statement signed by all the parties attesting that the seller/landlord has complied with all notification requirements, which the seller/landlord, agent and buyer/tenant must sign and date with the seller/landlord being required to sign before the buyer/tenant;
4. Retain the signed Disclosures for three years as proof of compliance. (However, since New Jersey Real Estate Commission regulations require that most documents in the broker's files be maintained for six years, you should keep the Disclosure for six years); and
5. Sellers (but not landlords) must provide the buyer with an opportunity to test the property for lead within a ten-day period but the sellers and buyer can agree to lengthen or shorten this period and the buyer has the right to waive it.

**Q.** *Who pays for the tests that the buyer can conduct?*

**A.** That is up to the parties. They can agree that either the seller or the buyer will pay, assuming that the buyer decides to do the tests. The key is that the seller must provide the buyer with the opportunity to test.

**Q.** *I had a situation where a bank owned the property and refused to sign a Disclosure. What was I suppose to do?*

**A.** That obviously is a difficult issue. Although there is an exemption for property sold in foreclosure, when the bank obtains property in foreclosure but then sells it, there no longer is any exception. As a result, the safest thing probably would be not to take the listing if the bank will not sign. However, if you decide to keep the listing, I would suggest you send a letter to the bank by certified and regular mail confirming you advised a bank representative (identify the representative) that the bank is required to sign the Disclosure but the bank refused. In addition, send a letter to the buyer advising the buyer that the bank refused to sign the Disclosure and the buyer can test for lead.

**Q.** *What should I do if I am a buyer's agent and the seller's agent has not provided me with a Disclosure?*

**A.** Well, if the seller's agent either refuses or simply has not provided it to you, you should send a letter to the seller's agent confirming this. You also should advise the buyer in writing that you requested but were not provided with it and that the buyer has a right to perform the lead-based paint test within 10 days.

## Renovations

**Q.** *Are there any specific federal laws that deal with renovations to properties that have lead-based paint?*

**A.** Beginning April 2010, federal law will require that contractors performing renovations, repairs and painting projects that in any way disturb lead-based paint in homes, childcare facilities and schools built before 1978 will have to be certified and follow specific work practices to prevent lead contamination.

**Q.** *Does this mean that the owner will have to undertake renovations?*

**A.** No. This only will apply when renovations, repairs or painting projects are undertaken in housing that is subject to the Act.

## Investigations and Penalties

**Q.** *Let's start with whether or not EPA investigators have the right to come into my office and demand documents. Do they?*

**A.** They do not have any right to come in unannounced to inspect documents in your office. However, they do have subpoena power. As a result, if you refuse to allow them to look at documents, you can expect that they will serve a subpoena on you and that you will have to comply with the subpoena.

**Q.** *Can they require me to produce all my business records?*

**A.** The law appears to indicate that they only can require you to produce documents relating to lead-based paint and lead-based hazards. You have the option whether or not to produce other business records.

**Q.** *What if there is some technical violation that they find in the file, such as the buyer signed the lead-based paint disclosure before the seller signed?*

**A.** Regardless how technical or minor the violation is, civil penalties can range up to $11,000 for each violation and actually can include imprisonment if the court deems the violation to be significant enough to warrant your going to jail.

## New Jersey Law

**Q.** *Are there any New Jersey laws that affect what I will have to do to comply with the Act?*

**A.** Good question. None of the disclosure requirements under the Act are affected by New Jersey law. However, New Jersey has its own maintenance and inspection requirements for lead-based paint that you should become familiar with if you are dealing with a property that has lead-based paint.

**Q.** *Give me some examples of what New Jersey wants me to do.*

**A.** Well, if you are representing the landlord, you may be responsible for abatement of lead-based paint in the interior of a dwelling unit that is occupied by children, especially if any of the children already have had lead poisoning. In addition, although one-and two-family rental units were exempt from such lead paint maintenance and inspection requirements in New Jersey, a new law signed into effect on January 8, 2008 removed the exemption for such rental units. Although New Jersey is not yet enforcing these requirements until the Department of Community Affairs promulgates rules to implement them, you will have to at least register such properties with the Bureau of Housing Inspection and maintain those properties in a lead-safe condition.

## Conclusion

As you can see from this dialogue, sloppy paperwork concerning lead-paint disclosures and your other responsibilities regarding lead-paint issues not only is unacceptable but may lead to significant fines and jail time. It therefore is incumbent upon you to ensure that you have the seller/landlord properly sign the Disclosure before it goes to the buyer, inform the seller/landlord of all of the seller's/landlord's obligations, and ensure that the seller/landlord actually complies with those obligations. If you do so, then you will not have to worry about EPA investigators showing up at your office for a surprise review of your records and undoubtedly will be able to sleep better at night. ■

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Barry S. Goodman, Esq.

REFERRAL FEES BY BARRY GOODMAN

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# States act on surprise fees

If you've ever been hit with an after-the-fact referral fee, you know the letdown. You've worked hard to help a relocating buyer and you're already mentally spending your commission when a relocation company calls demanding that you pay a referral fee for the buyer. You had no idea the buyer was working with a relocation company.

Do you have to pay the after-the-fact referral fee? What are your rights if the relocation company threatens to cut off its benefits to the buyer if you don't pay?

Brokers commonly pay referral fees to other practitioners and to relocation companies for referrals of buyers, sellers, lessors, or lessees. Real estate professionals often associate after-the-fact referral fees with instances in which a relocation company demands a fee after a salesperson has created a relationship with a client, even when the relocation company didn't refer the buyer or seller to the salesperson in the first place.

Although you may not have any legal obligation to pay the fee, many licensees feel pressure to when a relocation company threatens to withhold benefits—such as paying moving expenses—from the buyer or seller.

To address the problem, at least 10 states have enacted laws regarding the fees. Typically, these laws require that there be not only an actual introduction of the client by the referring broker but also a written referral-fee contract between the licensees. These states also prohibit paying referral fees to any person or entity, including a relocation company, that isn't a duly licensed broker.

A New York law, which takes effect in February 2003, prohibits licensees from demanding or receiving a referral fee or compensation after a listing agreement has been signed, an offer to purchase has been accepted, or a buyer agency agreement has been signed. The only exception to these rules: reasonable cause for payment.

What's reasonable cause? A recently enacted Connecticut regulation provides some guidance. The Connecticut rule prohibits licensees from demanding a referral fee unless there's an actual business introduction, a subagency relationship, a contractual referral-fee relationship, or a contractual cooperative brokerage relationship.

Other states, such as Alabama, Colorado, Idaho, Illinois, Kansas, Louisiana, and Tennessee, also require reasonable cause for referral fees. In Idaho, a written contract concerning the referral fee must exist before the seller signs the listing agreement,

1,094,751 active lawyers live in the United States. 71.4% are male.

Source: American Bar Association

or the buyer signs the representation agreement or a purchase offer.

Iowa similarly prohibits requesting a referral fee after a listing agreement has been signed or a purchase offer has been accepted.

Further, to protect relocating consumers from companies that threaten to reduce benefits if a referral fee isn't paid, many states—such as Alabama, Idaho, Kansas, Kentucky, Louisiana, New York, and Tennessee—have passed laws prohibiting such interference in client-licensee relationships. Other states, including Connecticut, Illinois, Kansas, and Kentucky, prohibit counseling a client to amend or terminate an agency agreement in order to receive a referral fee.

Even with the trend to prohibit, or at least narrowly limit, after-the-fact referral fees, you can still take steps to protect yourself from a relocation company or other licensee demanding such a fee.

- Routinely check with buyers and sellers at your first meeting to determine if their move is related to their job. If so, ask if their employer is providing relocation benefits.
- If buyers and sellers are receiving relocation benefits, determine the relocation company's referral fee policy and what benefits it offers to the employee.
- If you agree to pay an after-the-fact fee, get the specifics in writing and signed by both parties.
- Advise buyers and sellers in writing that you'll be paying the referral fee, and specify the amount. Provide this disclosure when you begin representing the buyers or sellers or as soon as you agree to pay the fee. Such a disclosure is not only a good business practice, but also a way to ensure your compliance with applicable state laws or real estate commission regulations.
- If you're a broker, make your salespeople aware of the need for a written agreement with the relocation company or other broker and a written disclosure to the referred party.
- Unless you have a blanket referral agreement with a relocation company or another broker, be sure you have a separate agreement for each transaction.

In light of the trend toward limiting after-the-fact fees, you should feel comfortable insisting that relocation companies have a fee agreement with you upfront. Then, if you're surprised with an after-the-fact fee demand, consult with your attorney. You might just find that it's illegal for the relocation company to collect. RM

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# What Duty Do You Have to Inspect Seasonal Rentals?

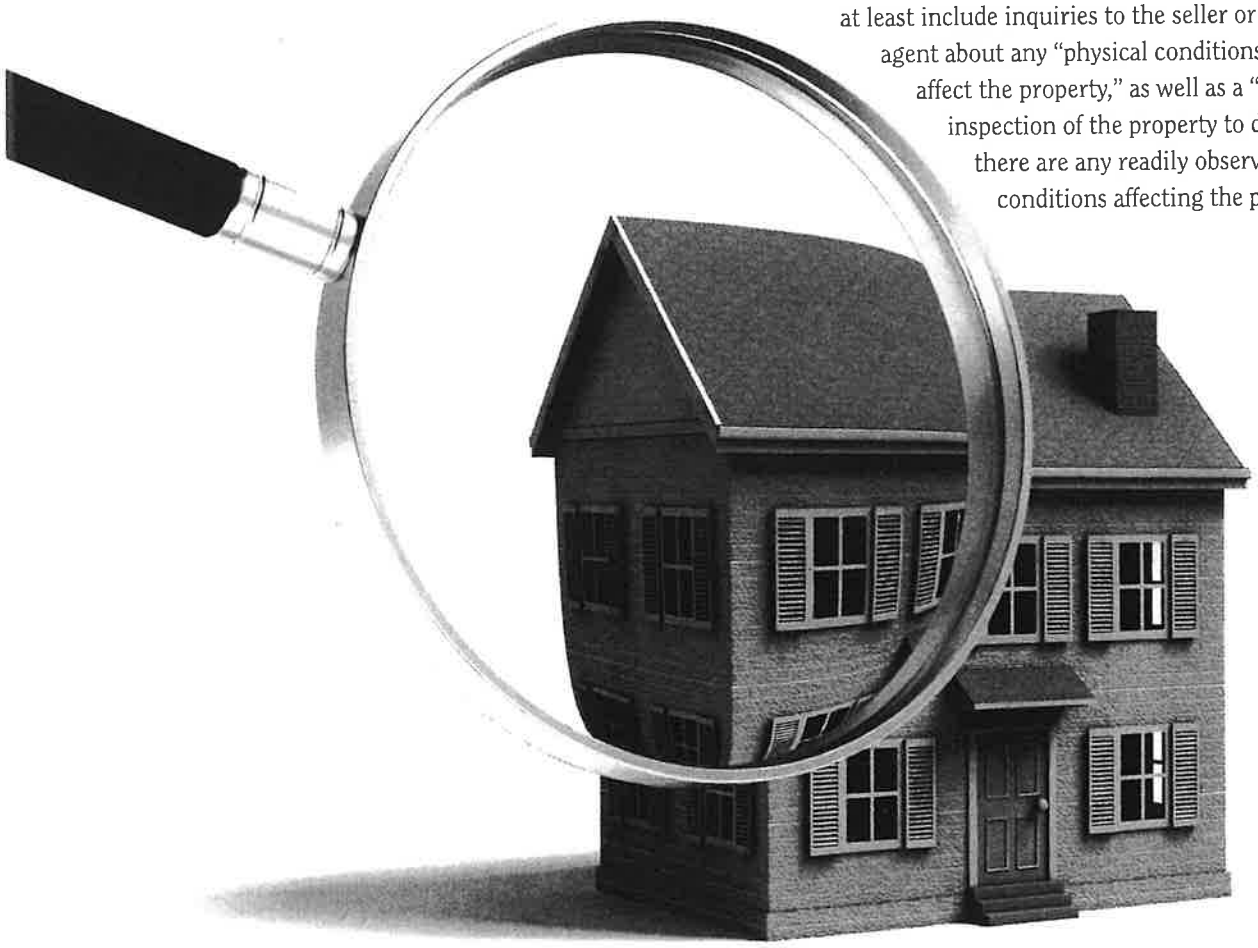
By Barry S. Goodman, Esq.

You are looking forward to what you hope will be a busy season for seasonal rentals. However, do you know what duty you have to inspect the premises for obvious and not so obvious defects that could cause whoever is renting the premises to suffer an injury? Could you be liable if there are construction defects, such as missing handrails or steps that are higher than the construction code permits? What level of inspection does the Real Estate Commission require? Is the duty to inspect a seasonal rental any different than the duty to inspect an open house?

A recent decision, Reyes v. Egner, deals with these questions. Whether you represent landlords, tenants, or both, it is critical that you understand what duty you have to inspect a seasonal rental for possible defects.

## THE REAL ESTATE COMMISSION'S REQUIREMENTS

The N.J. Real Estate Commission's regulations require that every real estate "licensee shall make reasonable effort to ascertain all material information concerning the physical condition of every property for which he or she accepts an agency or which he or she is retained to market as a transaction broker."[1] Such a "reasonable effort" must at least include inquiries to the seller or the seller's agent about any "physical conditions that may affect the property," as well as a "visual inspection of the property to determine if there are any readily observable physical conditions affecting the property."[2]



The Commission defines "material information" as including where "a reasonable person would attach importance to its existence or non-existence in deciding whether or how to proceed in the transaction, or if the licensee knows or has reason to know that the recipient of the information regards, or is likely to regard it as important in deciding whether or how to proceed, although a reasonable person would not so regard it."[3] Of course, real estate licensees must reveal such material information not only to their own client but, "when appropriate to any other parties to a transaction,"[4] including to a tenant of a seasonal rental.

## DUTY TO INSPECT AND WARN VISITORS IN AN OPEN HOUSE

In one of the key cases dealing with a real estate licensee's duty to inspect premises, the N.J. Supreme Court decided in Hopkins v. Fox & Lazo, REALTORS®[5] that a licensee has a duty to warn about property defects to potential home buyers and members of the public who attend an open house the licensee conducts. This duty extends "only to defects that are reasonably discoverable through an ordinary inspection of the home undertaken for purposes of its potential sale."[6] Significantly, the Court added that "[t]he broker is not responsible for latent defects that are hidden and of which the broker has no actual knowledge."[7]

In Hopkins, a person visiting an open house fell and was injured when she did not see that there was a step down because the floor covering on the step and both floor levels were the same pattern of vinyl. Of course, the woman who fell had never been to the house before going to the open house that day. Under such circumstances, the Court held that both the real estate licensee and the homeowner could be liable for the injury.

## DOES HOPKINS APPLY TO SEASONAL RENTALS?

**The key issue in Reyes v. Egner was whether or not the Hopkins decision concerning open houses should be extended to seasonal rentals. Since the N.J. Supreme Court's decision ultimately turned on the facts in Reyes, those facts are critical to understand the outcome of the case.**

In Reyes, Colombia Reyes ("Colombia") decided to rent a three-bedroom house for two weeks over the Labor Day holiday in Stone Harbor. Prudential Fox & Roach listed the rental, which was owned by Harry and Holly Egner, and provided a one-page form lease that Colombia and the Egners signed. The rent was $4,050 and the Egners paid Prudential a commission of 12 percent of that amount.

The rental premises has an elevated rear deck that is adjacent to the master bedroom, is approximately four-feet wide and leads to a six-step stairway that connects it to the ground below. The deck can be accessed through sliding glass doors from the master bedroom, which opens to a small wooden platform on the top of the deck. The platform is about seven inches below the bottom of the sliding glass door and there is another six and a half inch drop from the platform to the deck. The deck's wooden boards and the platform run in the same direction and essentially are the same color, which is similar to the wood coloring in the master bedroom. There also are no handrails attached to either the platform or the deck. Both the height of the step exiting the master bedroom and the lack of handrails appear to have been construction code violations. Colombia did not visit the property or take any visual tour of the property before moving in with her parents and other guests. On the ninth day of their stay in the house, Colombia's father, Hermes Reyes ("Reyes"), opened the sliding glass doors for the first time to go out onto the deck. He said he was unaware that there was a drop and, when he lost his balance, there was no handrail for him to grab. As a result, he fell down the stairs onto the ground and suffered severe injuries. Reyes and his wife then filed suit against the Egners and Prudential.

## THE APPELLATE DIVISION'S SPLIT DECISION

After the trial court held that neither Prudential nor the Egners owed any duty of care to conduct a reasonable inspection of the property for the protection of Reyes, the Appellate Division partially reversed, holding that the lessors, the Egners, owed a duty of care to Reyes but that the broker, Prudential, did not. With regard to the Egners, the Appellate Division held that such a lessor can be liable "even in the absence of a lessor's concealment, if the plaintiff demonstrates that the lessor has failed to disclose a condition 'which involves unreasonable risks of physical harm to persons on the land' if '(a) the lessee does not know or have reason to know of the condition or risk involved, and (b) the lessor knows or has reason to know

of the condition, and realizes or should realize the risk involved, and has reason to expect that the lessee will not discover the condition or realize the risk."[8] The Court also noted that the fact that the injuries were caused by possible construction code violations was not the determinative but could be used as evidence at trial.[9]

With regard to Prudential, the Appellate Division rejected Reyes' argument that the Hopkins decision concerning the duty of real estate licensees to inspect and warn in an open house situation should be extended to this case. The Court noted that, in Hopkins, the N.J. Supreme Court specifically indicated that "the broker is not a guarantor of the safe condition of the premises" and that "the broker's duty 'does not replicate the more comprehensive duty owed by homeowners,' especially since they do not have the same intimate knowledge of the structural flaws or physical defects in the premises as the homeowners."[10]

In addition, the Appellate Division indicated that Prudential only undertook a "limited scope" of responsibility by agreeing to advertise the property, collect rent and make emergency repairs. Moreover, the "walk-through" of the house that the Prudential agent did months earlier when she represented the Egners in the purchase of the property satisfied the Commission's duty to inspect the premises at the time of sale.[11]

The Appellate Division also rejected Reyes' contention that the statement in the Consumer Information Statement (CIS) that a seller's agent "must disclose defects of a material nature affecting the physical condition of a property which a reasonable inspection by the licensee would disclose"[12] was applicable. The Court noted that the Commission's regulations exempt the CIS requirement for residential rentals for not more than 125 consecutive days.[13] As a result, Court declined to extend the Hopkins decision and invited the N.J. Supreme Court to do so if it believed that would be appropriate.[14] The N.J. Supreme Court then agreed to review the decision as to Prudential.

## THE SUPREME COURT'S FACT-SENSITIVE DECISION NOT TO EXTEND HOPKINS

In a 3-3 decision (with one Justice recusing herself),[15] the N.J. Supreme Court affirmed the Appellate Division's decision that the Hopkins duty of care to warn about any reasonably discoverable dangerous conditions in a house does not extend to a real estate licensee handling a short-term lease of a summer rental under the facts of this case. The Court concluded that the decisive issue was that Reyes had been in the property for nine days before he fell, which allowed him "ample opportunity" to inspect and discern the physical defects that might be on the property.[16]

The Court explained that its "holding in Hopkins did not suggest an intent to require that a REALTOR® provide an ongoing guaranty of a property's safety, nor was it designed to protect occupants of a property from personal responsibility for awareness of their surroundings and the dangers inherent in those surroundings."[17] Significantly, the Court also noted that the duty imposed by the Commission to make a reasonable effort to ascertain all material information pertaining to the physical condition of a property and to disclose it as required in the regulations "does not extend to the imposition of liability in the scenario presented in this matter, where a tenant has, for nine consecutive days, been in possession of and in residence at the rental property."[18]

The three dissenting Justices contended that, although a broker would have a right of indemnification against the owner of the property, Reyes should be permitted to also sue Prudential.[19] The dissent therefore would have imposed "a duty on brokers, such as Prudential, to inspect and warn short-term renters of reasonably discoverable dangers on the premises."[20]

## CONCLUSION

As a result of the decision in Reyes, there presently is no duty for a real estate licensee to inspect a seasonal rental property and to warn renters about any defects that they discover. However, caution is advised in light of the fact-sensitive decision of the N.J. Supreme Court that in large part was based upon the fact that Reyes was in the rental property for nine days before he fell. It is unclear if the N.J. Supreme Court would have reached the same decision if Reyes had fallen within the first few hours of moving into the seasonal rental.

It therefore is strongly advised that real estate licensees continue to make reasonable efforts to ascertain all material

information concerning the physical condition of every seasonal rental property and to disclose any potentially dangerous conditions that they discover. It also is recommended that you include in listing agreements, and in a written disclosure to renters, that you are not inspecting or warranting the condition of the property and that the renter should do a walk-through of the property before signing the lease and, certainly, before taking occupancy. Finally, you should include in all listing agreements for seasonal rentals that the owner will defend and indemnify you if a lawsuit is brought by any person for injuries that arise from the condition of the property.

Even if there is no duty to inspect and warn, it still makes sense for you, as a real estate professional, to also recommend to the owner that the owner correct any defects of which you are aware and to advise potential tenants about any such problems. Such common sense steps will help to ensure that you will have minimized any possibility of liability for injuries in a short-term rental. ■

[1] N.J.A.C. 11:5-6.4(b).
[2] N.J.A.C. 11:5-6.4(b)1.
[3] N.J.A.C. 11:5-6.4(b)2.
[4] N.J.A.C. 11:5-6.4(c).
[5] 132 N.J. 426 (1993).
[6] Id. at 448.
[7] Id. at 448-449.
[8] Reyes v. Egner, 404 N.J. Super. 433, 456 (App. Div. 2009).
[9] Id. at 458.
[10] Id. at 464.
[11] Id. at 466.
[12] N.J.A.C. 11:5-6.9(h).
[13] N.J.A.C. 11:5-6.9(d)2.
[14] Reyes v. Egner, 404 N.J. Super. 433, 466-467 (App. Div. 2009).
[15] Any decision by the NJ Supreme Court to overturn an Appellate Decision opinion must be by majority of the Justices of the Court voting on the matter. Where there is a 3-3 decision, the ruling of the Appellate Division is deemed to be affirmed.
[16] Reyes v. Egner, 201 N.J. 417, 421-422 (2010).
[17] Id. at 421.
[18] Id. at 422.
[19] Id. at 429-431.
[20] Id. at 435.

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# Opinion 26 Revisited

By Barry S. Goodman, Esq.

As a real estate agent, you know that you have an obligation to provide a notice to buyers and sellers that they have a right to hire an attorney. This notice must appear as the cover of any sales contract you prepare. However, is that all you have to do to satisfy the mandates of the case known as Opinion 26? If the buyer or seller does not hire an attorney, what can you do to assist a buyer or seller to ensure the transaction will close? What do you have to do to satisfy your obligations under Opinion 26 even if the buyer and seller hire attorneys?

Although you undoubtedly are familiar with the requirement that you provide the Opinion 26 notice to buyers and sellers, you also must be familiar with your other responsibilities under Opinion 26, as well as the opportunities that Opinion 26 provides to you to assist buyers and sellers when they decide not to incur the cost of hiring a lawyer.

## Background

In 1995, the New Jersey Supreme Court decided in *In re: Opinion No. 26* that it is in the public interest to permit buyers and sellers of residential real estate to choose whether or not to incur the cost of hiring a lawyer. If they choose not to hire a lawyer, then real estate brokers and salespersons (collectively referred to as "brokers" in this article) and title agents can provide certain assistance in the title closing process as long as the broker provides the mandatory notice to the buyer and seller advising them of their right to hire a lawyer.

Opinion 26 originally was issued by the Committee on the Unauthorized Practice of Law ("UPL Committee") in response to a request by the New Jersey State Bar Association to prohibit what is known as the "South Jersey Practice." Under this practice, real estate brokers and title agents have provided assistance to buyers and sellers in South Jersey who have not retained an attorney to represent them in the title closing process for over half a century. In Opinion 26, the UPL Committee declared that such assistance by brokers and title agents constitutes the unauthorized practice of law.

Brokers in South Jersey were outraged by this decision since they believed it would severely impact real estate sales in South Jersey where many of the 60-75 percent of buyers who choose not to incur the cost of hiring a lawyer do so to be able to afford to buy a home. In addition, South Jersey brokers sought to preserve their role as the "quarterback" of the transaction, including setting a "time of the essence" closing date in the contract, so that the parties (and brokers) will have certainty as to when the settlement will take place.

***A cornerstone of the Court's decision was its requirement that a written notice be provided by the broker to every buyer and seller before they sign a broker-prepared contract of sale and that the notice must be attached as the cover page of the contract.***

NJAR® agreed to support South Jersey brokers and advocate the right of buyers and sellers to choose whether or not to hire an attorney. After NJAR® convinced the New Jersey Supreme Court to stay Opinion 26 so that a full record could be created upon which the Court could decide whether or not to uphold the UPL Committee's decision, the Court appointed a Special Master to conduct a trial concerning the propriety of the South Jersey Practice.

After a lengthy trial, the Special Master recommended to the Supreme Court that the South Jersey Practice be permitted as long as there was a disclosure to buyers and sellers about their right to hire an attorney and other requirements were met. The Supreme Court then rendered its decision permitting the South Jersey Practice to continue with certain conditions.

## The Supreme Court's Decision

The Court emphasized that its decision to permit brokers and title agents throughout New Jersey to assist buyers and sellers who choose not to hire a lawyer was based upon the "public interest." In determining the public interest, the Court balanced the Court's belief that many aspects of the South Jersey Practice constitute the practice of law and that buyers and sellers would be well served to hire a lawyer against the fact that there was no evidence that any harm had befallen the public as a result of the South Jersey Practice.

The Court noted that the South Jersey Practice also appears to save money for consumers who choose not to incur the cost of attorney's fees. It concluded that "the parties must continue to have the right to decide whether those savings are worth the risks of not having lawyers to advise them in what is almost always the most important transaction they will ever undertake."

A cornerstone of the Court's decision was its requirement that a written notice be provided by the broker to every buyer and seller before they sign a broker-prepared contract of sale and that the notice must be attached as the cover page of the contract. If the written notice is not given, then the broker will be deemed to have engaged in the unauthorized practice of law, which can subject the broker to criminal sanctions and civil liability for any damages.

In addition to providing the required notice, the Court set forth specific requirements for brokers who assist buyers and sellers in lawyerless closings that brokers must carefully follow.

## Permitted, Required and Prohibited Conduct by Real Estate Brokers

The following list provides the requirements set forth by the Court in Opinion 26 and some guidelines concerning the assistance that a broker can provide to buyers and sellers in the title closing process.

1. **Preparation of Contract.** A broker has the right to prepare the contract of sale. However, the broker must include the Opinion 26 notice advising the buyer and seller about their right to hire an attorney as the cover page of the contract when the contract is delivered to the buyer and seller.
2. **Advice Regarding Notice.** The broker must personally advise the buyer and seller to read the notice before signing the broker-prepared contract.
3. **Broker's Copy of Notice.** Although the Supreme Court did not require that the broker obtain a copy of the notice signed and dated by the buyer and seller, it is strongly recommended that the broker have the buyer and seller sign and date a copy of the notice so that the broker can bring it to the closing. This practice will help to avoid any later claim that the notice was not properly provided.

4. **Notice if Contract Not Personally Delivered.** If the broker does not personally deliver the broker-drawn contract, then the broker must contact the buyer and seller regarding the mandatory notice by speaking to them personally or by telephone. Even in this circumstance, it is strongly recommended that the broker then obtain a signed copy of the notice indicating when and how the buyer and seller were provided with the notice. If this is not feasible, it would be prudent for the broker to send a letter to the buyer and/or seller by certified mail, return receipt requested, stating how and when the notice was provided.
5. **Ordering Title Search.** A broker is permitted to order the title search on behalf of the buyer when the buyer has chosen not to hire an attorney.
6. **Inspections and Tests.** The broker can order and assemble all necessary tests and inspections, as well as the survey, when the buyer is not represented by an attorney. Similarly, if the seller is not represented by an attorney but has a responsibility to provide certain documents, such as a certificate of occupancy or a smoke detector certificate, the broker can arrange for these documents.
7. **Deed and Affidavit of Title.** The broker can arrange for an attorney to prepare the deed and affidavit of title for the seller but cannot prepare either of these conveyancing documents.
8. **Clearing Up Title Exceptions.** A broker can assist the seller in clearing up routine exceptions to title, which are known as Type 1 exceptions (preprinted items in all title reports that deal with such issues as marital status and name changes) and Type 2 exceptions (judgments, tax liens and other money liens that typically are paid at the closing). However, a broker is prohibited from assisting in clearing up Type 3 exceptions (easements, covenants and the like) and Type 4 exceptions (other serious legal objections to title). The broker has a duty to recommend that the parties retain an attorney to deal with any unusual or serious exceptions in the title report.
9. **Necessity of Notice at Closing.** Since the title agent must ask the buyer and seller at the settlement if and when they received the mandatory notice, it is recommended that the broker bring the notice signed and dated by the buyer and seller to the closing to avoid any problems.
10. **Recommending an Attorney.** Although the Court did not impose any new duty on brokers to recommend an attorney, it re-emphasized the existing duty under Real Estate Commission regulations for a broker to recommend an attorney whenever the situation appears to warrant it.

## Conclusion

NJAR®'s victory in this matter allowed brokers throughout New Jersey to provide assistance to buyers and sellers that historically only had been provided in South Jersey. Indeed, the Supreme Court's decision unquestionably created opportunities for brokers, including increased control over the closing process and the timing of the closing, and permitted certain buyers who choose to save the cost of attorney's fees to purchase homes they otherwise may not have been able to purchase.

Competitive forces and a difficult real estate market may very well necessitate that all brokers in New Jersey be able to assist buyers and sellers who choose not to hire a lawyer. As a result, all brokers should become familiar with the Court's requirements in Opinion 26. ■

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Barry S. Goodman, Esq.

# NEW JERSEY REALTORS® PREVAILS IN CASE LIMITING MUNICIPAL LICENSING FEES

By Barry S. Goodman, NJ Realtors® Legal Counsel

In December 2011, Hamilton Township passed an ordinance imposing a licensing fee on all apartments that are rented for more than 30 days, including single-family homes. The annual fee for each apartment was initially $100, but the fee was reduced to $85 and later reduced even further to $65. This ordinance affected approximately 1,100 units in Hamilton Township, including 498 apartment units at the development owned by Timber Glen. Timber Glen objected to the licensing fee — which would have cost the company $32,370 per year based upon the $65 fee per unit — and filed a suit challenging the ordinance.

New Jersey Realtors® won a significant victory for tenants and the rental industry when the court held that municipalities are limited in the licensing fees they can charge for apartments. In the case, *Timber Glen Phase III, LLC v. Township of Hamilton*, the Appellate Division held that municipalities can only impose a licensing fee with regard to residential rental units if they are rented for a term of less than 175 consecutive days by a person having a permanent residence somewhere else. As a result, a licensing fee that was imposed by Hamilton Township on Timber Glen and other apartment owners was rendered invalid. This ruling applies to all municipalities in New Jersey.

Since a municipality only has the authority that is vested in it by statute or the New Jersey Constitution, Hamilton Township argued that it had the authority to impose the licensing fee under what is known as the Licensing Act, which contains broad language that allows municipalities to license "hotels, boarding housings, lodging and rooming houses, trailer camps and camp sites, motels, furnished and unfurnished rented housing or living units and all other places and buildings used for sleeping and lodging purposes." Timber Glen, on the other hand, argued that an Amendment to the Licensing Act in 1998, which contains narrow language concerning the scope of a municipality's authority to license and impose fees for rental units, should be applied rather than the broader section upon which Hamilton Township relied. The narrower section of the Licensing Act allows municipalities to impose license fees with regard to "the rental of real property for a term less than 175 consecutive days for residential purposes by a person having a permanent place of residence elsewhere."

After the trial court ruled in favor of Hamilton Township, Timber Glen appealed. New Jersey Realtors® filed an amicus application supporting the position of Timber Glen and also arguing that the additional licensing fees would be passed on to tenants, who already were struggling to afford the high rents for apartments in New Jersey, especially in these difficult economic times. The New Jersey Apartment Association and the New Jersey Builders Association also appeared on behalf of Timber Glen. The New Jersey League of Municipalities appeared as an amicus on behalf of Hamilton Township's position.

The Appellate Division reversed the trial court's decision and held that the narrower language limits the broader language in the Licensing Act. Thus, municipalities can only impose a licensing fee with regard to a residential rental that is for a term of less than 175 consecutive days by a person with a permanent residence elsewhere. The court held that if it were to adopt Hamilton Township's argument, there would have not been any need to add the narrower language to the Licensing Act since it already would have been part of the broader language that Hamilton Township relied upon. The court refused to render the narrower language meaningless.

As a result, if you live or work in a municipality that imposes improper licensing fees for residential apartments, it is strongly suggested that you contact your local board or Bruce Shapiro, New Jersey Realtors®' local government and Regulatory Affairs Coordinator. ■

# Are You Complying with the Americans With Disabilities Act?

By Barry S. Goodman, Esq.

Has one of your sellers ever said to you that his vision is so bad that he could not read the listing agreement? Maybe one of your buyers has said that she is hard of hearing and could not understand what you were saying about the offer that you were about to submit to the seller. What obligation do you have if a person in a wheelchair is unable to get into your office because there is a small step at the front door? Does the number of people working in your office affect how you must deal with these issues?

The United States Department of Justice recently revised its regulations implementing the Americans With Disabilities Act ("ADA") dealing with such issues[1]. The new regulations took effect on March 15, 2011, except with regard to the new standards for access to buildings that will take effect March 15, 2012. All real estate brokers and salespersons therefore must know what their obligations are when dealing with somebody who has a covered disability.

## BACKGROUND OF THE ADA

Title III of the ADA prohibits discrimination against any person with a disability by businesses that provide goods or services to the public, which are called places of "public accommodation" in the ADA[2]. Such places of public accommodation include a "sales or rental establishment," which encompasses a real estate brokerage office. A person is considered to have a "disability" under the ADA if he or she has any physical or mental impairment that substantially limits one or more of the person's major life activities or has a record of or can be regarded as having such an impairment[3]. Although this is a very broad definition, the most common issues in places of public accommodations are a person's vision or hearing, or a person being in a wheelchair.

Under the ADA, a real estate brokerage office is required to take "steps that may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services."[4] The only exception would be if the brokerage office can demonstrate that "taking those steps would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations being offered or would result in an undue burden, i.e., significant difficulty or expense."[5] The ADA applies to places of public accommodation regardless of the number of employees or salespersons in the office.

## APPLYING THE ADA TO REAL ESTATE TRANSACTIONS

Real estate licensees are required to provide people who are blind or have low vision with all relevant documents in a format that the person can use, such as on a computer disk or audio cassette. As explained by the Department of Justice, "[i]t may be effective to e-mail an electronic version of the documents so the client can use his or her screen-reading technology to read them before making a decision or signing a contract. In this situation, since complex financial information is involved, simply reading the documents to the client will most likely not be effective. Usually a customer will tell you which format he or she needs. If not, it is appropriate to ask."[6] The bottom line is that the auxiliary aids and services that the broker provides must ensure effective communications with the person who has the disability.

Similarly, if a person is deaf or has some other hearing impairment, a real estate licensee likely will have to arrange for someone to provide sign language or for an oral interpreter because of the complexity of the issues involved in a real estate contract. The new regulations specifically permit the use of new technology, which could include video remote interpreting (often called "VRI"), which is a service that allows for video conferencing of an interpreter who is at another location. Exchanging written notes with a person who has a hearing impairment may be sufficient if the communications are less complex than reviewing a sales contract or lease.

## ADA OFFICE ACCESSIBILITY REQUIREMENTS

The new ADA regulations revise the 1991 standards covering architectural barriers in existing buildings. If a building complies with the 1991 standards, then no modification will be required unless there are renovations to the building that alter any of the elements.

However, if the building has architectural barriers that do not comply with the 1991 standards, then the broker will have the choice of complying with the 1991 or 2010 standards if the renovation is done before March 15, 2012. After March 15, the building will have to be brought up to the 2010 standards if they are "readily achievable."

Some examples of architectural barriers that must be removed or remediated are replacing an entrance that has a step or steps with a ramp or providing an alternate accessible entrance, widening doorways to accommodate wheelchairs, installing accessible door hardware, creating access from parking areas, making bathrooms accessible, and widening aisles throughout the office so that persons in wheelchairs can move around the office.

The regulations specifically provide that "grandfather provisions" that often are found in local building codes do not exempt businesses from their obligations under the ADA. It therefore is recommended that brokers consult with an architect or some other professional far in advance of March 15, 2012 to ensure that their offices comply with these standards.

## ADA COMPLIANCE FOR COURSE WORK

Any private entity that offers examinations or courses for real estate licenses must comply with the ADA not only in providing the courses but also with regard to access to and within the school. This would include providing auxiliary aids and services where applicable, such as for blind, deaf or speech impaired persons. However, the ADA specifies that the school is not required to provide students "with personal devices, such as wheelchairs; individually prescribed devices, such as prescription eyeglasses, or hearing aids; or services of a personal nature including assistance in eating, toileting, or dressing."[7]

## CONCLUSION

Any time that you, as a real estate licensee, become aware that a person has a covered disability that would effect that person's ability to understand documents or what is being discussed, it is important for you to ask the person what can be done to allow the person to more fully participate. Often, the person will be able to take care of the issue him or herself, even though you cannot require the person to do so.

You have an obligation to comply with the ADA to ensure that person's participation unless compliance would create an undue burden for you. As a result, you have to provide necessary auxiliary services and aids, as well as have accessible offices, so that persons with covered disabilities can fully participate in and understand all necessary aspects of a real estate transaction that you are handling.

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1. The Department of Justice has put out a booklet entitled "ADA Update: A Primer For Small Business" summarizing the new regulations, which can be found at http://www.ada.gov/regs2010/smallbusiness/smallbusprimer2010.htm.

2. 42 U.S.C. § 12181, *et seq.* There are five sections in the ADA: (1) Title I prohibits discrimination by employers who have 15 or more employees; (2) Title II prohibits discrimination by state and local governments and transportation authorities; (3) Title III prohibits discrimination in places of public accommodation; (4) Title IV covers telecommunications; and (5) Title V includes miscellaneous provisions. A real estate broker who has 15 or more employees, including salespersons, should consult an attorney about Title I since employment law under the ADA is beyond the scope of this article.

3. (1) The phrase *physical or mental impairment* means –

   (i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory (including speech organs); cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine;

   (ii) Any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities;

   (iii) The phrase physical or mental impairment includes, but is not limited to, such contagious and noncontagious diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, HIV disease (whether symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism;

   (iv) The phrase physical or mental impairment does not include homosexuality or bisexuality.

   (2) The phrase *major life activities* means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

   (3) The phrase *has a record of such an impairment* means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

   (4) The phrase is regarded as having an impairment means—

   (i) Has a physical or mental impairment that does not substantially limit major life activities but that is treated by a public entity as constituting such a limitation;

   (ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

   (iii) Has none of the impairments defined in paragraph (1) of this definition but is treated by a public entity as having such an impairment.

   (5) The term disability does not include—

   (i) Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;

   (ii) Compulsive gambling, kleptomania, or pyromania; or

   (iii) Psychoactive substance use disorders resulting from current illegal use of drugs.

4. 36 C.F.R. § 36.303(a). Examples of auxiliary aids and services include the following:

   (1) Qualified interpreters; notetakers; real-time computer-aided transcription services; written materials; exchange of written notes; telephone handset amplifiers; on-site or through video remote interpreting (VRI) services; assistive listening devices; assistive listening systems; telephones compatible with hearing aids; closed caption decoders; open and closed captioning, including real-time captioning; voice, text, and video-based telecommunications products and systems, including text telephones (TTYs), videophones, and captioned telephones, or equally effective telecommunications devices; videotext displays; accessible electronic and information technology; or other effective methods of making aurally delivered information available to individuals who are deaf or hard of hearing;

   (2) Qualified readers; taped texts; audio recordings; Brailled materials and displays; screen reader software; magnification software; optical readers; secondary auditory programs (SAP); large print materials; or other effective methods of making visually delivered materials available to individuals who are blind or have low vision;

   (3) Acquisition or modification of equipment or devices; and

   (4) Other similar services and actions.
   36 C.F.R. § 36.303(b).

5. 36 C.F.R. § 36.303(a). A business's overall resources (rather than a comparison to the fees paid by the customer meaning the interpreter) determine what constitutes an undue burden. If a specific communications method would be an undue burden, a business must provide an effective alternative if there is one."

6. The United States Department Justice, "ADA Update: A Primer For Small Business," at p. 6. The United States Department of Justice, "ADA Update: A Primer For Small Business," at p. 7.

7. 36 C.F.R. § 36.306.

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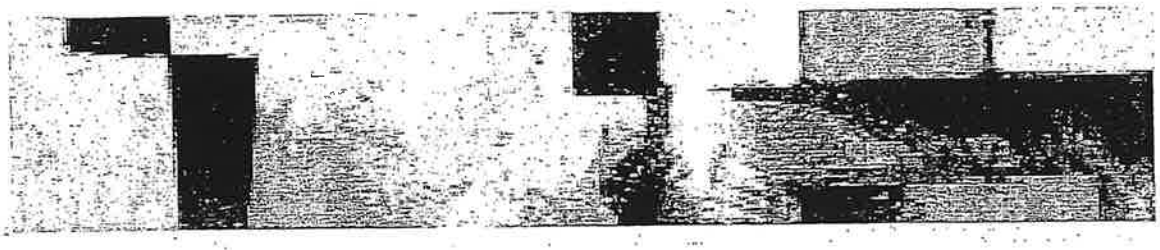

# MARKETING THROUGH SOCIAL MEDIA: DO YOU UNDERSTAND THE RISKS?

**Barry S. Goodman***

This article originally appeared in the April 2010 edition of *New Jersey REALTOR®*.

It seems as though everybody is blogging or otherwise using social media to market themselves. Why should you be any different? Marketing through social media can be a cost effective replacement or supplement to newspapers ads, postcards and other mailings. It doesn't cost you anything but time and you can use it to promote open houses, get clients, solicit new agents for an office, and stay in touch with agents who currently are in your office.

Whether you are a fan of Facebook, LinkedIn, RealTown, Twitter or any other website for blogging, there are significant legal issues that you, as a broker or a salesperson, must keep in mind in order to avoid a lawsuit or sanctions being imposed by the New Jersey Real Estate Commission (the "Commission") or some other agency.

## WHAT IS SOCIAL MEDIA?

Social media is an extremely broad term that can relate to any online communications, which could include blogging, emails, or any website that allows for interfacing. The National Association of REALTORS® ("NAR") has defined "using social media" generally as meaning "posting or uploading content to all types of interactive electronic communications including but not limited to websites, weblogs, social networks, discussion boards, and listserves."

## LEGAL IMPLICATIONS OF SOCIAL MEDIA USAGE

Any time you use social media as a marketing tool, there are numerous legal risks that are involved. Such marketing may include merely referring to yourself as a REALTOR® or real estate licensee, giving real estate advice, advertising or otherwise marketing properties, soliciting buyers or sellers, or simply providing information that relates to your role as a real estate licensee.

For example, whenever you undertake such marketing, you should ensure that you are fully complying with the Commission's regulations concerning advertising and treat such communications in the same way you would if you were speaking to someone face-to-face, including avoiding any misleading or deceptive comments that could trigger a violation of the Consumer Fraud Act, (and its mandatory award of treble damages and attorneys fees). For example, if you are providing information about a house in a blog, make sure that you not only disclose all material information pertaining to the physical condition of the property as required under the Commission's regulations but that you also clearly identify yourself as a salesperson, broker-salesperson or broker and indicate your regular business name, as well as the regular business name of the individual, partnership, firm or corporate broker through whom you are licensed in the form required by the Commission.

In addition, NAR's Code of Ethics fully applies to social media usage pursuant to Standard of Practice 1-2. This includes but is not limited to statements that you might make in a blog about properties and other agents. For example, Article 2 of the Code provides that "REALTORS® shall avoid exaggeration, misrepresentation, or concealment of pertinent facts relating to the property or the transaction...." In addition, Article 15 provides the following prohibition against statements concerning competitors: "REALTORS® shall not knowingly or recklessly make false or misleading statements about competitors, their businesses, or their business practices."

You also should be aware that the term "REALTOR®" is trademarked. As a result, NAR has indicated that certain uses of REALTOR® are acceptable as a name under which you blog, such as when you use it in connection with your actual name (e.g., janesmithrealtor, realtorjsmith, realtorjanechicago) but that it is unacceptable to use REALTOR® in connection with fictitious names (e.g., chicagorealtor, realtormom, hotshotrealtor, cyberrealtor, janechicagorealtor).



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Moreover, there are numerous other legal issues that can arise from blogging:

- **Defamation** - In addition to violating the Code of Ethics with regard to comments about other agents, you should be careful not to make any unsubstantiated statements about other licensees, buyers, sellers, or anyone else since you could be faced with a defamation lawsuit. Even if you think you are anonymously posting the statements under a pseudonym, it might be possible for the defamed person to find out who posted the slanderous remarks.

- **Testimonials** - The Federal Trade Commission passed regulations that went into effect December 1, 2009, requiring that all testimonials or other endorsements reflect the honest opinions and true experience of the endorser. If the endorser is being paid, whether through free products or monetary compensation, or there is some other material connection between the advertiser and the endorser, this must be disclosed. Fines can be imposed for up to $11,000 per violation and the violator could be required to reimburse consumers for all financial losses stemming from the inappropriate testimonials.

- **Identity Theft** - Not all people who you admit into your circle of virtual friends really will be interested in your marketing efforts. Be careful what you include in your blogs since the information may very well be viewed by people who are seeking to steal your identity or may be disseminated beyond your friends to other people who are seeking to steal it.

- **Broker Liability** - If a salesperson posts a blog that violates any law, a broker may very well be liable for that blog. Brokers therefore should have reasonable policies in place that are uniformly enforced concerning salespeople using blogs.

- **Creation of Client Relationships** - Be careful if you are soliciting buyers and sellers through a blog. You should make sure that you timely provide a Case Information Statement to a potential client and otherwise comply with all Commission regulations concerning such buyers and sellers.

- **Discrimination/Harassment** - Brokers should have written office policies prohibiting any discrimination or harassment and immediately should investigate and stop any discrimination or harassment, whether in a blog or otherwise.

- **Invasion of Privacy** - The law is evolving with regard to whether or not an employer has any right to review blogs of employees. This issue may depend upon whether or not a computer, blackberry or the like supplied by the employer was used. Courts also have looked at whether or not the employer obtained the password for a blog from the employee through any type of coercive means.

- **Antitrust** - As with any form of communication, you should avoid discussions in blogs with other licensees about commission rates or other business terms that potentially could be construed as attempting to conspire or agreeing to fix such rates or terms, which would violate antitrust laws.

## ENJOY BLOGGING BUT AVOID THE RISKS

Social media can be a very powerful marketing tool but you have to assume that the entire world will read your blog, including other agents, brokers, buyers, sellers, the Commission, etc. Even personal postings that have nothing to do with real estate might be used by buyers, sellers and potential employers in the future to decide whether or not to hire you. As a result, be careful what you post. Indeed, if the posting is in any way real estate related, then you must be even more careful to comply with all of the rules and regulations of the Commission and other State and Federal agencies, as well as NAR's Code of Ethics.

In order to ensure such compliance, brokers should have a written policy concerning the use of social media by their salespeople. It is recommended that the policy be signed by the broker's agents at least once a year, be included in the office personnel handbook, and be discussed at least once a year in an office meeting. The policy also should be consistently enforced, including but not limited to disciplinary action for violating the policy.

The bottom line is BLOG BUT BLOG RESPONSIBLY!

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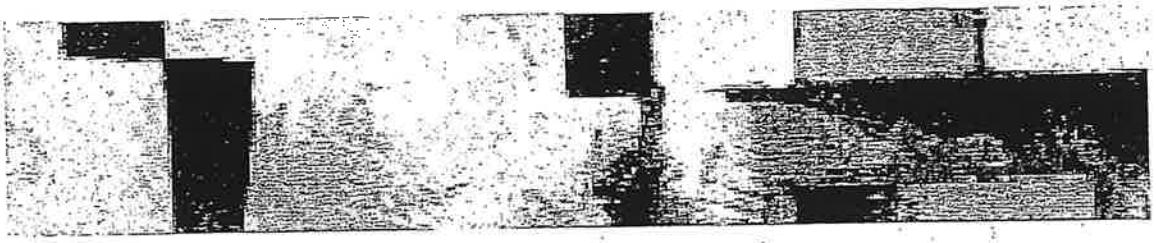

# REBATES FOR BUYERS: ARE THEY RIGHT FOR YOU?

**Barry S. Goodman***

Buyers approach you about representing them to find a home in New Jersey and immediately tell you they expect you to pay them a rebate from part of your commission before they will agree to let you represent them. Can you pay a rebate to buyers in New Jersey? What about the sellers? If you can pay any rebate, what conditions must you meet as a real estate licensee before you pay any such rebate?

The questions and answers below will provide you with the information you need to decide whether or not you should offer rebates.

## THE PROHIBITION AGAINST REBATES

**Q: Aren't rebates to buyers and sellers prohibited in New Jersey?**

A. They historically have been prohibited. Section 17(k) of the Licensing Act prohibited licensees from paying any rebate, profit, compensation or commission to anyone who does not have a real estate license. The only exception was for free, discounted or other services or products that are allowed under Section 17(i) of the Act.

**Q: Has the law changed?**

A: You bet it has! Section 17(k) of the Act recently was amended to allow real estate brokers to pay rebates to buyers under certain conditions. However, the Act still prohibits rebates to sellers.

**Q: Why was this amendment passed?**

A: A broker who operated in many other states where rebates to buyers are allowed had a model of representing buyers and providing them with a rebate of a portion of its commission on the transaction. They argued that buyers should have the right to negotiate commissions in much the same way as sellers can negotiate the commission in the listing agreement. In these difficult economic times, the Legislature decided that such rebates were pro-consumer and, as a result, passed this legislation, which the Governor signed into law.

**Q: So you are saying that only a broker can provide a rebate and that the rebate only can be provided to buyers?**

A: That's correct. Only a real estate broker, not a real estate salesperson, broker-salesperson or referral agent, can provide a rebate. In addition, the law is very clear that the rebate only can be paid to buyers, not sellers, lessors or lessees.

**Q: If I decide to give rebates to buyers, does it have to be in writing or can I continue to have a verbal relationship with my buyers?**

A. Any agreement to provide a rebate to buyers must be in writing and entered into at the onset of the brokerage relationship with the buyers. The writing can be a written document, an electronic document or a buyer agency or other agreement.



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**Q: Are there any tax implications for the buyers if they receive a rebate?**

A: There may very well be. The broker providing the rebate therefore must recommend to the buyers that the buyers contact a tax professional concerning the tax implications of receiving the rebate. It also is recommended that the broker get information from the buyers to provide the buyers with a 1099 tax form.

**Q: Do I have to tell the listing agent that I am providing a rebate to the buyers?**

A: Yes. Any broker providing a rebate to buyers must disclose the payment of the rebate to all parties involved in the transaction, including but not limited to the listing agent, the sellers and the mortgage lender, if applicable. In addition, the broker must comply with all State and Federal requirements with respect to the disclosure of the payment of the rebate.

**Q: Can I condition the payment of a rebate to buyers on the buyers using some other service or product that I offer?**

A: Absolutely not. The rebate cannot be contingent upon the use of any other service or product that is offered by the broker who will be providing the rebate or any affiliate of the broker. The rebate also cannot be based upon the use of any lottery, contest or game.

**Q: Are there any advertising issues that I should be aware of if I decide to offer rebates to buyers?**

A: There are. First, the advertisement must have a disclosure concerning the buyers' obligation to pay any applicable taxes for receiving the rebate. Next, a notice that the purchaser should contact a tax professional concerning the tax implications of the rebate must be included. Finally, the required disclosure and notice must be conspicuously displayed in the advertisement and the size of the text must be equal to or larger than the size of the text used for the advertisement.

**Q: Can I provide the buyer with a rebate for undertaking activities that real estate licensees might otherwise do?**

A: You're prohibited from paying any unlicensed person, including the buyers, for any act that requires licensure. As a result, you cannot provide them with a credit or a check at the closing for providing any services that would require licensure.

## FORM REBATE AGREEMENTS

**Q: What agreements are available from NJAR® that will satisfy my obligation to have a writing or agreement concerning the payment of rebates to buyers?**

A: NJAR® now has five different forms online that, at your option, you can use if you decide to provide rebates to buyers. The most basic Agreement merely provides the basic terms under which the rebate will be paid to the buyers.

**Q: What other forms does NJAR® have concerning rebates to buyers?**

A: NJAR® decided to have four other forms for the convenience of its members. These include two Non-Exclusive Buyer Agency Agreements, one that has a provision for rebates to buyers in it and one that does not. NJAR® also has two Exclusive Buyer Agency Agreements, one that has the rebate provision in it and one that does not.



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**Q: Why would I bother entering into either an Exclusive or Non-Exclusive Buyer Agency Agreement rather than just keeping it simple by entering into an agreement that only deals with my providing a rebate to the buyers?**

A: Each broker offering rebates has to make a business decision whether or not to enter into a Buyer Agency Agreement, but it is highly recommended that the decision be for his or her entire office. However, the advantage of a Buyer Agency Agreement, whether it is exclusive or non-exclusive, is that the agreement can protect the broker by providing, for example, how and what amount the buyers' agent will be paid, a protection period for property shown by the buyers' agent to the buyers, and a representation from the buyers that they do not have any Exclusive Buyer Agency Agreement with any other broker.

## CONCLUSION

**Q: Do you recommend that I start providing rebates to buyers?**

A: That is a decision each broker will have to make for him or herself. However, there are already brokers who are providing such rebates in New Jersey as a result of this new law. As with all changes to the law that allow for new business models, competitive sources ultimately will decide how effective a business model offering such rebates to buyers will be. However, if you decide to provide rebates to buyers, you must ensure that you comply with all the requirements for providing such rebates.

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# What to Do if the Listing Broker Offers a Minimal Commission

by Barry S. Goodman, Esq., NJAR Counsel

What can you do? The listing broker only offers a "minimal" commission to you, as a buyer's agent. Can you negotiate the offer with the listing broker? How about negotiating with the seller? Should your buyer negotiate the offer? Can you offer a reciprocal minimal commission to that broker on your listings?

There are many legal, ethical and practical issues you, as a buyer's agent, must consider in such situations. Understanding your options and obligations for dealing with this situation will maximize the likelihood of your being paid the commission you expected and minimize the possibility of a lawsuit, an ethics complaint, or of the Real Estate Commission (REC) sanctioning you for improper conduct.

## What Legal Standards Apply?

It is important for buyer's agents and listing agents to know what duties they have regarding commission splits under REC regulations. The starting point for any discussion is to keep in mind that you, as a buyer's agent, have a fiduciary duty to the buyer. Of course, the listing agent also has the same fiduciary duty to the seller. In fact, REC regulations require that each licensee "protect and promote, as he would his own, the interests of the client or principal he has undertaken to represent."[1]

In addition, the REC requires that, "[u]nless directed not to do so in writing by an owner..., every licensee shall fully cooperate with all other New Jersey licensees, utilizing cooperation arrangements which shall protect and promote the interests of the licensee's client or principal."[2] An exception is, if the seller, "with full knowledge of all relevant facts, expressly relieves the listing broker from one or more of those requirements in writing."[3] Thus, absent such a written waiver by the seller, the listing broker has a duty to fully cooperate with you as a buyer's agent under REC regulations.

Listing agents also are required to include in the written listing agreement the precise commission splits that will be offered to other brokers so that the seller will know what commission is being offered to buyer's agents.[4] However, a listing broker is not prohibited "from varying his commission split policy with respect to any one or more selling brokers in order to achieve equality of commission splits with such other selling broker or brokers in connection with their commission split policy with such listing broker."[5]

## Is NAR'S Code of Ethics Applicable?

The Code of Ethics of the NATIONAL ASSOCIATION OF REALTORS® (NAR) also significantly affects what can and cannot be done by you as a buyer's agent and by the listing broker. For example, REALTORS®. must advise sellers when they enter into a listing agreement about the REALTOR®'s policy regarding cooperation and the amount of any compensation that will be offered to buyer's agents or transaction brokers.[6]

The Code's Standard of Practice 16-16 is of particular importance with regard to this issue. It specifically prohibits a REALTOR® from using the terms of an offer to try to modify the listing broker's offer of compensation. It also prohibits a REALTOR® from making the submission of an executed offer contingent on the listing broker modifying his/her offer of compensation.[7]

However, keep in mind that the Code of Ethics only applies to the activities of

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REALTORS® and not to the conduct of buyers (or sellers).

**What Are Your Options?**

Based upon New Jersey law and the Code of Ethics, there are at least six options for dealing with a listing broker who only is offering a minimal commission. The key to choosing which of these options is in the best interest of your buyer is to have an agreement, preferably in writing, with the buyer at the beginning of your relationship after you have fully explained the ramifications of each option. In this way, the issue of a minimal commission split to you will not come as a surprise to the buyer or be a problem if it arises.

Your options when faced with a minimal commission offer include at least the following:

1. The buyer can include in a written offer to the seller that the seller will pay your full commission. Note that only the buyer, not you, can decide to include this in the offer. It only should be included in the offer where the buyer has provided informed consent, which would include your explaining to the buyer how such a term will affect the offer.

A quick example will show how the offer will be affected. Let's say that your buyer is submitting a $400,000 offer and that you and the buyer have agreed that you will be paid a 3% commission. However, the listing broker only is offering a 1% commission to buyer's agents. As a result, if the $400,000 offer includes the seller paying your 3% commission, the offer in effect will be $8,000 less ($400,000 x 2% = $8,000) than another offer for $400,000 that does not include that the seller will pay an "extra" 2% to the buyer's agent.

2. The buyer can agree to pay your commission or any part of it that the seller does not pay. This preferably would have been agreed upon in writing at the inception of your relationship with the buyer.

3. You can negotiate directly with the listing broker to be paid the commission you expected. However, you cannot place your interest in receiving the commission you expected above the interest of your client, the buyer. As a result, if your buyer wants to place an offer on the house, you must do so regardless of whether or not you are going to be paid your full commission at that point. This is why it is so important for you and the buyer to have agreed early in your relationship how this compensation issue will be handled.

4. You can negotiate directly with the seller if the listing agent agrees or the buyer can negotiate directly with the seller. However, you should be careful about encouraging the buyer to directly negotiate with the seller since you are subject to ethical standards. It should be the buyer's decision to enter into such negotiations.

5. You can agree with the buyer that you will not show the buyer any listings where the listing broker is not offering the full commission that you and the buyer have agreed you will be paid. However, such an agreement should be in writing after the buyer has given his or her informed consent with full knowledge that this will limit the number of properties the buyer will be shown.

6. You simply can remove yourself from the transaction and let the buyer negotiate the offer directly with the listing broker or seller. If the commission split that is being offered to you is extremely low and you have not worked out with the buyer ahead of time how you will be paid in such a situation, this may be the most realistic choice. However, if you have come to an agreement with the buyer about your compensation in a timely manner, this option should never have to come into play.

**Can You Offer the Same Minimal Commission to the Listing Broker on Your Listings?**

Do you have to offer the same commission to all buyer's agents? If you want to vary the commission for a specific broker on your listings, what steps must you take?

A broker has the right to unilaterally decide the terms on which he/she will deal with other brokers, consistent with the REC regulations and NAR Code of Ethics cited above and with the full knowledge of his/her client (preferably in writing). The key is that it must be a unilateral decision and not be a part of any agreement, conspiracy or other joint decision that could be considered to be a boycott or restraint of trade under the antitrust laws. You, therefore, should not make this decision in conjunction with any other broker.

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## What to Do if the Listing Broker Offers a Minimal Commission

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If you decide to vary the commission you will be offering in the MLS for a specific broker, you should advise that broker by sending him/her a letter. The letter should be sent by certified mail, overnight express or some other means that will provide you with evidence it was received. Do not copy the MLS or any other broker, person or association on the letter. The letter solely should be between you and the other broker so as to avoid any implication that you are encouraging others to make the same decision (remember, no group boycotts).

The letter should state the specific dollar amount or percentage you will be paying as a commission to the other broker, rather than simply saying that the commission will be "reciprocal" or the same as the other broker has in his/her listings. It also specifically should state that this amount is in lieu of the amount set forth in the MLS for all of your listings.

Finally, you must inform the seller for each listing you take that your policy is to provide a lower commission to that broker and that this policy may limit the number of potential buyers who will submit an offer for the property. This preferably should be in writing, which can include having the seller sign the letter that you have sent to that broker.

### Conclusion

The key to avoiding any problems is to remember that you have a fiduciary duty to your buyer (as the listing agent must remember that he/she has a fiduciary duty to the seller) to place the buyer's interest over your financial interest. Problems with minimal commission splits will not arise if you have fully discussed this issue with your buyer before the issue arises. Whether you have an exclusive agency or not, it always is preferable to have your agreement with the buyer in writing in order to avoid any last minute problems when you finally locate your buyer's dream house. If you've earned your commission, and if you have taken the time to reach an agreement with the buyer at the beginning of your relationship, there is no reason why you should not be paid the full commission you were expecting.

Barry S. Goodman, Esq., a partner in the law firm of Greenbaum, Rowe, Smith & Davis LLP, is General Counsel for NJAR. He is a trial attorney who focuses his practice on real estate brokerage and other real estate-related matters, as well as antitrust suits and corporate shareholders and partnership disputes.

*1 N.J.A.C. 11:5-6.4(a).*
*2 N.J.A.C. 11:5-6.4(f).*
*3 N.J.A.C. 11:5-6.4(f)2.*
*4 N.J.A.C. 11:5-6.4(f)3.*
*5 N.J.A.C. 11:5-7.6. However, such a varying commission split policy cannot be directly or indirectly undertaken based upon "any punitive or retaliatory action against any other licensee(s) or such actions based upon the failure or refusal to adhere or to adopt any commission." id.*
*6 NAR Standard of Practice 1-12.*
*7 NAR Standard of Practice 16-16 provides as follows: "REALTORS®, acting as subagents or buyer/tenant representatives or brokers, shall not use the terms of an offer to purchase/lease to attempt to modify the listing broker's offer of compensation to subagents or buyer/tenant representatives or brokers nor make the submission of an executed offer to purchase/lease contingent on the listing broker's agreement to modify the offer of compensation."*

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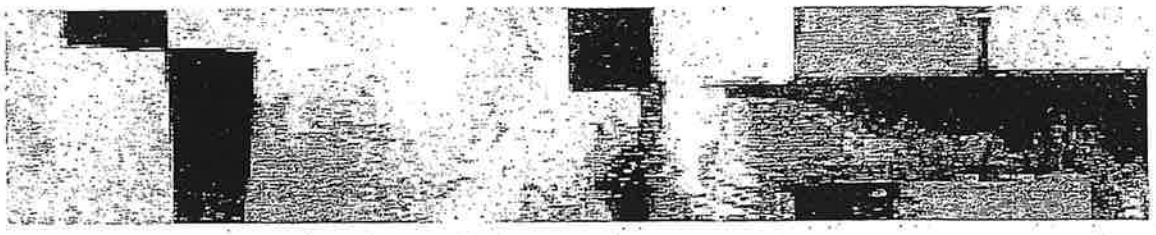

# DOES A VIOLATION OF THE LICENSING LAW VOID A LISTING AGREEMENT?

**Barry S. Goodman***

Although the New Jersey Real Estate Licensing Act[1] (the "Act") requires you, as a listing agent, to leave a copy of the fully executed listing agreement with the seller when it is executed and to specify the termination date in the listing agreement, you inadvertently forgot to do so. As a result, you could be subject to sanctions by the Real Estate Commission for violating the Act.

However, does such a violation of the Act also automatically void the listing agreement? Under a 1979 case, the answer to this question has been "yes." However, based on a recent Appellate Division decision, the listing agreement no longer automatically would be void but, depending upon the circumstances, might be voidable.

## Section 17 of The Act

Under Section 17[2] of the Act, real estate licensees are prohibited from engaging in certain conduct. One of these prohibitions specifically deals with listing agreements. Section 17(f) specifically provides that a real estate licensee will be guilty of violating the Act for the following conduct regarding a listing agreement:

> f. Failure to provide his client with a fully executed copy of any sale or exclusive sales or rental listing contract at the time of execution thereof, or failure to specify therein a definite terminal date which terminal date shall not be subject to any qualifying terms or conditions.

In 1979, a trial court held that, if Section 17(f) is violated, the listing broker would not be permitted to enforce the listing agreement because the agreement was void as a matter of public policy[3]. No cases in New Jersey had been decided on this issue since then until a September 2007 Appellate Division decision.

## The Appellate Division Considers If Violations Of The Act Void Listing Agreements

In a case known as *Exit A Plus Realty v. Zuniga*[4], the Appellate Division reviewed the issue of whether or not a violation of the Act should automatically void a listing agreement and bar a broker's right to recovery a commission under the agreement.

By way of background, Exit A Plus Realty ("Exit Realty") was the buyer's agent and Coldwell Banker Jablonski Real Estate ("Coldwell Banker") was the listing agent with regard to the sale of property in Bayonne, New Jersey by Edison and Teresita Zuniga to Sharon Rockett ("Rockett"). The Zunigas executed a multiple listing agreement granting to Coldwell Banker the exclusive right to sell the Zunigas' home during the period from April 14, 2005 to June 14, 2005. The offering price for the home was $474,900. The listing agreement provided that Coldwell Banker was offering to cooperating brokers a commission of two percent (2%) minus two hundred dollar ($200).

There is a dispute whether or not the listing agreement was left with the Zunigas when they signed it. They testified that it was not but the Coldwell Banker agent said that he left a copy of it with them. The trial court accepted the Zunigas' testimony that the listing agreement was not left with them when they signed it.



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In addition, the trial court found that the listing agreement was not completed when it was signed because the space providing for the extended protection period was left blank and later was filled in by the Coldwell Banker agent and mailed to the Zunigas. Mr. Zuniga testified that, when he received the listing agreement in the mail, the blank space for the extended protection period was filled in with "90 days." He therefore immediately called the Coldwell Banker agent. Mr. Zuniga testified that the agent told him that he should not worry about it and did not explain what the 90 days meant. Mr. Zuniga further testified that, since he had agreed to list the property with Coldwell Banker for "60 days," he put a line through the handwritten "90 days" and wrote "60" above it.

In mid-May 2005, Exit Realty then produced Rockett as a buyer for the property. The contract included a price of $465,000, subject to the property being appraised at that price or above. However, the appraisal came back at $450,000 and the Zunigas refused to lower the price. Instead, one day after the expiration of the exclusive listing agreement with Coldwell Banker, the Zunigas advised the buyer that they were declaring the contract void unless she agreed to purchase it for $465,000, which she refused to do.

Several days later, the Zunigas agreed to lower the price to $450,000 and the buyer agreed to purchase the property. Title closed on July 19, 2005 and, upon learning of the sale, the brokers demanded to be paid their commission, which the Zunigas refused to pay.

As a result, Coldwell Banker and Exit Realty filed suit. After a trial, the trial court dismissed the lawsuit, holding that Section 17(f) had been violated and, as a result, the listing agreement automatically was void and unenforceable. Coldwell Banker appealed.

**The Appellate Division Adopts NJAR®'s Position Concerning A Violation of Section 17(f)**

The New Jersey Association of REALTORS® ("NJAR®") filed an application to appear as an amicus curiae before the Appellate Division concerning this important issue. The Appellate Division not only granted NJAR®'s application but then adopted NJAR®'s position with regard to the issue and reversed the longstanding policy in New Jersey that listing agreements automatically are void when there is a violation of the Act.

NJAR® argued that the listing agreement in question is enforceable even assuming, after its execution, there may not have been strict compliance with Section 17(f). NJAR® contended that Section 17 does not provide that listing agreements will be void if this section is violated. Instead, it provides that the agent may be subject to sanctions by the Real Estate Commission. The Appellate Division agreed with NJAR®'s position.

The Appellate Division specifically rejected the 1979 trial court decision and stated as follows: "[W]e are of the view that a violation of any of the enumerated provisions of N.J.S.A. 45:15-17 would render the agreement voidable, but not automatically void. Indeed, as pointed out in the amicus curiae brief submitted by NJAR®, if the Legislature had wanted to invalidate agreements entered in contravention of N.J.S.A. 45:15-17, it could have done so explicitly, as it has done in numerous other instances."

The Court also noted that the Zunigas did not suffer any prejudice as a result of the failure to have a copy of the listing agreement with them on the date it was signed since it was mailed to them the next day. Similarly, they were not prejudiced by the insertion of the 90-day provision in the agreement since Mr. Zuniga saw that the "90 days" had been inserted and therefore could have objected to the insertion and refused to go forward with the listing agreement. Instead, he changed "90 days" to "60 days," which was accepted by Coldwell Banker. The Appellate Division also found that Mr. Zuniga's testimony that he understood the 60-day period to be the term of the agreement, not an extended protection period, to be at odds with the actual wording of the listing agreement.

Finally, the Court noted that Zunigas' cancellation of the contract of sale with the buyer one day after the expiration of the exclusive listing agreement and their subsequent acceptance of the offer of purchase at the appraised value of the property gave rise to significant questions of good faith and fair dealing by the buyer and sellers. The Court held that "technical violations that resulted in no prejudice" to the buyer and sellers should not be the basis for denying a broker's claim to a commission.



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## Conclusion

As a result of this significant Appellate Division decision, listing agreements no longer automatically are void if a real estate licensee violates Section 17 of the Act. However, listing agreements are voidable depending upon all of the facts and circumstances involved in the transaction. In addition, real estate licensees still may be subject to sanctions by the Real Estate Commission for violating Section 17. Real estate licensees therefore still should carefully adhere to the requirements of Section 17 in order to ensure that their commissions are protected.

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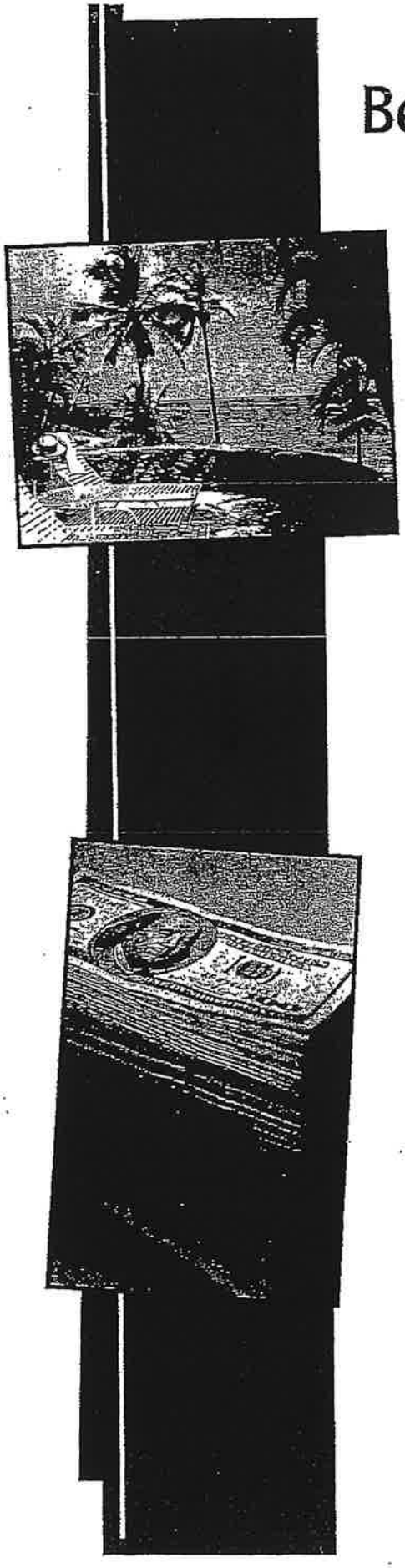
1) N.J.S.A. 45:15-1, et seq.

2) N.J.S.A. 45:15-17.

3) See Winding Brook Realty v. Platzer, 166 N.J. Super. 575 (Law Div. 1979), aff'd on other grounds, 173 N.J. Super. 472 (App. Div.), certif. denied, 85 N.J. 119 (1980).

4) _____ N.J. Super. _____ (App. Div., decided and approved for publication on September 5, 2007).



# Beware the Sellers' Bonus!

By Barry S. Goodman, Esq.

*You have just listed a new home and have very motivated sellers who already are under contract to buy another home. The sellers suggest a "bonus" to the selling agent above the commission that normally would be offered and decide to offer a $5,000 bonus plus a seven-day trip to Bermuda as an incentive for selling agents to sell their home. The sellers also offer you a bonus of a $5,000 American Express Gift Card if you can sell their home within 30 days.*

*Can the sellers offer such bonuses to the selling agent and you? Is there any problem with the selling agent or you accepting such bonuses? In a slow market in which sellers are seeking ways to gain an edge to sell their house, it is important that you understand what you can and cannot do regarding such bonuses.*

## Legal Considerations Regarding Bonuses

The real estate licensing law provides some clear parameters for any such bonuses. First and foremost, the licensing law specifically provides that "[n]o real estate salesperson or broker-salesperson shall accept a commission or valuable consideration for the performance of any of the acts herein specified [as a licensee], from any person except his employer, who must be a licensed real estate broker."[i] Thus, not only must the broker pay all commissions to an agent, but any "valuable consideration" provided to an agent for any activities as a real estate licensee also must be paid through the broker to the agent.

This requirement that such compensation only be paid to the agent by the broker is reinforced in a provision in the licensing law that provides that a salesperson can be sanctioned for accepting such a payment from someone other than the broker. The licensing law specifically provides that a real estate licensee can be sanctioned by the Real Estate Commission for "[a]ccepting a commission or valuable consideration as a real estate broker-salesperson or salesperson for the performance of any of the acts specified in this act from any person, except his employing broker, who must be a licensed broker."[ii]

Sanctions for violating this rule may include the Commission placing the real estate licensee on probation, or suspending or revoking the agent's license, as well as fining the agent not more than $5,000 for the first violation and not more than $10,000 for any subsequent violation. If the licensee is guilty of a third offense, the Commission may direct that no license as a real estate broker, broker-salesperson or salesperson shall ever be issued to that person again. Under the licensing law, each transaction shall be construed as a separate offense.[iii]

In addition, only a real estate broker, not a salesperson or broker-salesperson, has the right to sue to be paid a commission or any other consideration if the seller failed to pay the bonus.[iv] Thus, the agent would not have any right to sue the seller for the bonus since only the broker can file a lawsuit to recover the bonus.

Finally, it should be noted that, under Real Estate Commission regulations, all salespersons must have a written agreement with the broker specifying the rate of compensation to be paid to the salesperson during his or her affiliation with the broker.[v] The terms of this written agreement presumably would be binding with regard to any split of compensation to be paid to the salesperson, including a bonus.

## Monetary v. Other Consideration

There are two types of bonuses that a seller can offer, a cash bonus or some item of value. Under New Jersey law, each of these bonuses has to be analyzed in a different way.

With regard to a cash bonus, since all payments for work done as a real estate licensee must be paid through the broker, the bonus can be paid to the broker, who then can compensate the agent. Of course, such a payment would be subject to the provisions of the written agreement between the salesperson and the broker.

More problematic is a bonus that is offered in the form of a trip, gift card, plasma television, or some other item. Unless the agent and broker have agreed, or at least can agree, how such a bonus will be paid through the broker to the agent, it is unclear how the agent could be paid this bonus.[vi] This would be true whether the seller was offering this bonus to the listing agent or the selling agent.

## Conclusion

As a result, it is clear that sellers may offer bonuses to selling agents, as well as listing agents, in New Jersey. However, agents must understand that they cannot accept any such bonus directly from the seller. All such bonuses must be paid through the agent's broker. Otherwise, there could be serious consequences for the agent.

Barry S. Goodman, Esq., a partner in the law firm of Greenbaum, Rowe, Smith & Davis LLP, is General Counsel for NJAR.

Barry S. Goodman, Esq.

i *N.J.S.A. 45:15-16.*
ii *N.J.S.A. 45:15-17(m).*
iii *N.J.S.A. 45:15-17.*
iv *N.J.S.A. 45:15-3.*
v *N.J.A.C. 11:5-4.1(a).*
vi *This agreement should be included in the written agreement between the broker and salesperson that is required to set forth the rate of compensation to be paid to the salesperson*

# Promotions in New Jersey: Be Careful What You Offer!

By Barry S. Goodman, Esq., NJAR General Counsel

The expectations of buyers and sellers are changing. Of course, you have to provide personal and professional services to help buyers locate their dream homes and to market homes for sellers. However, many of them now also expect you to provide free or discounted promotions from other businesses that will make their move easier and less expensive. In New Jersey, what can you offer? To whom do you have to offer such promotions? Can you offer promotions that are being marketed around the rest of the country by other REALTORS®? It is important to understand laws that are unique to New Jersey to avoid any pitfalls when you offer such promotions.

## Background

The New Jersey Real Estate Licensing Act (the Act) historically prohibited any real estate licensee from "[u]sing any plan, scheme or method for the sale or promotion of the sale of real estate which involves a lottery, a contest, a game, a prize, a drawing, or the offering of a lot or parcel or lots or parcels for advertising purposes."[1] Similarly, the Act prohibited licensees from "[p]aying any rebate, profit, compensation or commission to anyone not possessed of a real estate license."[2] The Real Estate Commission (the Commission) broadly interpreted these provisions in the Act to prohibit a broker from offering any free or discounted services or products, including coupons, from any other business.

In the mid-1980s, Coldwell Banker, which then was owned by Sears Roebuck, initiated a promotion under which it offered Sears merchandise coupons providing discounts for buyers and sellers. The Commission concluded that the coupon program was prohibited as a "prize" and as a "rebate, profit, compensation or commission" in violation of the Act.

Coldwell Banker appealed this decision. However, the Appellate Division issued an opinion in 1990 affirming the Commission's decision.[3] Such promotions therefore were prohibited in New Jersey.

## Amendments to the Licensing Act

After a significant majority of other states began to allow such promotions, in April 2001 the Legislature amended the relevant sections of the Act to permit real estate brokers to offer "free, discounted or other services or products" under certain conditions.[4]

First, the promotion cannot be tied to the consumer entering into "a sale, listing or other real estate contract as a condition of the promotion or offer." As a result, receipt of the offer can be conditioned, for example, on the person attending a sales presentation. However, it should be available to all consumers and not limited to actual buyers or sellers entering into a buyer agency, listing or other real estate agreement.[5]

Next, the promotion still cannot involve a lottery, contest, game, prize, drawing or offering of lots or parcels. Finally, if the broker is receiving "any compensation" for such a promotion or offer, the broker must disclose the compensation in writing to the consumer in the form and substance required by the federal Real Estate Settlement Procedures Act (RESPA) no later than when the promotion or offer is extended to the consumer.[6]

The Commission then promulgated regulations providing additional conditions and clarifications. First, the Commission explained that the amendment to the Act covers all "offerings which confer monetary benefit upon consumers." Examples of covered promotions provided in the regulation include the following: free or subsidized homeowner's warranties; property, radon and pest inspections; surveys; mortgage fees; offers to pay other costs typically incurred by parties to real estate transactions; and coupons offering discounts on commissions charged by brokerage firms.[7]

The Commission also provided that, whenever the promotion has a value of more than $5.00 retail, the licensee must provide a written disclosure to the recipient stating in a clear and conspicuous manner that (1) the consumer is not required to enter into any sale, listing or other real estate contract as a condition of receiving the promotion, (2) whether the consumer has to perform any action to qualify for the promotion, and (3) if the offered services or products are not delivered when the disclosure is provided to the consumer, the date they will be delivered.[8]

In addition, the Commission specified that this disclosure must be provided to the consumer no later than when the promotion or offer is extended to the consumer. Finally, the broker is prohibited from requiring the consumer to take any action prior to delivery of the disclosure "other than an action necessary to accomplish the delivery of the disclosure to the consumer."[9]

## Permitted Promotions

Real estate licensees, therefore, now are permitted to provide certain promotions and offers for free or discounted services or products as long as they comply with these requirements. For example, licensees can provide free or discounted services or products from other companies that could be for home improvement services, warranty programs, landscaping, furniture and appliance coupon books, interior decorating consulting and American flags, as well as products and services unrelated to the home.

A recently announced promotion that is a joint offering of the NATIONAL ASSOCIATION OF REALTORS® (NAR) and

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## Promotions in New Jersey: Be Careful What You Offer!

*continued from page 8*

Lowe's provides a good example of the parameters for offering promotions in New Jersey. Under this program, Lowe's will provide customized mailings for REALTORS® that Lowe's will send to a REALTOR®'s sellers, buyers and prospective buyers with discount coupons and rebates. These marketing services will be free for REALTORS®. In addition, REALTORS® will be entitled to five percent discount gift cards and rebates from Lowe's.

Any REALTOR® in New Jersey offering the Lowe's program will have to ensure its compliance with the Act and the Commission's regulations. For example, when a REALTOR® provides Lowe's with names, addresses, etc., for consumers who should be sent the marketing material, the REALTOR® should not limit the names to consumers who entered a sale, listing or other real estate contract. In addition, written disclosures will have to be provided to consumers since REALTORS® will be receiving compensation in the form of free marketing, discount gift cards and rebates.[10]

### Conclusion

The amendments to the Act have provided real estate brokers with a tremendous opportunity to offer promotions that they previously could not offer. However, brokers must carefully analyze any promotion that they decide to offer to consumers to ensure that it fully complies with the Act and the Commission's regulations. As long as the promotion complies, there is no reason that brokers cannot offer, and consumers cannot receive, the benefits of such promotions.

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1 N.J.S.A. 45:15-17(g). 2 N.J.S.A. 45:15-17(k). 3 Coldwell Banker v. Real Estate Commission, 242 N.J. Super. 354 (App. Div. 1990). 4 See N.J.S.A. 45:15-17(g) and (k). 5 N.J.S.A. 45:15-17(g). It should be noted that NAR Standard of Practice 12-3, which provides that promotions are not "unethical even if receipt of the benefit is contingent on listing, selling, purchasing or leasing through the REALTOR® making the offer," is subject to the limitations and restrictions of New Jersey law. 6 N.J.A.C. 45:15-7(g). 7 N.J.A.C. 11:5-6.1(m)2. 8 N.J.A.C. 11:5-6.1(m)4. 9 N.J.A.C. 11:5-6.1(m)7. 10 If the Lowe's (or any other) rebate is a payment to a salesperson, it must be made through the broker pursuant to N.J.S.A. 45:15-16. In addition, brokers and salespersons should consider including a provision in the salesperson's independent contractor agreement permitting the salesperson to receive the other "compensation" from Lowe's.