

A close-up portrait of a woman with long, light-colored hair, smiling. The image is dimmed, with text overlaid. A solid red vertical bar is in the top right corner.

LEGAL UPDATE

Presented By:

Ashley Strauss-Martin, Esq.

April/May 2019

**BROUGHT TO YOU BY THE:
NEW MEXICO ASSOCIATION
OF REALTORS®**

TOPICS COVERED TODAY



- ▶ LEGISLATIVE – THE DETAILS
 - ▶ HOA – 7/1/19
 - ▶ HOME INSPECTOR LIC. – 1/1/20
 - ▶ AUCTIONS – 6/14/19
- ▶ LEGAL HOT LINE ISSUES
- ▶ TOP RISK MANAGEMENT ISSUES
- ▶ CASE LAW

NM LEGISLATURE



HOME INSPECTOR LICENSING – Key Components for Brokers

- ▶ E and O Insurance
- ▶ Following contractual provisions are INVALID
 - ▶ That waive any duty owed pursuant to the Act or rule
 - ▶ That limit the liability of the HI to an amount less than the professional liability insurance minimum coverage per claim as prescribed by the Home Inspector Licensing Board



HOME INSPECTOR LICENSING

Key Components for Brokers

▶ **Grounds for Suspension/Revocation**

- ▶ **Offered** or delivered compensation, inducement or reward to the owner of the property **or to the broker or the agent** for the referral of any business to the HI or the HI's company;
- ▶ **Performed** or offered to perform for an add'l fee any repair on a home which the HI or *the HI's company* has prepared a report **during the 12 months** **prior** to the repair or offer to repair

HOMEOWNER ASSOCIATION ACT (NOT CONDOS)

GOOD NEWS: Caps DC Fee At \$300

GOOD NEWS: To be paid at time of Closing - Only **IF**
deal closes!!!!

BAD NEWS: Only good for 60 days from issuance

GOOD NEWS: HOA can only charge \$50 to update
info which is good for another 60 days and must be
provided within 3 days of request

GOOD NEWS: HOA Management Companies have
to give list of all fee charged and HOA must provide
such list to all homeowners

AUCTION OF REAL PROPERTY

Services rendered



Shall be done so by NM QB

Before auction, transaction-specific written agreement with QB that includes:

Description of parties, real estate
Terms of compensation;
Effective date and termination date;
Statement that auctioneer agrees to cooperate

- 1) Fully with QB and ABs designated by QB;
- 2) Conduct contact with parties through QB;
- 3) Conduct all marketing and solicitations in the name of QB.

**NMAR
LEGAL
HOTLINE
ISSUES**



DEFINITION – “TRANSACTION COORDINATOR”

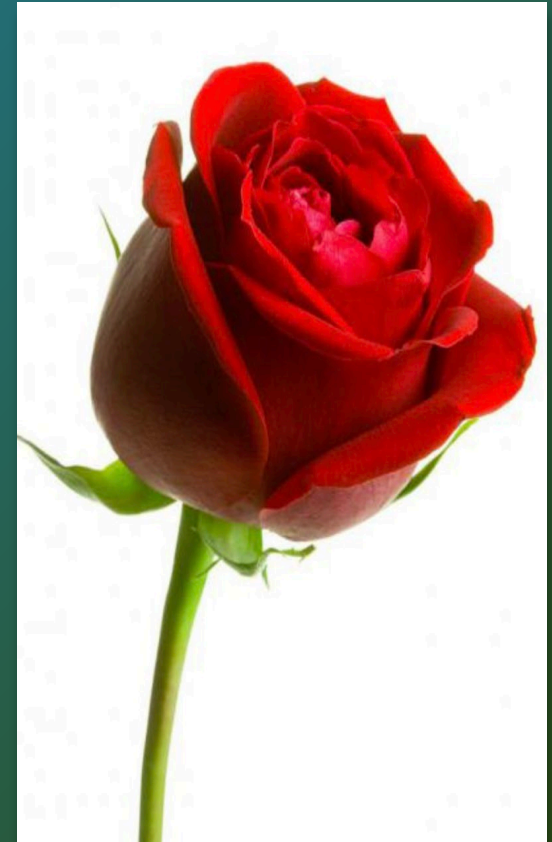
A person engaged by a licensee who assists the licensee in the processing of the RE transaction, may include (not limited to):

- ▶ gathering necessary information and paperwork for and from buyers and sellers;
- ▶ overseeing and organizing contractual deadlines;
- ▶ communicating and coordinating with lenders, title companies, inspectors, other licensees in the transaction and the parties to the contract to facilitate the closing of the real estate transaction;
- ▶ assembling the final real estate transaction file for closing.



WHAT'S IN A NAME?

- ▶ TC may or may not be licensed
- ▶ TC may be inside the brokerage or out
- ▶ TC may be doing business for one or more than one broker
- ▶ TC could be called:
 - ▶ An assistant
 - ▶ Team member



TRANSACTION COORDINATORS

- ▶ Broker engaging licensed TC must disclose the **name** of TC to all parties and brokers in the transaction
- ▶ In the event of multiple TCs, each name needs to be disclosed; it will **not** suffice to simply list a team name
- ▶ If TC is performing work for multiple brokerages, TC must have a QB License and a transaction-specific written agreement with each brokerage for which the TC is performing those services (NMAR Form 1700);
- ▶ Licensed TCs owe a certain set of duties to the parties to the transaction; the extent of those duties depends on whether the TC
 - ▶ engages directly with the parties to the transaction or
 - ▶ only with the broker that hired him/her.

DISCLOSURE PROCESS

Listing Side:

- Disclose TC to seller on Cover Page II of Listing Agreement
- Disclose TC to buyer and buyer's broker on Form 2100, which can be uploaded into MLS or provided to buyer's broker BEFORE buyer submits an offer
- Only buyer and buyer's broker need to acknowledge receipt of Form 2100 (seller has already done so on Cover Page II of the Listing Agreement)

Buyer's Side:

- Disclose on Cover page II of Buyer's Broker Agreement, if one was being used, or on Form 2100
- Send Form 2100 over to seller and listing broker with PA
- If Buyer's Broker Agreement used, buyer would not need to again acknowledge receipt of Form 2100,

2100A TC BROKER DUTIES

STAND- ALONE FORM

ATTACH

TO LISTING OR
BUYER'S BROKER
AGREEMENT AS
EXHIBIT "A"

ATTACH

TO 2100 – EXHIBIT A

- IF USING 2100 FOR DISCLOSURE OF ADVERSE MATERIAL FACTS OR CONFLICT OF INTEREST, DON'T ATTACH 2100A



LOVE LETTERS - BEWARE



- What is it? Letter to seller telling seller why he/she should sell his/her house to this particular buyer
- Buyers may include pictures of themselves
- Buyer love letters are rarely just about the property; almost always include information about the buyers
- Fair housing laws are all about selling real estate to anyone who is qualified to buy it — regardless of race or family status
- Writing a letter to a seller isn't illegal
- Tell seller about letters from buyers and explain why they should not look at them before he/she accepts an offer



THAT CRAZY LITTLE THING CALLED.....FIRPTA

BUYER'S BROKERS – ARE YOU
CONFIRMING YOUR BUYER HAS
RECEIVED A STATEMENT FROM A
QUALIFIED SUBSTITUTE (TITLE
COMPANY) AT CLOSING?????

TRANSACTION BROKER VS. AGENT

- **BENEFITS**
 - **LIMITED RESPONSIBILITY**
 - **LIMITED LIABILITY**
- **DRAWBACKS**
 - **NEGLIGIBLE AUTHORITY**

An easy way to "have your cake and eat it, too" is to buy two cakes.



Digital Millennium Copyright Act (DMCA) –

It's NO Joke!

The Law Office of
DAVID C. DEAL
Copyright and Intellectual Property Law

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CROZET, VIRGINIA 22932

TELEPHONE 434-233-2727
FAX 888-963-8085

DAVIDDEAL.com
DAVID@DAVIDDEAL.com

December 18, 2018

VIA USPS First Class Mail and Email

[REDACTED]
[REDACTED]
[REDACTED]
Albuquerque, NM 87106
[REDACTED]

Re: Infringement of Photographic Copyright by The Ortega Team

Dear Mr. [REDACTED]

My firm represents Blaine Harrington, a professional photographer whose original copyrighted work has been infringed by The [REDACTED] Team.

Enclosed are a number of exhibits that offer evidence of such infringement: Exhibit A is a copy of Mr. Harrington's copyrighted photograph, "20121008_nm-tex_0062." Exhibit B includes documentation of [REDACTED] Team's public use of the photograph. Exhibit C is the copyright registration for the photograph.

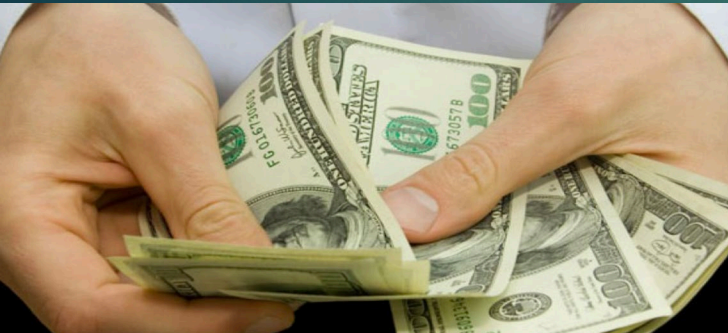
As evidenced by the exhibits, The [REDACTED] Team's use of "20121008_nm-tex_0062" represents an infringement of our client's copyright. If The [REDACTED] Team has a license for the copyrighted work identified in Exhibit A, please contact our office immediately to provide documentation.

Our client has a number of options, including the right to file suit against The [REDACTED] Team for copyright infringement. Please keep in mind that damages for copyright infringement are designed to recover the economic loss of the misuse, as well as to prevent and deter infringement. I encourage you to share this letter with your legal counsel, who can confirm the details of the applicable federal law outlined above.

In straightforward copyright cases such as this, it is often advantageous for parties to settle without filing suit. This is especially true given the extremely high cost of litigating intellectual property cases. While my firm has experience litigating copyright infringement cases, we have found that both parties are often best served by negotiating a resolution. Accordingly, our client has authorized my firm to resolve this matter on the following conditions:

DEMAND
MADE TO AB
FOR
\$6,500

NO E AND O
COVERAGE

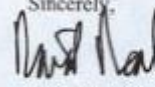


1. The [REDACTED] Team remove the infringing work and any infringing derivatives thereof from the organization's website, and anywhere else the image has been used;
2. The [REDACTED] Team agree not to infringe any of Mr. Harrington's work in the future; and,
3. The [REDACTED] Team tender \$6,500.00 to the Law Office of David C. Deal's client trust account to compensate Mr. Harrington for the infringement.

This offer is designed to minimize The [REDACTED] Team's ultimate exposure in this matter. Moreover, because The [REDACTED] Team requires the use of photographs in print and digital media, resolving the issue of copyright infringement through a confidential settlement will likely serve the long-term interests of the organization.

The longer this matter continues, the less inclined Mr. Harrington will be to resolve this matter without litigation. This is especially true if The [REDACTED] Team attempts to avoid the responsibility of infringement or employs delaying tactics. We can provide a sample confidential settlement agreement or we welcome the opportunity to jointly draft an agreement with your legal counsel that reflects a sound resolution to this matter.

Please carefully consider this letter and the associated exhibits. If we do not receive a response from you or a representative of The [REDACTED] Team within fifteen days from the date at the top of this letter, we will take further steps to resolve this matter.

Sincerely,

David C. Deal

DMCA



- 2016 LEGISLATIVE CONFERENCE LEGAL UPDATE
 - <https://www.nmrealtor.com/wp-content/uploads/2013/12/RANM-Legislative-Conference-Legal-Update-20160128.pdf>
- License Agreements
 - <https://www.nar.realtor/legal/copyright-trademark/listing-photo-sample-agreements>

DMCA



- 12/1/2016, for safe harbor protection, must register Designated Agents through new online system
- Entities that registered through the previous paper registration had until Dec. 31, 2017 to re-register otherwise **they lose DMCA safe-harbor protection.**
- New system replaces paper-based (\$6 vs. \$105)
- Must re-register every 3 years or lose safe harbor protection
- <https://dmca.copyright.gov/osp/login.html>
- **Q and As:**
 - <https://www.copyright.gov/dmca-directory/faq.html>

2104 – RESIDENTIAL PA, PARA. 21(H)(i)

H. BUYER'S OBJECTIONS/TERMINATION.

- i. If Buyer has reasonable objections to any issue or condition disclosed by any document (Para. 18), survey or ILR (Para. 19) and/or inspection (Para. 21), **then no later than the applicable Objection Deadline**, Buyer may OBJECT and request that Seller cure the issue/condition (NMAR Form 5109 – ORW Agreement) or Buyer may TERMINATE this Agreement (NMAR Form 5105 – Termination Agreement). Buyer's objections or termination must be in writing. If Buyer **OBJECTS AND ASKS SELLER TO CURE**, Buyer MUST produce with his objections a copy of the document, survey and/or SECTION of the inspection report on which Buyer's objections are based; production of such document, survey or report is **NOT** required if Buyer **TERMINATES WITHOUT ASKING SELLER TO CURE OBJECTIONS**. If Buyer timely elects to terminate, Earnest Money, if delivered, shall be refunded to Buyer. Buyer's failure to timely deliver to Seller his objection or termination shall be deemed a waiver of Buyer's right to object or terminate and of the applicable contingency.

SO CAN I PROVIDE THE WHOLE REPORT????

- ▶ PA does NOT REQUIRE the buyer to do so;
- ▶ Providing entire report could actually harm the seller (seller must disclose all that bad stuff to the next buyer if this deal falls apart (Breach of Reasonable Care?????); and
- ▶ Providing entire report could violate the HI's copyright, thus exposing the buyer and seller (if seller should share report w/next buyer) to a lawsuit (Breach of Reasonable Care???)
- ▶ Role of the broker is to assist the buyer/seller in complying with the terms of the contract. The buyer is in compliance with the contract by providing the SECTION of the report. If the seller WANTED the ENTIRE report, the seller would counter the offer and say "If buyer is objecting, I want a copy of the entire report, not just the SECTION".

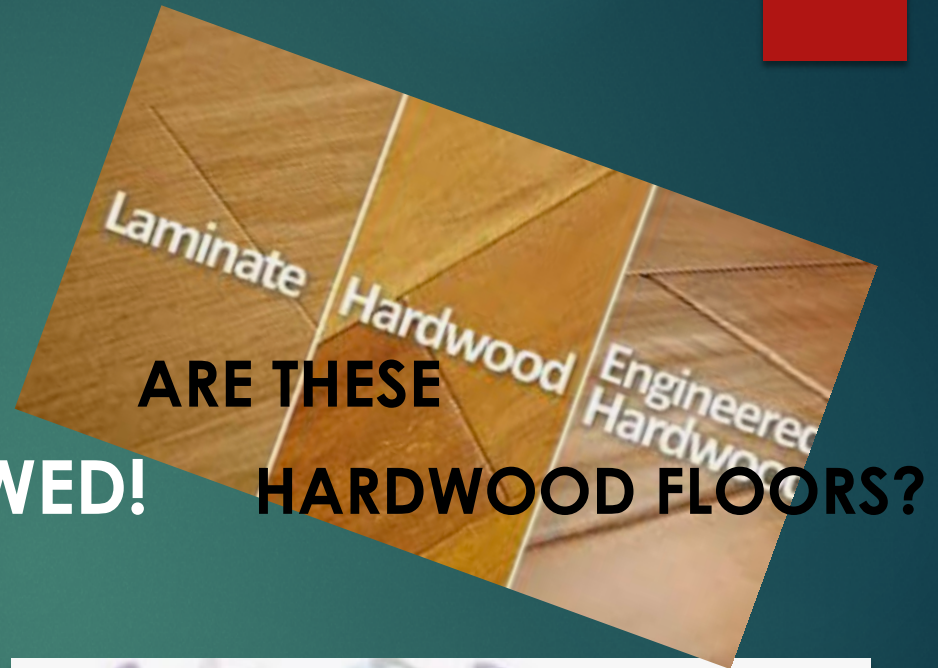
DISCLOSING REFERRAL FEES

All Brokers in this transaction owe the following broker duties to ALL BUYERS AND SELLERS in this transaction, even if broker is not representing buyer or seller. Written disclosure of potential conflict of interest or any other written agreement 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/relationship of a business, personal or family nature that the broker has in the transaction; or
- ▶ any written agreement the Broker has with a licensed Transaction Coordinator who will be providing services related to the transaction.

SELLER'S DISCLOSURE

- REQUIRED?
- ROLE OF BROKER?
- HELPING SELLER?
- NO GUESSING ALLOWED!



LET'S PLAY SOME HOT LINE Q AND A!!!

▶ Q: BUYER OBJECTS AND IS WAITING FOR SELLER TO RESPOND. SELLER IS TAKING HIS SWEET TIME AND BUYER IS GETTING NERVOUS. RESOLUTION DEADLINE HAS NOT PASSED. BUYER CAN:

- A. WITHDRAW HIS OBJECTIONS AND TERMINATE THE CONTRACT;
- B. AMEND HIS OBJECTIONS TO SOMETHING HE THINKS THE SELLER WOULD BE MORE WILLING TO ACCEPT OR WITHDRAW HIS OBJECTIONS ALL TOGETHER;
- C. AMEND HIS OBJECTIONS TO ASK FOR ADDITIONAL ITEMS (BUYER REALIZES HOUSE NEEDS MORE WORK);
- D. WAIT FOR SELLER TO RESPOND AND AND IF SELLER DOESN'T AGREE TO ALL REQUESTED CURES, BUYER CAN TERMINATE OR CON'T TO NEGOTIATE W/ SELLER;
- E. A AND D;
- F. B AND D.

LET'S PLAY SOME HOT LINE Q AND A!!!

▶ Q: PARTIES GO UNDER CONTRACT ON APRIL 4TH. DEADLINE FOR OBJECTIONS IS 16 DAYS AFTER DATE OF ACCEPTANCE, PER THE NMAR PA, WHEN IS THE DEADLINE FOR OBJECTIONS?

Sun	Mon	Tue	Wed	Thu	Fri	Sat
	1	2	3	4	5	6
7	8	9	10	11	12	13
14	15	16	17	18	19	20
21	22	23	24	25	26	27
28	29	30				

LET'S PLAY SOME HOT LINE Q AND A!!!



- ▶ BUYER SUBMITS AND OFFER
- ▶ SELLER COUNTERS
- ▶ BUYER SUBMITS A 2ND COUNTEROFFER
- ▶ SELLER HASN'T ACCEPTED 2ND COUNTEROFFER,
AND GETS ANOTHER OFFER
- ▶ BUYER FINDS OUT SELLER GOT ANOTHER OFFER ON
THE PROPERTY
- ▶ BUYER IMMEDIATELY SIGNS COUNTER OFFER #1
AND SEND IT'S BACK TO SELLER
- ▶ **DEAL OR NO DEAL?**

LET'S PLAY SOME HOT LINE Q AND A!!!



- ▶ Buyer did not ask to have the storage sheds stay, but the seller is stating they are going to leave at least one of them
- ▶ May be on concrete foundation or on cinderblocks, not sure.
- ▶ Buyer does NOT want the storage shed and it's going to cost the buyer some money to have it removed

LET'S PLAY SOME HOT LINE Q AND A!!!



- ▶ All personal property not otherwise being left, must be removed by seller on or before buyer takes possession
- ▶ Whether something is personal property or a fixture depends on whether it is affixed to the real property (definitions for these two terms can be found in the Para. 31 of the PA).
- ▶ If the shed was permanently affixed to a concrete slab, that would be a fixture (and it would stay), whereas, if it was sitting on cinderblocks that were not affixed to the real property, it would be considered personal property and would have to go (unless the parties had agreed otherwise).
- ▶ Para. 10 states that if seller does not remove his personal property by the possession date, then it becomes the buyer's and if the buyer does not want it and must pay someone to remove it, the seller is responsible to the buyer for the cost incurred in removing it

NATIONAL RISK MANAGEMENT ISSUES



▶ WIRE FRAUD

- ▶ Alert homebuyers at the outset of the transaction. Many brokers are requiring signed disclosures.
- ▶ Avoid sending wire instructions (and any sensitive financial information) via email.
- ▶ Instruct homebuyers to call wire recipient using an independently-verified phone number.
- ▶ Security-conscious email and password practices – never open unsolicited links or attachments, use strong passwords, purge regularly, avoid using unsecured wifi.
- ▶ Contact law enforcement immediately if fraud is suspected.

NATIONAL RISK MANAGEMENT ISSUES

- ▶ **ICs vs Employees** - Inherent conflict between common law IC status and the traditional classification of real estate brokers as ICs.
- ▶ **Risk Reduction Tips – For TEAMS too!**
 - ▶ NM addresses only in the WC context
 - ▶ **QBs** - Always have a written independent contractor agreement
 - ▶ Don't mandate meetings, administrative office duties, or use of certain tools.
 - ▶ Allow salespeople to work where, when, and how they deem best

NATIONAL RISK MANAGEMENT ISSUES



- ▶ Section 8(a) of RESPA prohibits payment in exchange for referral of business for settlement service.
- ▶ Real estate licensees are exempted from that prohibition (Sec. 8(c)(3)), meaning that real estate licensees can pay each other for referrals.
- ▶ Pursuant to Section 8(c)(2), all other settlement service providers may pay each other for services performed by other providers as long as the payments equate to fair market value of the service received.
- ▶

NATIONAL RISK MANAGEMENT ISSUES



▶ RISK REDUCTION TIPS: I

- ▶ Payments related to advertising service arrangements must be for goods or services actually provided and for the fair market value of the services provided. Document analysis used to determine fair market value.
 - ▶ Do not endorse settlement service provider or enter into exclusive arrangements.
 - ▶ Service provider should be monitored to ensure that it is performing the services set forth in any agreement and should be able to demonstrate such performance.

HUD SAYS- PAYMENTS FROM HOME WARRANTY COMPANIES

- ▶ Must be for services that are “actual, necessary and distinct from the primary services provided” by REALTOR®.
- ▶ Cannot pay compensation to a REALTOR® for the “mere taking of an application.”
- ▶ Even where the REALTOR®’s services are “actual, necessary and distinct”, HUD must be satisfied that the amount of the payment is “reasonably related” to the value of the services being
- ▶ **CANNOT** pay a REALTOR® on a per-transaction basis if the only services provided by that REALTOR® are marketing services directed to that REALTOR®’s own clients and customers. Regardless of the work involved, such activities constitute “referrals” rather than marketing services.

HUD SAYS- HOME WARRANTY COMPANY PAYMENTS

▶ Examples of services that a REALTOR® can provide for (and receive payment from) a Home Warranty company:

- ▶ conducting actual inspections of items to be covered by the warranty to identify pre-existing conditions;
- ▶ recording serial numbers of the items to be covered;
- ▶ documenting the condition of the covered items by taking pictures;
- ▶ reporting to the home warranty company regarding inspections.

HUD SAYS- HOME WARRANTY COMPANY PAYMENTS

▶ HUD has indicated that it would look more favorably at a contractual relationship between a REALTOR® and a home warranty company if:

- ▶ the contract makes the REALTOR® the legal agent of the home warranty company such that the home warranty company assumes responsibility for REALTOR®'s representations;
- ▶ the REALTOR® discloses his/her compensation arrangement to his/her clients and makes clear to them that they can purchase home warranties from other companies (or not at all).



CASE LAW

NH Federal Court

- ▶ Finder entered into an “finder’s agreement” with an entity Owner that owned a Business located in NH. Owner would pay Finder a finder’s fee if Finder found a buyer for the Business.
- ▶ Finder located Buyer from CA. Finder entered into a confidentiality agreement with Buyer that required Buyer to pay him a finder’s fee if Buyer circumvented Finder and worked with Owner directly.
- ▶ Buyer contacted the Owner directly and purchased entire Business-the real property, equipment, machinery, and personal property.
- ▶ Finder filed a lawsuit against Buyer and Owner in CA seeking payment outlined in both contracts. Case was transferred to federal court in NH, and Buyer and Owner argued that NH’s real estate license law barred payment to Finder because he did not hold a NH RE license.
- ▶ Finder argued that CA law applied to this transaction and so he could collect the finder’s fee – CA law allows payment of finders fees if all Finder is doing is locating purchasers.

CASE LAW

NH Federal Court

- ▶ Which state's law applied? Usually, a federal court with parties from varying jurisdictions applies the Choice of Law from the state where the court is located, but this lawsuit was originally filed in CA. So, the CA Choice of Law rules determine which state's law applies to the transaction.
- ▶ Court said under CA's choice of law, NH law applied.
- ▶ NH law requires a real estate license to receive a fee for the conveyance of any interest in real estate
- ▶ Finder argued that the transaction only tangentially involved real estate, but NH case law is clear that a license is required to receive a fee for the brokering of ANY interest in real estate.
- ▶ Court ruled Finder could not collect a fee.

The image features a background of a Domino's Pizza logo on the left, which consists of a red diamond with a white circle inside, and a blue diamond with the word "DOMINOS" in white and "PIZZA" in blue below it. To the right, there is a close-up of pizza toppings, including melted cheese, pepperoni, and mushrooms. The text "CASE LAW" and "US COURT OF APPEALS – 9TH CIR." is displayed in white on a red rectangular background at the top right.

CASE LAW

US COURT OF APPEALS – 9TH CIR.

- ▶ Domino's Pizza, LLC has website "dominos.com" and its mobile app
- ▶ Website user filed a lawsuit against Website Owner alleging that Website and App were incompatible with screen reading devices and prevented individuals who used these devices from making purchases and that Owner had failed to comply with WCAG 2.0 Guidelines
- ▶ Following the filing, Website began directing individuals who had trouble to a 24-hour hot line

**CASE
LAW
US
COURT
OF
APPEALS
9TH CIR.**

- ▶ Website Owner argued that the ADA and its implementing regulations currently do not address the accessibility requirements for websites and it would violate due process to require the Website and App to meet certain standards when the DOJ has failed to promulgate the required standard for compliance.
- ▶ Trial court agreed and postponed the consideration until DOJ issued its rules. User appealed.

CASE LAW – 9TH CIR.

US COURT OF APPEALS

- ▶ ADA requires private entities that operate a “place of public accommodation,” to remove any existing architectural or communication barriers so that disabled persons are provided equal participation and benefits.
- ▶ ADA did not address whether public websites fall under Title III, but the DOJ has opined that public websites are places of “public accommodation” and began rule making in 2010 to create accessibility requirements
- ▶ WCAG 2.0 Guidelines are accessibility guidelines created by an international organization that sets standards for the internet; DOJ has required certain businesses to make their websites compliant with these standards
- ▶ DOJ has discontinued its rule making process.

CASE LAW - 9th Cir.

US COURT OF APPEALS

- ▶ Court reversed the trial court and remanded the case
- ▶ 1st - DOJ had stated in 1996 its belief that ADA applied to websites as places of public accommodation and so Owner had notice of DOJ's position
- ▶ 2nd - User was not just seeking to hold the Website Owner liable for violating WCAG 2.0; User was arguing that he was unable to access the content of Website and App, which are places of public accommodation under ADA
- ▶ 3rd - DOJ's failure to create specific standards did not violate Website Owner's due process rights b/c Website Owner knew ADA required Owner to provide "full and equal enjoyment" of its goods and services on its Website and App for all users.

CHRISTOPHER
MOEHRL
VS.
NAR,
REALOLGY,
HOMESERVICES
OF AMERICA,
RE/MAX AND
KW REALTY

WHO FILED IT?

- HOMES SELLERS WHO LISTED THEIR HOMES ON ONE OF 20 MLSs

WHY?

- Allege Defendants conspired to require home sellers to pay the broker representing the buyer of their homes, and to do so at an inflated amount in violation of federal anti trust laws

MOEHRL VS. NAR, Et. Al.

BASIS FOR LAWSUIT

Centers around NAR's Adoption of Rule that requires all brokers to make a blanket, non-negotiable offer of compensation when listing property in MLS

Brokers essentially required to market property through MLS; MLSs are controlled by local NAR Associations

Sellers required to pay cost that would be borne by buyers in a competitive market

MOEHRL VS. NAR, Et. Al.

CLAIMS:

WITHOUT RULE, BUYERS WOULD PAY THEIR OWN BROKERS AND BUYERS' BROKERS WOULD COMPETE TO BE RETAINED BY OFFERING A LOWER COMMISSION

WITH RULE PRICE COMPETITION AMONG BUYERS' BROKERS IS RESTRAINED BECAUSE BUYER DOES NOT PAY OR NEGOTIATE HIS BROKER'S COMMISSION

AND MOST BUYERS' BROKERS WON'T SHOW HOMES TO THEIR CLIENTS IF SELLER/LISTING BROKER IS OFFERING A LOWER COMMISSION OR WILL SHOW THOSE HOMES LAST

MOEHRL vs. NAR, Et. Al.

FACTS ALLEGED

- ▶ NAR uses its control of the MLSs and Defendant Franchisors use their agreement with their local franchisees to require brokers in local residential real estate markets to adhere to NAR's rules, including Buyer Broker Commission Rule.
- ▶ In more competitive foreign markets, home buyers pay their brokers if they choose to use one, and they pay less than 1/2/ the rate paid to buyer's brokers in the US
- ▶ Buyer's often find their own homes, but buyers' brokers continue to be paid 2.5-3% despite their diminishing role
- ▶ Inflated buyer's broker commissions have inflated total commissions paid by home sellers, such as Plaintiff

MOEHRL vs. NAR, Et. Al.

FACTS ALLEGED

- ❖ NAR requires members AND MLSs to comply with NAR's MLS Handbook
- ❖ Sanctions for failing to do so
- ❖ No Professional Liability Insurance if don't comply with NAR Handbook
- ❖ NAR Reviews for Compliance
- ❖ Franchisees collaborated with local Realtor associations to implement, comply and enforce NAR's rules

MOEHRL vs. NAR, Et. Al.

FACTS ALLEGED

- Home sellers have been forced to pay commissions to buyer brokers— their adversaries in negotiations to sell their homes—thereby substantially inflating the cost of selling their homes
- Home sellers have been compelled to set a high buyer broker commission to induce buyer brokers to show their homes to the buyer brokers' clients.
- Home sellers have paid inflated buyer broker commissions and inflated total commissions.
- The retention of a buyer broker has been severed from the setting of the broker's commission; the home buyer retains the buyer broker, while the home seller sets the buyer broker's compensation.

MOEHRL vs. NAR, Et. Al.

ANTI-TRUST ARGUMENT

- Price competition among buyers' brokers has been restrained.
- Competition among home buyers has been restrained by their inability to compete for the purchase of a home by lowering the buyer broker commission
- Franchisors and their franchisees have increased their profits substantially by receiving inflated buyer broker commissions and inflated total commissions

MOEHRL vs. NAR, Et. Al.

RELIEF REQUESTED

- Court Certify as a Class Action
- Award
 - Plaintiff and the other members of the Class damages and/or restitution;
 - pre- and post-judgment interest;
 - costs of suit, including reasonable attorneys' fees and expenses;
 - **Permanent injunction**, enjoining Defendants from continuing to require sellers to pay the buyer broker and from continuing to restrict competition among buyer brokers

NAR'S FORMAL RESPONSE

Not Yet Filed, But NAR Says.....

- Several state and federal courts have considered challenges to MLSs, and they have concluded that MLSs benefit consumers b/c they encourage brokers to share listing information and cooperate when serving the interests of their clients.
- NAR believes strongly that the lawsuit is baseless
- Be cautious about discussing the case online
- Direct all media inquiries to NAR's VP of Media Communications, Mantill Williams (mwilliams@realtors.org).
- If you have any questions about the legal allegations, please direct those to Lesley Muchow (lmuchow@realtors.org).

Price-fixing – Per Se Violation

- Similar commissions and offered-commission-splits do not necessarily mean they are FIXED.
- Any agreement, express or implied, with a competing brokerage to charge a certain commission, or offer the same commission splits, is a *per se* violation of the antitrust laws, with both criminal and civil consequences.
- Brokers should independently set their prices or risk antitrust liability.
- May be tempting to respond to a customer inquiry about a commission that the price is standard or is what some real-estate association suggests they charge, but **DON'T.**
- Associations should never suggest a commission and a broker should not suggest that prices are set collectively

Market or Customer Allocation Per Se Violation

- Brokers should not agree to divide territories (and this is not limited to written agreements)
- So if there are two major brokerage firms in a smaller town divided by a river, they should not decide between them that one will take properties north of the river, while the other stays to the south. Anti-trust Violation
- Agreement to allocate customers. Brokers should not agree to stay away from each other's clients or former clients.
- Poaching may seem impolite, but agreeing not to do it can violate the antitrust laws.

GROUP BOYCOTTS

Per Se Violation

- Brokers and unique business models challenge the traditional full-service brokerage model
- Not uncommon for competitors to react w/ anticompetitive conduct, **against** the new entrants.
- When two or more market participants agree—including oral agreements—to refuse to do business with a new entrant, it can be an antitrust violation
- For ex: a discount broker might put a house on the market for a client, but two existing brokers, who agreed not to do business with that discount broker, refuse to show the house to their buyer clients, even though the house might be suitable and appropriately priced. That agreement could violate the antitrust laws, REC regulations and the COE

CAUTION – WHEN BROKERS WORK COLLECTIVELY



- Case reports—as well as government antitrust investigations and consent decrees—are full of disputes about antitrust challenges to MLS policies
- An MLS serves the procompetitive function of centralizing the homes in a market for sale, along with relevant information about the properties and their asking prices and terms
- But MLSs are often run collectively by local real-estate associations
- If an MLS's access policies discriminate against certain brokers or individuals, they might invite antitrust scrutiny

NMAR VOICE

LEGAL CORNER

- Sent via email within the first week or after end of quarter
- Interesting News regarding NMAR, Legislation, Housing Stats, REC, NAR, Events and the Legal Corner
- Legal Corner Topics in the past:
 - TC Info I Covered Today
 - Social Media Advertising
 - Posting and Reposting Listings
 - What's It Means to be a Non-Disclosure State
 - Audio Video Surveillance in Homes
 - Title Company Rule Changes Impacting Your Clients
 - Selling Properties with Solar Panels
 - Highlights from Legal Updates

Not Receiving It?

Contact Diane at NMAR - diane@nmrealtor.com

Q AND A's



NMAR LEGAL HOT LINE

(505) 821-1583 (ABQ AREA)

OR

1-877-699-7266 (STATE-WIDE)

LEGALHOTLINE@NMREALTOR.COM



MONDAY – FRIDAY

9:00 TO 1:00 PM





*THANK
you!*