

REALTORS® ASSOCIATION OF NEW MEXICO

LEGAL UPDATE

Presented By:

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TOPICS COVERED TODAY

- NEW MEXICO
 - NM LEGISLATIVE
 - NM REC PROPOSED RULES
 - NEW/REVISED RANM FORMS
 - LBP DISCLOSURE
 - LISTING AGREEMENT
 - TERMINATION GRID



TOPICS COVERED TODAY

- FEDERAL/NATIONAL
 - TRID – FAQs
 - COPYRIGHT INFRINGEMENT AND THE DIGITAL MILLENNIUM COPYRIGHT ACT
 - FIRPTA
 - TAX RELIEF



TOPICS COVERED TODAY

CASE LAW UPDATE



NM LEGISLATURE

- RANM'S 2016 Legislative Agenda

- HOA

- Home Inspector
Licensing

- Constitutional

- Amendment Prohibiting Transfer Tax



**PROPOSED
CHANGES TO NM
REC RULES**

MEETING -FEB. 19TH

AT GAAR



NM REC UPDATE

- CLARIFICATION THAT PROPERTY MANAGER IS AGENT OF OWNER
- BROKER DUTIES OWED TO CUSTOMERS, CLIENTS, TENANTS AND OTHER BROKERS
- NEW DEFINITION OF COMMERCIAL REAL ESTATE AND FOREIGN BROKER



EDUCATION

- CE INCREASED FROM 30 TO 36 HRS PER LICENSING CYCLE (EVERY 3 YRS)
- MUST INCLUDE REC APPROVED
 - 4 HR ETHICS CLASS ONCE DURING EACH 3 –YR LICENSING CYCLE
 - 4 HR CORE ELECTIVE COURSE ONCE DURING EACH 3 –YR LICENSING CYCLE, AND
 - 4 HR CORE COURSE **ANNUALLY** DURING EACH OF THE 3 YEARS OF THE LICENSING CYCLE

EDUCATION

**ELIMINATION OF
MANDATORY
COURSE**



EDUCATION

- EDUCATION
 - CORE COURSE – Covers.....
 - broker duties
 - E and O
 - laws and regulations and
 - disciplinary case studies



EDUCATION

- EDUCATION
 - CORE ELECTIVE COURSE –
 - residential sales OR
 - commercial sales OR
 - vacant land/ranch sales oOR
 - property management



EDUCATION

- Brokers may receive up to a maximum of four (4) approved education course credit hours during each licensing cycle for attending commission meetings, or rule hearings, or disciplinary hearings, or meetings of the Education Steering Committee.



REC PROPOSED RULES

- FOR CLARIFICATION -
- Associate brokers who have remained inactive from date of licensure shall complete the Broker Business Practices course within the first year after their license is activated.



REC PROPOSED RULES

- EXAMINATION AND LICENSING REQUIREMENTS:
 - Candidates who are licensed as ABs and are taking the broker's examination to upgrade to QB status are exempt from the 3-yr time limit (pre-licensing courses w/i 3-yr of application) and must only provide documentation of course completion

REC PROPOSED CHANGES

- Exam candidates currently licensed as real estate salespersons or brokers in other states or jurisdictions will be exempted from completing the real estate principles and practice and real estate law courses in New Mexico and from taking the national portion of the broker's examination
- A NM broker upgrading their license from AB to QB will also be exempted from taking the national portion of the exam

REC PROPOSED CHANGES

- TERMS OF E AND O COVERAGE

- ~~An extended reporting period of not less than 365 days~~ - an automatic 90-day extended reporting period with the ability of any insured broker, upon payment of an additional premium, to obtain an optional extended reporting period of 1, 2, or 3 years



REC PROPOSED CHANGES

- FINGERPRINTING - To ensure that the commission is receiving the most current information available, fingerprinting ~~should~~ shall be done no earlier than ~~six months~~ twenty- one days prior to ~~applying for or~~ ~~renewing a license~~ submitting documents to apply for or renew a license.



REC PROPOSED CHANGES

- QB RESPONSIBILITIES –
 - LICENSE DISPLAY: in the event of a virtual office, this requirement is met by displaying a legible photo or scanned image of the licenses on the home page of the brokerage's web site through a link labeled "real estate licenses".
 - RULES MANUAL IN OFFICE -added "in hard copy or electronic form"



REC PROPOSED RULES

- NEW QB RESPONSIBILITIES
 - Ensure that the qualifying broker's name and contact information is clearly and conspicuously displayed on any express written agreement entered into between the brokerage and its customers and clients



REC PROPOSED RULES

- NEW – A BUSINESS ENTITY WISHING TO ENGAGE IN REAL ESTATE BROKERAGE ACTIVITY MUST DESIGNATE A QB TO QUALIFY THAT BUSINESS TO ENGAGE IN BROKERAGE ACTIVITY



REC PROPOSED RULES

- BROKER DUTIES TO CUSTOMER/CLIENTS
 - Honesty, reasonable care, and ethical and professional conduct



REC PROPOSED RULES

- DEFINITION OF HONESTY AND REASONABLE CARE AND ETHICAL AND PROFESSIONAL CONDUCT: *conduct that a reasonable person would understand to meet standards of professionalism and ethical conduct within a profession, including but not limited to good faith, competence, trustworthiness, diligence, and lawful behavior.*



REC PROSED REGS

- BROKER DUTIES TO CUSTOMERS/CLIENTS
 - *advice to clients and customers to consult with an attorney regarding the effectiveness, validity, or consequences of any express written agreement entered into with a brokerage.*



REC PROPOSED RULES

- *Brokers Duties to Tenants:*
 - *honesty, reasonable care, and ethical and professional conduct*
 - *compliance with local state, and federal fair housing and anti-discrimination laws, the NM real estate license law and the REC rules, the NM Uniform Resident Relations Act, and other applicable local, state, and federal laws and regulations.*



REC PROPOSED RULES

- *Brokers Duties to Tenants:*
 - *Performance of any and all written agreements entered into with the tenant*
 - *Prompt accounting for all money or property received by the broker from the tenant, including issuance of a receipt for cash received*
 - *Written disclosure that the broker is the agent of the owner of the property and not of the tenant.*

REC PROPOSED RULES

- *Brokers Duties to Tenants:*
 - *Written disclosure of any adverse material facts actually known by the broker about the property or the transaction, or about the financial ability of the parties to the transaction to complete the transaction;*
 - *adverse material facts do not include any information covered by federal fair housing laws or the NM Human Rights Act.*



REC PROPOSED RULES

- *Brokers Duties to Tenants*
 - *Advice to tenants to consult an attorney regarding the effectiveness, validity, or consequences of any express written agreement the tenant is required to sign.*



REC PROPOSED RULES

- *BROKERS DUTIES TO OTHER BROKERS:*
 - *Honesty, reasonable care, and ethical and professional conduct*
 - *timely presentation of and response to all offers or counter-offers*



REC PROPOSED RULES

- *BROKERS DUTIES TO OTHER BROKERS:*
 - *active participation in assisting their customer or client in complying with the terms and conditions of the contract and with the closing of the transaction;*



BROKERS DUTIES TO OTHER BROKERS

- *if a broker in the transaction is not providing the service, advice or assistance described in Para. (1) and (2), the customer or client must agree in writing that the broker is not expected to provide such service, advice or assistance, and the broker shall disclose the existence of such agreement in writing to the other brokers involved in the transaction*

BROKERS DUTIES TO OTHER BROKERS

- *compliance with local state, and federal fair housing and anti-discrimination laws, the New Mexico real estate license law and the REC rules, the NM Uniform Resident Relations Act, and other applicable local, state, and federal laws and regulations.*



BROKERS DUTIES TO OTHER BROKERS

- *written disclosure of any adverse material facts actually known by the AB or QB about the property or the transaction, or about the financial ability of the parties to the transaction to complete the transaction; adverse material facts requiring disclosure do not include any information covered by federal fair housing laws or the NM Human Rights Act;*

BROKERS DUTIES TO OTHER BROKERS

- *written disclosure to other brokers involved in the transaction of any potential conflict of interest that the broker has in the transaction including but not limited to:*
 - *any written brokerage relationship the broker has with any other parties to the transaction;*
 - *OR any material interest or relationship of a business, personal, or family nature that the broker has in the transaction;*

REC PROPOSED REGS

- *BROKER DUTIES TO OTHER BROKERS:*
 - *Non-interference with a purchase agreement or any express written agreement that another broker has with their client or customer.*



REC PROPOSED RULES

- *TRUST ACCOUNTS*
 - *The qualifying broker must have access to all trust accounts and all financial records related to the brokerage's trust accounts.*



REC PROPOSED RULES

- *MANAGEMENT AGREEMENTS*
 - Shall specify that the brokerage relationship between the property manager and the owner is an agency relationship.
 - Shall define duties and responsibilities of broker and owner - **ADDED**
 - Disclosure of the status of any default or other financial situation that could affect the tenant's residency.



REC PROPOSED RULES

- **MANAGEMENT AGREEMENTS**
 - *If the property manager is prohibited by law or contract from providing the owner with a given document, such as a tenant's criminal background check or credit report, the property management agreement shall include the following:*



REC PROPOSED RULES

- **MANAGEMENT AGREEMENTS**
 - *a written disclosure to the owner that the property manager is prohibited by law or contract from providing such documents to the owner, and*
 - *the owner's written consent that such documents will not be provided.*



REC PROPOSED RULES

- **ADVERTISEMENTS**
 - All real estate advertising shall be a true and factual representation of the property and real estate services being advertised and the brokerage providing the services and shall not be presented in such a manner that will confuse or mislead the public..
 - *Must include broker's license number*



REC PROPOSED RULES

- **ADVERTISEMENTS**

- *The trade name and the brokerage office telephone number shall be prominently displayed in a type size not less than 33 percent of the AB's name, or in the case of a team of ABs, the team name. The AB's broker's license number shall be displayed in all advertising in a legible format. Directional signs are exempt from these requirements.*



REC PROPOSED RULES

- *ADVERTISEMENTS*
 - *In the event that disclosure of the brokerage name and telephone number as registered with the Commission is not practical in electronic displays of limited information, such as “thumbnails”, text messages, links and “tweets” of 200 characters or less, such displays are exempt from the disclosure requirement provided such displays are linked to a display that includes all of the required disclosures.*

RANM FORM CHANGES

LEAD-BASED PAINT
DISCLOSURE

LISTING AGREEMENT –
EXCLUSIVE RIGHT TO SELL
FORM 1106

TERMINATION GRID



RANM FORMS

- LEAD-BASED PAINT DISCLOSURE
 - CHECK BOXES WERE REPLACED BY BUYER AND SELLER INITIAL SPACES THROUGHOUT DOCUMENT



BROKER'S CERTIFICATION

5. BROKER'S CERTIFICATION. (both A and B should be initialed)

Both the Seller's Broker and the Buyer's Broker (if compensated by the Seller or Seller's Broker) are considered the "agents" under the Regulations and are required to certify as follows and sign this form, regardless of their brokerage relationships. Therefore, both the Seller and Buyer's brokers should initial below UNLESS the Buyer's Broker is being compensated entirely by the Buyer.

_____ A. Agent has informed Seller of Seller's obligations under Sec. 42 U.S.C.A. 4852d to:

- 1) Provide Buyer with the federally approved pamphlet, "Protect Your Family from Lead in Your Home;"
- 2) Complete this Lead-based Paint Addendum before giving it to Buyer;
- 3) Disclose any known lead-based paint or lead-based paint hazards in the Property;
- 4) Deliver to Buyer a list of and copies of all records and reports pertaining to lead-based paint and/or lead based paint hazards in the Property;
- 5) Provide Buyer with a ten-day (10) period (or other period mutually agreed in writing by Buyer and Seller) to have the Property inspected;
- 6) Retain a completed copy of this Addendum for at least three (3) years following the closing of the sale.

_____ B. Agent is aware of Agent's duty to ensure compliance with the requirements of Sec. 42 U.S.C.A.
_____ 4852d

BUYER'S CERTIFICATION

- *Both the Seller's Broker and the Buyer's Broker (if compensated by the Seller or Seller's Broker) are considered the "agents" under the Regulations and are required to certify as follows and sign this form, regardless of their brokerage relationships. Therefore, both the Seller and Buyer's brokers should initial below UNLESS the Buyer's Broker is being compensated entirely by the Buyer.*



RANM FORMS

**LISTING AGREEMENT
EXCLUSIVE RIGHT
TO SELL
FORM 1106**



RANM FORMS

- **COVER PAGE II - BROKERAGE RELATIONSHIPS DISCLOSURE**
- A. Transaction broker: a qualifying broker, associate broker or brokerage that provides real estate services without entering into an agency relationship. The transaction broker relationship is a non-fiduciary relationship.
- B. Exclusive agency: an express written agreement between a person and a brokerage wherein the brokerage agrees to exclusively represent as an agent the interests of the person in a real estate transaction. Such agreements include buyer agency, Owner agency, designated agency, and sub-agency agreements. Exclusive Agency creates a fiduciary relationship in which the broker owes not only broker duties to his client, but also fiduciary duties.
- C. Dual agency: an express written agreement that modifies existing exclusive agency agreements to provide that the brokerage agrees to act as a facilitator in a real estate transaction rather than as an exclusive agent for either party to the transaction.

LISTING AGREEMENT

- ADDED TO PROPERTY - PARA. 3
 - OTHER RIGHTS (I.E. MINERAL, SOLAR, WATER, ETC.)
 - LIST OF AFFIXED AND PERSONAL PROPERTY (AND SPACE TO LIST EXCLUSIONS) FROM RESIDENTIAL PURCHASE AGREEMENT



LISTING AGREEMENT

- **NEW** – (TO BE COMPLETED ONLY IF ENTRY INTO THE MLS WILL NOT OCCUR WITHIN 48 HOURS OF THE BEGINNING OF THE TERM AS SET FORTH IN PARAGRAPH 2)
- LISTING WILL BE ENTERED INTO THE MLS WITHIN 48 HOURS OF



LISTING AGREEMENT

- _____ (SELLER'S INITIALS) SELLER HAS BEEN INFORMED OF THE BENEFITS OF THE MLS AND WAIVES THOSE BENEFITS FOR THE TIME PERIOD SPECIFIED HEREIN
- BROKER'S MLS MAY REQUIRE THE OWNER ALSO COMPLETE A WAVIER OF MLS BENEFITS
- FOR MORE INFORMATION ON MLS BENEFITS, SEE RANM FORM 1820 - MLS INFORMATION SHEET



LISTING AGREEMENT

- **NEW PARA. FOR LEASES**

- THE LISTING PRICE SHALL BE \$ _____
PER/MONTH OR SUCH PRICE AS SHALL
BE ACCEPTABLE TO OWNER

- UNDER WHAT CIRCUMSTANCES
COMPENSATION IS DUE



LISTING AGREEMENT

- If Owner enters into a written agreement for the sale of the Property, unless that agreement is terminated or the interest of the Buyer/Tenant is forfeited, Broker:
(broken down into 2 sections)
- (i) shall shall not be required to show the Property;
- (ii) shall shall not be required to submit additional offers to Owner.

LISTING AGREEMENT

- OWNER'S AUTHORIZATIONS: NEW
- *Material Authorizations. the following owner's authorizations serve as material inducement for formation of this agreement and may not be withdrawn without broker's written consent. owner's attempt at non-compliance with this provision constitutes interference with broker's ability to perform under this agreement and a material default of this agreement, which entitles broker to all remedies available through law and/or equity.*

LISTING AGREEMENT

- PLACE IN MLS
- PLACE A FOR SALE/LEASE SIGN ON PROPERTY
- LOCKBOX INSTALLATION
- BROKER OBTAIN INFO ON PROPERTY
- DIVULGE TERMS/EXISTENCE OF OFFERS
- INCLUDE INTERIOR PHOTOS/VIDEO
- OTHER



LISTING AGREEMENT

- ALL INTERNET ADVERTISING CAN BE CHANGED WITH WRITTEN NOTICE TO BROKER
 - ON INTERNET OR NOT
 - BLOGGING
 - AVMs



LISTING AGREEMENT

- **COMPENSATION PARAGRAPH 9 - NEW**
- If during the term of this Agreement, without consent of Broker, Property is withdrawn from sale or rental; OR
- If Owner enters into a rental agreement during the term of this Agreement or the Protection Period and during the term of such rental of the Property, including any renewals or holdovers (collectively “rental term”), or within _____ days after termination of the rental term, any tenant, or his heirs, executors, or assigns shall buy the Property from Owner; OR



LISTING AGREEMENT

- FOR LEASE SECTION - If Owner enters into a rental agreement during the term of this Agreement or the Protection Period, with respect to any holdovers or renewals of the lease, regardless of whether this Listing Contract has expired, Owner agrees to pay a compensation of _____ . In the event this paragraph is left blank, the compensation shall be the lease compensation as set forth in Paragraph A above.

LISTING AGREEMENT

- USE OF LISTING CONTENT; INTELLECTUAL PROPERTY LICENSE.
 - Owner acknowledges and agrees all photographs, images, graphics, video recordings, virtual tours, drawings, written descriptions, remarks, narratives, pricing information, and other copyrightable elements relating to the Property provided by Owner to Broker (the “*Owner Listing Content*”), or otherwise obtained or produced by Broker in connection with this Agreement (the “*Broker Listing Content*”),



LISTING AGREEMENT

and any changes to the Owner Listing Content or the Broker Listing Content, *may be filed with one or more multiple listing services, included in compilations of listings, and otherwise distributed, publicly displayed and reproduced, subject to the limitations listed in Section 8 of this Agreement*



LISTING AGREEMENT

- *Owner hereby grants* to Broker a non-exclusive, irrevocable, worldwide, royalty free **LICENSE** to use, sublicense through multiple tiers, publish, display, and reproduce the Owner Listing Content, to prepare derivative works of the Owner Listing Content, and to distribute the Owner Listing Content or any derivative works thereof, subject to the limitations listed in Section 8 of this Agreement.



LISTING AGREEMENT

- This non-exclusive license *shall survive the termination* of this Agreement for any reason whatever. Owner represents and warrants to Broker that the Owner Listing Content, and the license granted to Broker for the Owner Listing Content, *do not violate or infringe upon the rights*, including any copyright rights, of any person or entity.

LISTING AGREEMENT

- Owner acknowledges and agrees that as between Owner and Broker, *all Broker Listing Content is owned exclusively by Broker*, and Owner has no right, title or interest in or to any Broker Listing Content

.



LISTING AGREEMENT

– OWNER INDEMNIFICATION:

- incorrect or undisclosed information about the Property which Owner knew or should have known;
- injury to third-parties occurring at the Property provided such injury is not due to Broker's own negligent, reckless or intentional action; and
- *infringement of any copyright arising out of Broker's use of Owner Listing Content.*

LISTING AGREEMENT

- Added
 - Electronic signature consent
- Modified – so language is the same as in the purchase and other agreements
 - Attorney fees and costs
 - Governing law and venue
 - Severability



TERMINATION GRID/CHART





This Chart highlights sections of the RANM Residential Purchase Agreement - Form 2104 ("Agreement") that provide for the optional termination of the Agreement by one of the parties or the automatic termination of the Agreement based on a set of circumstances as described below and in the Agreement. This chart addresses only the plain language of the Agreement – individual circumstances may alter the outcome. This chart does NOT address every scenario that constitutes a default of the Agreement. Non-performance of either party under the Agreement may constitute a default of the Agreement, even if such default is not specifically noted in the Agreement (See Para. 32 (Default) of the Agreement for more information). This chart should not be relied upon as legal advice and is not a substitute for consultation with legal counsel in the event the parties have questions or a dispute regarding the Agreement.

PARAGRAPH:	IF:	THEN:	EARNEST MONEY?
EARNEST MONEY			
3	Buyer fails to timely deliver Earnest Money	Considered default of Agreement	See Para. 32
FINANCED OR CASH PURCHASE			
5(A)(ii)	Buyer does not provide a pre-qualification letter to Seller within timeframe stipulated	Agreement automatically terminates	Earnest Money shall be refunded to Buyer
5(A)(iii)	Buyer does not obtain and deliver a new pre-qualification letter within two days of changing lender	Seller has the option to terminate Agreement	If terminated by Seller, Earnest Money shall be refunded to Buyer

TERMINATION GRID

This Chart highlights sections of the RANM Residential Purchase Agreement - Form 2104 ("Agreement") that provide for the optional termination of the Agreement by one of the parties or the automatic termination of the Agreement based on a set of circumstances as described below and in the Agreement.



TERMINATION GRID

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TERMINATION GRID

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FEDERAL LAW

TRID FAQS



TRID FAQs

Q: Whose license number should go on the form?



TRID FAQs

- A.: CFPB does not specify whose license number should go on form, other than that it should be information that allows the buyer to contact the brokerage if the buyer has questions.
- *Brokerages should use their best judgment in providing this info to lenders/closing agents*
- *Options: office license number, principal broker for the brokerage, for multiple offices, the managing broker for the office that handled the transaction*

TRID FAQs

- **Q: The lender for my buyer's upcoming closing has refused to send me the CD, instead telling me that I must receive this from my client, the borrower. What has changed - does this have something to do with the new TRID rules?**



TRID FAQs

- A: The TRID rules do not limit the sharing of these disclosures, but some lenders are taking the position that there is personally identifiable information on the CD and therefore other federal laws (not TRID) prohibit the lender from sharing this information with third parties without the consent of the borrower.



TRID FAQs

- RANM added consent language to allow for the sharing of these disclosures, but not all lenders are accepting these consents and are still refusing to directly send the CD to the broker. NAR is working with industry partners to facilitate the sharing of the CD, but at present, brokers may need to obtain it directly from their client.

TRID FAQs

- **Q: I've heard of different lenders requiring a new Closing Disclosure and 3-day review period for minor changes such as last minute repairs. I thought the new rules would allow for such changes without a new 3-day period.**



TRID FAQs

- A: Correct. While some lenders may adopt different policies internally, the CFPB has made it clear that only 3 circumstances REQUIRE a new CD and 3-day review period:
 - APR increases by more than 1/8 percent for fixed rate or 1/4 percent for adjustable rate
 - Prepayment penalty is added
 - Basic loan product changes, i.e. switching from a fixed to adjustable rate mortgage.

TRID FAQs

- Even though the TRID rules will only directly delay closings in these limited circumstance, TRID also requires lenders to make refunds for certain “tolerance violations”, which arise when certain charges involved in obtaining the mortgage vary from the initial estimates contained in the Loan Estimate.
- Because of the potential tolerance refunds, lenders are carefully scrutinizing any variations between the Loan Estimate and the CD or other changes in the property value, and so any variations have the potential to cause the lender to delay the transaction.



COPYRIGHT INFRINGEMENT AND THE DMCA



COPYRIGHT

- IF YOU HAVE PHOTOGRAPHERS TAKING YOUR LISTING PHOTOS, YOU SHOULD HAVE PHOTO AGREEMENTS
 - How you can use the photographs
 - Ensure compliance with agreements
 - Think about how you want to use listing photographs and ensure future agreements permit those uses
 - Maintain a record of all agreements



COPYRIGHT

- SAMPLE PHOTO AGREEMENTS
 - <http://www.realtor.org/law-and-ethics/who-owns-your-property-photos>
 - Work for Hire – own rights as they are created
 - Assignment Agreement – photographer assigns all his/her rights in the photos to you
 - Exclusive License Agreement – exclusive use of photos in connection with the real state industry



DMCA

- Do you have a website?
- Do you have photographs posted by 3rd parties?
 - MLS OR IDX
- Do you have links to other websites on your website?
- If yes, you open yourself up for copyright infringement claims



DMCA

- DIGITAL MILLENNIUM COPYRIGHT ACT
 - EFFECTIVE OCTOBER 28, 1998
 - Title II, the “Online Copyright Infringement Liability Limitation Act,” creates limitations on the liability of online service providers for copyright infringement when engaging in certain types of activities.

–”



DMCA

- A party seeking the benefit of the limitations on liability in Title II must qualify as a “service provider.”
- “Service Provider” is defined as a provider of online services or network access, or the operator of facilities therefor.”



DMCA

- A party that qualifies as a service provider must also satisfy certain “conditions of eligibility,” including the adoption and reasonable implementation of a “repeat infringer” policy that “provides for the termination in appropriate circumstances of subscribers and account holders of the service provider’s system or network.



DMCA

- In addition, a qualifying service provider must accommodate “standard technical measures” that are “used by copyright owners to identify or protect copyrighted works.” (methods of protecting and encrypting copyrighted works).

DMCA

- First protection relates to materials posted to your blog or website by a user
 - a photograph, a film clip, an audio file that a user posts to a comment section on your site or to a forum thread.
 - Many other potential examples, the important thing is that the material is posted by another person, not you



DMCA

- The safe harbor for user-uploaded content will only apply if the service provider:
 - does not have actual knowledge that the material or an activity using the material on the system or network is infringing;
 - in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; OR



DMCA

- upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;
- does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity;



DMCA

- 2nd provision relates to links you post to other online material located elsewhere.
- This safe-harbor states that an online service provider will not be held liable for money damages.



DMCA

- "for infringement of copyright by reason of the provider referring or linking users to an online location containing infringing material or infringing activity, by using information location tools, including a directory, index, reference, pointer, or *hypertext link.*" IF.....



DMCA

- do not receive any financial benefit directly attributable to the infringing activity if you have the ability to control such activity; &
- act expeditiously to remove or disable access to the infringing material (such as by taking away the link) upon obtaining knowledge or awareness that the material is infringing or upon receiving a properly drafted notice of infringement

DMCA

- ADDITIONAL ADMINISTRATIVE REQUIREMENTS:
- Designate a Copyright Agent to Receive DMCA Takedown Notices
- The U.S. Copyright Office maintains a list of designated agents to receive notices of claimed copyright infringement.
- <http://www.copyright.gov/onlinesp/>



DMCA

- This list enables copyright owners who believe that their work is being infringed to send complaints or "takedown notices" to internet service providers hosting or linking to the disputed material



DMCA

- Designate an agent and file an Interim Designation with the United States Copyright Office, along with a filing fee – currently \$105 –

MORE ON THIS LATER



DMCA

- Adopt and Communicate to Users a Copyright Infringement Policy
 - Publish a statement on your site
 - your **DMCA agent's contact information** and
 - your policies regarding copyright infringement AND
 - Consequences of repeated infringing activity
 - The notice can be a part of the website's terms of use or some other notice displayed prominently on the site.



YOUR POLICY

- EXPLAIN THAT YOU RESPOND EXPEDITIOUSLY TO NOTICES OF CLAIMED COPYRIGHT INFRINGEMENT AND TERMINATE USERS OR ACCOUNT HOLDERS WHO ARE "REPEAT INFRINGERS."



YOUR POLICY

- If you have no subscribers or account holders, your policy may state "If we become aware that one of our users is a repeat copyright infringer, it is our policy to take reasonable steps within our power to terminate that user."



YOUR POLICY

- Include a statement detailing proper form for notice of claimed infringement, include:
 - a physical or electronic signature of a person authorized to act on behalf of the owner of the infringed copyright;
 - identification of the copyrighted work or works claimed to have been infringed;
 - identification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed;



YOUR POLICY

- information reasonably sufficient to permit the service provider to contact the complaining party (e.g., the address, telephone number, or email address);
- a statement that the complaining party has a good faith belief that use of the material is not authorized by the copyright owner;



YOUR POLICY

- a statement that information in the complaint is accurate and that the complaining party is authorized to act on behalf of the copyright owner



DMCA

- Law states that if a complaining party does not substantially comply with these requirements, its notice will not serve as "actual notice" for the purpose of Section 512.
- Include in policy a statement explaining the procedure for users of your site to make a counter-notification



DMCA

- Properly Comply with a Notice of Claimed Infringement When Received
 - Once you verify that a copyright notification substantially meets these formal requirements, in order to qualify for the safe harbor, you are required to:



DMCA

- expeditiously remove or disable access to the material that is claimed to be infringing (there is little guidance on what counts as "expeditious")



DMCA

- notify your user or subscriber that the material has been removed so that they may file a counter-notice should they wish (you are not required to notify the user before removing the material);
- if proper counter-notice is provided, notify the copyright holder and provide a copy of that counter-notice; and



DMCA

- If proper counter-notice is provided and if the copyright holder does not file suit within 10 business days, restore the removed material



DMCA

- **NOTE: Not Every Cease-and-Desist Letter is a DMCA Takedown Notice**
 - apply only to claims of *copyright infringement*
 - Defamation claims, or claims alleging misappropriation of trade secrets, or others
 - look at the precise allegations and legal claims made in the letter and evaluate your next steps from there



DMCA

- This may also work in reverse; you may receive a DMCA takedown notice for material that is technically not eligible for safe-harbor treatment, such as material you posted yourself
- If it satisfies the complaining person that you take the material down, and you have no serious objection, you might want to do so



REGISTERING AN AGENT

- Use Copyright office form or create own
- Copyright Office has suggested formats available for filing either an Interim Designation or an Amended Designation
- Copyright Office does not require that you use the forms it provides, but encourage it.
- If you opt to create your own, you must include all required information



DMCA

INTERIM DESIGNATION::

<http://www.copyright.gov/onlinesp/agent.pdf>

AMENDED DESIGNATION:

<http://www.copyright.gov/onlinesp/agenta.pdf>

NOTE: Entire Interim Designation or Amended Designation submitted will be posted on the Copyright Office's website.



DMCA

- Provide service provider's LEGAL name
- If you have alternative names (for example additional URLs), you will want to include them in the same filing so you do not pay over and over again to register.
- Each group of 10 alternative names (or fewer) will require the payment of an additional fee.



FIRPTA



FIRPTA

- The provision increases the rate of withholding from 10% to 15% except in the case of sales of residences intended for personal use by the acquirer, if the purchase price does not exceed \$1 million.



FIRPTA

- If the amount realized (generally the sales price) is \$300,000 or less, AND the property will be used by the buyer as a residence, there is still no withholding



FIRPTA

- If the amount realized is more than \$300,000 but does not exceed \$1,000,000, AND the property will be used by the buyer *as a residence*, then the withholding rate is still 10%
- But if amount realized is more than \$300,000, and property is NOT being used as a residence (commercial, vacant land), then new rate is 15%



FIRPTA

- If the amount realized exceeds \$1,000,000, then the withholding rate is 15% on the amount realized, regardless of use by the buyer.



TAX RELIEF

- FEDERAL TAX RELIEF
EXTENDED FOR PHANTOM
INCOME FROM SHORT SALES
AND FORECLOSURES



NAR BOARD OF CHOICE

- Under previous jurisdictional policies of the NAR, REALTORS® were required to join the board where their principal place of business is located, prior to joining any other board



NAR BOARD OF CHOICE

- The "Board of Choice" concept allows REALTORS® to choose the board to which they want to belong on the basis of the factors they decide are most important rather than being limited by office location or jurisdictional boundaries.



NAR BOARD OF CHOICE

- At the same time, services of other boards are available without the necessity of holding membership in those boards



NAR BOARD OF CHOICE

- Original Board of Choice policies authorized REALTORS® to join any board within the state where their office is located.
- Based on amendments approved by the NAR Board and Members in 1995, the policy was expanded to authorize REALTORS® to join a primary board across contiguous state lines

CASE LAW




INDEPENDENT CONTRACTOR STATUS

- *Monell et al. v. Boston Pads* (Mass)
 - Defendants required plaintiffs to
 - own day planner
 - pay desk fees each month
 - have cell phones with a “617” area code
 - complete office hours duty in some cases,
 - were subject to disciplinary action if productivity goals were not met



INDEPENDENT CONTRACTOR STATUS

Court found that the Massachusetts real estate statute required the broker to exercise some degree of supervision over the plaintiffs in order to comply with real estate license laws and acknowledged that it was impossible to read the real estate statute and the independent contractor statute in harmony



INDEPENDENT CONTRACTOR STATUS

The Massachusetts IC statute contains a presumption that an individual is an employee unless 3 specific factors are met, the “ABC test”.

However, given the real estate statute’s supervision requirement, it would be difficult, if not impossible, for brokers to meet the independent contractor statute’s 3-factor test



INDEPENDENT CONTRACTOR STATUS

Recognizing the inherent conflict, the court turned to the rules of statutory construction, under which the court determined the real estate statute, as the more specific statute, must control.

The plaintiffs' appealed the trial court's decision and the Massachusetts Supreme Court granted direct review of the case.



INDEPENDENT CONTRACTOR STATUS

- The Massachusetts Supreme Court affirmed the lower court's ruling.
- The Court noted that despite the level of supervision and control brokers are required to exercise over their salespeople under the real estate license laws, the real estate statute expressly permits a broker to classify their salespeople as employees OR independent contractors.

INDEPENDENT CONTRACTOR STATUS

MEANWHILE.....

ON THE
OTHER SIDE
OF THE
COUNTRY
IN SUNNY
CALIFORNIA



INDEPENDENT CONTRACTOR STATUS

- *Bararsani v. Coldwell Banker*,
- In July 2013, the defendants filed a Demurrer seeking to dismiss the plaintiffs' complaint, asserting it was without basis because the CA law sets out the relevant three-part test for classification of real estate professionals as independent contractors, which defendants alleged were satisfied

INDEPENDENT CONTRACTOR STATUS

- Plaintiffs filed a response
- Court said- while the language in the Code cited by defendants CB expressly permits real estate professionals to be treated as independent contractors or as employees, the Code does not *require* that real estate professionals be treated as independent contractors



INDEPENDENT CONTRACTOR STATUS

- The court denied defendants' Demurrer - CA law permits a worker to be classified as an IC for some purposes, but not all, &
- Stating that the court would apply a multi-factor common law test to determine whether plaintiffs were properly classified as independent contractors for purposes of this case



INDEPENDENT CONTRACTOR STATUS

- Also, the court denied plaintiffs' motion to invalidate mandatory arbitration and class action waiver clauses contained in IC agreements executed by class members.
- Individuals who executed such agreements would be bound by such clauses, and ineligible as class members.
- The case is in discovery



INDEPENDENT CONTRACTOR STATUS

- California case, *Cruz et. al. v. Redfin*
 - required them to obtain a smartphone, laptop and GPS
 - maintained complete control over and provided the plaintiffs with training and supervision as to how they were to perform their duties



INDEPENDENT CONTRACTOR STATUS

- Similar facts are alleged in another case filed - *Galen v. Redfin Corporation*
 - Galen had signed an IC agreement with Redfin, which contained a mandatory arbitration clause.
 - Trial court would not compel arbitration,
 - Court of Appeals reversed and required arbitration - Plaintiff appealed



INDEPENDENT CONTRACTOR STATUS

- An unfavorable outcome in these cases could lead to a drastic shift in the way the real estate industry has historically done business
- And may result in a significant reduction in the # of real estate agents, as brokers struggle with the increased costs of employing agents



INDEPENDENT CONTRACTOR STATUS

- And brokers would have to assume heightened control over real estate salespeople
- Resulting in significant decrease in the freedom and flexibility that real estate agents currently enjoy in an independent contractor relationship



SIGNS – 1st AMENDMENT

- *Reed v. Town of Gilbert* - Supreme Court of the US
 - Does town's ordinance that regulates signs based on the content of the sign violate the 1st Amendment of the US Constitution
 - Code that regulates the display of outdoor signs identifies signs by various categories, and the categories are then regulated in different ways



SIGNS – 1st AMENDMENT

- Code has particular regulations for
 - “Temporary Directional Signs Relating to a Qualifying Event” (signs directing the public to the meetings of a nonprofit group) and
 - Noncommercial signs such as political signs and
 - Ideological signs



SIGNS – 1st AMENDMENT

- Church uses signs to direct attendees to the different locations where it holds its services.
- Signs would be posted around the town on Saturday morning, and then removed after the services on Sunday afternoon



SIGNS – 1st AMENDMENT

- Town fined the Church twice for failing to comply with the Sign Code because the signs were up for more than 12 hours
- Church filed a lawsuit challenging the Sign Code as an unconstitutional abridgement of their speech in violation of the United States Constitution.



SIGNS – 1st AMENDMENT

- Court ruled that the Sign Ordinance's regulations for "Temporary Directional Signs" are unconstitutional.
- 1st Amendment prohibits laws that limit free speech
- Laws that regulate based on the speech's content are presumptively unconstitutional and require the government to show that the law is narrowly tailored to serve a compelling governmental interest in order to survive review.



SIGNS – 1st AMENDMENT

- Court determined that the Sign Code regulated speech based on its content, as the sign's content determined how it was regulated.
- 1st Amendment prohibits any regulation of speech based on the speech's content and therefore the regulations were subject to *strict scrutiny*



SIGNS – 1st AMENDMENT

- The temporary direction signs were treated differently than political signs, and both were treated differently than ideological signs, showing that the sign's content determined how it was regulated
- The Sign Code failed to pass the scrutiny tests applied to content-based restrictions on speech



SIGNS – 1st AMENDMENT

- The Town offered two governmental interests to support the distinctions made in the type of signs:
 - preserving the Town’s aesthetic appeal
 - traffic safety



SIGNS – 1st AMENDMENT

- Court said neither interest was narrowly tailored to support the content regulation, as other types of signs could be unlimited in number while directional signs were strictly regulated
- Town had not shown how these regulations protected the Town's aesthetics



SIGNS – 1st AMENDMENT

- Town did not show how limiting directional signs protected traffic safety while at the same time allowing an unlimited number of other signs.
- Court reversed the lower court's rulings



BROKER COMMISSION

- *AMA Realty Grp. Of Illinois v. Melvin M. Kaplan Realty, Inc.* – Ill. App.
 - Broker had exclusive listing agreement
 - Buyer contacted Broker, but Owner had secret meetings with Buyer
 - Listing Agreement expired and Buyer immediately sent Owner an offer
 - Buyer purchased property



BROKER COMMISSION

WHAT DO
YOU THINK

?



BROKER COMMISSION

- COURT HELD
 - Listing Agreement required Owner to send all inquiries to Broker
 - Owner's secret meetings with Buyer was a breach of this provision –
- SIDE NOTE: Broker filed lien against property for commission and buyer countersued for slander of title – Let's talk about that.....





ADA AND FHAA

- *Anderson v. City of Blue Ash* – 6th Cir.
 - Owner's daughter was disabled- - hard for her to get walk and affected her balance
 - Owner bought daughter a miniature horse to held daughter walk around back yard and get exercise
 - When Owner wouldn't remove horse, City passed an ordinance – “no farm animals on residential properties”



ADA AND FHAA

- Owner sued claiming violations of the Americans with Disabilities Act and the Fair Housing Amendments Act
- Trial Court found in favor of City and Owner appealed
- 6th Cir. said as to ADA - Owner had produced enough evidence for lower court to consider if the request was reasonable



ADA AND FHAA

- On FHAA, a reasonable modification is one that is necessary for the same enjoyment of the dwelling that a non-disabled person would receive
- Exceptions to ordinances and zoning rules are required if test is satisfied
- Case was sent back for further proceedings



RANM LEGAL HOT LINE

1-877-699-7266

LEGALHOTLINE@NMREALTOR.COM

MONDAY – FRIDAY
9:00 TO 1:00 PM



REALTORS®
ASSOCIATION
OF THE
GREAT STATE OF
NEW MEXICO

THANK YOU!

