



**WELCOME TO THE NMAR  
WINTER LEGAL UPDATE  
BROUGHT TO YOU BY THE  
NEW MEXICO  
ASSOCIATION OF  
REALTORS®**

**PRESENTED BY:  
ASHLEY STRAUSS-MARTIN,  
ESQ.**

# TOPICS COVERED TODAY



- ▶ NATIONAL/NAR TOPICS
- ▶ LEGAL HOT LINE TOPICS
- ▶ CASE LAW FROM NEW MEXICO  
AND AROUND THE NATION



# **NAR AND NATIONAL ISSUES**

**“CLEAR  
COOPERATION”**  
MLS Statement 8.0,  
NAR Handbook on  
MLS Policy:

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

# CLEAR COOPERATION Q AND As

Is it mandatory?

- As of May 1, 2020 – YES

Can a seller “opt –out”

- Not if they wants to “publicly market” their property.


What is a “Business Day”?

- Business days exclude Saturdays, Sundays and holidays. For consistency among all REALTOR® Association MLSs, the approved timeframe is 1 business day.; “holidays” include all recognized federal and state holidays.

# “CLEAR COOPERATION” RATIONALE

- ▶ Distribution of listing information and cooperation among MLS participants is pro-competitive and pro-consumer.
- ▶ By joining an MLS, participants agree to cooperate with other MLS participants except when such cooperation is not in their client's interests.
- ▶ Policy intended to bolster cooperation and advance the positive, procompetitive impacts that cooperation fosters for consumers.
- ▶ The public marketing of a listing indicates that the MLS Participant has concluded that cooperation with other MLS participants is in their client's interests.





**“CLEAR  
COOPERATION”**  
MLS Statement 8.0,  
*NAR Handbook on  
MLS Policy:*

- ▶ Is Policy consistent with Article 3 of the NAR Code of Ethics?
- ▶ Yes. By joining the MLS, Participants agree to be bound by the MLS Rules and Regulations. Per the policy’s rationale, the public marketing of a listing indicates that the MLS participant has concluded that cooperation with other MLS participants is in their client’s best interests.

# “CLEAR COOPERATION” MLS Statement 8.0

- ▶ Are any property types excluded?
- ▶ The obligations of Statement 8.0 were specifically adopted to address concerns with residential “for sale” exclusive listing contracts required to be filed with the service.
- ▶ Based on the Advisory Board’s discussions that **did not include commercial properties, rental properties, and new construction developments with multiple properties (single family homes, condos, etc.)** Those property types, and other exclusive listings that require mandatory submission, **can be included in the application of Statement 8.0 at local discretion.**





# “CLEAR COOPERATION” MLS Statement 8.0

- ▶ **Does the Policy apply to non-active listings?**
- ▶ Yes. Policy Statement 8.0 applies to any listing that is or will be available for cooperation. Pursuant to Policy Statement 8.0, "coming soon" listings displayed or advertised to the public by a listing broker must be submitted to the MLS for cooperation with other participants. MLSs may enact "coming soon" rules providing for delays and restrictions on showings during a "coming soon" status period, ensuring flexibility in participants' listing and marketing abilities, while still meeting the participant's obligations for cooperation.

# “CLEAR COOPERATION”

## MLS Statement 8.0

- ▶ How does 1-Business Day Deadline correspond with MLS Filing Deadlines?
  - ▶ NO. Local MLS’s filing deadline, typically found in Section 1 of the MLS rules, is the amount of time that a broker has to file the listing with the service after receiving all of the appropriate signatures on the listing contract.





## “CLEAR COOPERATION” MLS Statement 8.0

- ▶ Does the Policy require every broker to turn in their listings within 1 business day of taking a listing?
- ▶ No. MLSs have different local rules as to listing turn-in times. If a listing is taken and is not yet ready to be marketed/shown, longer timelines for turn in may apply in local markets. If a listing is marketed to the public, however, the Policy’s 1 business day timeline goes into effect.

## “CLEAR COOPERATION”

MLS Statement 8.0, NAR Handbook on MLS Policy:

- ▶ Does Policy Statement 8.0 require a broker to turn in every listing to the MLS within 24 hours of signing the listing?
- ▶ NO - TWO DIFFERENT ISSUES/DEADLINES:
  - ▶ No. MLSs have local rules as to listing turn-in times. If a listing is taken and is not yet ready to be marketed/shown, longer timelines for turn in may apply in local markets.
  - ▶ If a listing is marketed to the public, however, Policy Statement 8.0's 1 BUSINESS DAY timeline goes into effect.



# “CLEAR COOPERATION” MLS Statement 8.0

If the MLS has established a “Coming Soon” status, or other pre-marketing solution that shares listing data with all MLS participants and subscribers, does that comply with the cooperation requirements of the policy?

YES!

# “CLEAR COOPERATION”

## MLS Statement 8.0, NAR Handbook on MLS Policy:

- ▶ What if the listing isn't ready to be shown? Are “Coming Soon” or “Delayed showing” listings allowed under Policy Statement 8.0?
- ▶ The concept of “Coming Soon” and “Delayed Showing” can be achieved within local MLS. Listings which are truly not yet ready to be shown can be shared with MLS's brokers and agents to create exposure while the property is being prepared for showing.
- ▶ MLSs can also add clarity to the coming soon and delayed showing process by defining specific statuses and showing requirements if these listings are to be included in the MLS. For example, while in Coming Soon status, showings are not allowed until its status is changed to active, and any showings of the listing would immediately trigger that status change.

# “CLEAR COOPERATION”

MLS Statement 8.0, *NAR Handbook on MLS Policy*:

- ▶ DOES THIS PROHIBIT OFFICE EXCLUSIVES?
- ▶ NO. "Office exclusive" listings are an important option for sellers concerned about privacy and wide exposure of their property being for sale. In an office exclusive listing, direct promotion of the listing between the brokers and licensees affiliated with the listing brokerage, and one-to-one promotion between these licensees and their clients, is not considered public advertising.
- ▶ Common examples include divorce situations and celebrity clients. It allows the listing broker to market a property among the brokers and licensees affiliated with the listing brokerage. If office exclusive listings are displayed or advertised to the general public, however, those listings must also be submitted to the MLS for

# “CLEAR COOPERATION” MLS Statement 8.0

DOES POLICY REQUIRE THAT LISTINGS  
BE INCLUDED IN IDX FEEDS?



No. While listings that are displayed on the Internet must be submitted to the MLS and distributed to other MLS participants for cooperation, submitting a listing for cooperation within the MLS does not necessarily require that listing to be included in an MLS's IDX display, if the seller has opted out of all Internet display.

Per MLS rules, participants can work with their listing clients to determine an appropriate marketing plan, taking into account the client's needs and full disclosure of the benefits to market exposure.



## “CLEAR COOPERATION”

MLS Statement 8.0, *NAR Handbook on MLS Policy*:

- ▶ Does 8.0 require listings to be submitted to the MLS, if they are advertised to a select group of brokers outside the listing broker's office?
- ▶ Yes. "Private listing networks" that include more brokers or licensees than those affiliated with the listing brokerage constitute public advertising or display pursuant to Policy Statement 8.0. Listings shared in multi-brokerage networks by participants must be submitted to the MLS for cooperation.

**“CLEAR  
COOPERATION”**  
MLS Statement 8.0,  
*NAR Handbook on  
MLS Policy:*

- ▶ In some market, listing brokers use exempted listing to withhold sold data from the MLS. This can be of concern of particular concern in non-disclosure states, such as NM. Under the new policy, can a listing broker, upon instruction from their seller, withhold sales data?
  - ▶ This is a matter of local discretion. In most MLSs, Participants are required to submit status changes to the service, including the details of a sale and the sales price. However, this does not prevent the MLS from exploring and establishing local options and specific criteria to withhold sales data when requested by the seller (or buyer). MLSs are encouraged to work with local brokers to determine their needs.

# “CLEAR COOPERATION”

## MLS Statement 8.0

How will Policy effect properties not ready to be shown yet and Days on Market calculations?



These are factors that can be determined locally.  
Brokers should discuss with their MLSs the desire to submit properties which are not yet ready for showings in the MLS.



Brokers and MLSs should consider whether a new listing must immediately become active, whether a temporary "coming soon" or "no showings" status is allowed, and when "Days on Market" will begin in these scenarios.

**“CLEAR  
COOPERATION”**  
MLS Statement  
8.0,  
*NAR Handbook  
on MLS Policy:*

- ▶ How do MLSs enforce compliance?
- ▶ Compliance is up to local determination. The policies in the markets previously discussed usually include an escalating process of warnings and fines. Reporting of non-compliance is often taken care of by the marketplace. When listings are publicly marketed, agents and consumers become aware and can report unsubmitted listings by MLS participants to the MLS.

**Has this type  
policy already  
been  
implemented  
any where  
else?**

- ▶ Similar policies have been enacted in some marketplaces. MRED in Illinois has a similar policy in place, as does Bright MLS in Pennsylvania.
- ▶ Northwest MLS in the Seattle area has had a policy disallowing the pre-marketing of properties since 2013. Its intent could be viewed as similar to Policy 8.0 in terms of encouraging greater participation and inventory within the MLS. **Northwest MLS is NOT a REALTOR®-owned MLS**

# ANY FORESEEABLE ISSUES?

- ▶ **ANTITRUST:** At least one national franchise sent a letter to Bright MLS in which the national franchisor's attorney argued that:
  - ▶ new ban runs contrary to anti-trust regulations dating back to the 1970s, citing observations regarding "office exclusive" listings made by the FTC and the DOJ
  - ▶ it would "not be surprised if an action is brought in the near future, either by regulatory agencies or others, seeking to enjoin these new policies."
- ▶ **INSURANCE:** NAR Insurance Policy available to all REALTOR®-owned MLSs as long as the MLS adheres to NAR MLS Model Policies will cover **defense costs** for anti-trust claims made against the MLS; however, it will **NOT** cover any damages awarded to a plaintiff or fines levied by a governmental body for an anti-trust violation.
  - ▶ Consequently, MLSs may wish to explore add'l anti-trust coverage

# MEDIATION - CODE OF ETHICS

---

- ▶ Mediation of Code of Ethics complaints at discretion of local Board
- ▶ Complaints brought by the public or REALTORS® may be mediated.
- ▶ Complaints brought by the GC and complaints alleging a violation of the **PUBLIC TRUST** may NOT be mediated. “Public trust” refers to misappropriation of client or customer funds or property, willful discrimination, or fraud resulting in substantial economic harm.
- ▶ Chair of the PSC and/or the Board President selects one or more ethics mediators to act on behalf of the committee.
- ▶ Initiated in two ways.
  - ▶ filing a written ethics complaint;
  - ▶ through a personal, telephone, or written inquiry or complaint generally alleging potentially unethical conduct but which
    - ▶ is not filed on the appropriate form or
    - ▶ is not specific as to which Article(s) may have been violated.

# MEDIATION - CODE OF ETHICS

---

- ▶ Where a written ethics complaint in appropriate form is received, it's reviewed by GC to determine whether a possible violation occurred or whether complaint should be dismissed
- ▶ Where an informal inquiry or general letter of complaint that does not allege a potential violation of the public trust is received, it will NOT be reviewed by the GC, but will be referred to an ethics mediator.
- ▶ Persons inquiring about the process for filing ethics complaints, as well as REALTORS® will be advised
  - ▶ that ethics mediation is available as an alternative to a formal ethics hearing provided that all parties agree to participate,
  - ▶ that they may decline or withdraw from mediation and have their complaint considered at a formal ethics hearing.



# MEDIATION - CODE OF ETHICS

---

- ▶ When a written ethics complaint in appropriate form is reviewed by GC and the GC concludes that a hearing is warranted, or when a general letter of inquiry or complaint is received, and the matter(s) complained of does not involve a possible violation of the “public trust”, **the materials will be referred to the ethics mediator**
- ▶ If mediator concludes that a potential violation of the **public trust** may have occurred, the mediation process shall be immediately terminated, and the parties shall be advised of their right to pursue a formal ethics complaint; to pursue a complaint with any appropriate governmental or regulatory body; to pursue litigation; or to pursue any other available remedy.

# MEDIATION - CODE OF ETHICS

---

- ▶ Mediation Resolutions can include, but are not limited to:
  - ▶ payment of disputed funds, repairs or restoration of property,
  - ▶ written or oral apology,
  - ▶ acknowledgement of a violation of the Code of Ethics.
- ▶ In cases where a REALTOR® acknowledges that the Code has been violated, that admission may be sufficient to resolve the matter or, alternatively, the parties may agree that discipline should be imposed.
- ▶ Discipline may, **at the agreement of all parties**, include any of the forms of discipline established in the COE and Arbitration Manual and may also include payment of monies to the complainant or to a third party.
- ▶ Parties may agree that complainant will withdraw a complaint or agree not to file a formal, written ethics complaint in return for the respondent's action or acknowledgement. **Any discipline imposed must be agreed to by all of the parties.**

# MEDIATION - CODE OF ETHICS

---

- ▶ Ethics mediators CANNOT refer concerns they have regarding conduct of any party to mediation to GC, to the state real estate licensing authority or to any other regulatory body.
- ▶ Mediators are authorized to refer concerns that the public trust may have been violated to the GC
- ▶ Failure or refusal of respondent to comply with terms of any mutually agreed on resolution shall entitle complaining party to resubmit the original complaint or, where a formal complaint in the appropriate form had not been filed, to file an ethics complaint.
- ▶ The time the matter was originally brought to board or association's attention shall be considered the filing date

# MEDIATION - CODE OF ETHICS



- ▶ The allegations, discussions, and decisions rendered in ethics mediation proceedings are confidential and shall not be reported or published by the board, any member of a tribunal, or any party under any circumstances except those established in the Code of Ethics and Arbitration Manual of the National Association as from time to time amended.

# NEW - CODE OF ETHICS

---

- ▶ COE Training now due every three years, opposed to every two years – beginning Jan. 2022
  - ▶ If taken during current cycle (2019, 2020, 2021) then satisfied for this cycle and new cycle begins January 1, 2022.
- ▶ Learning Objections revised to focus on:
  - ▶ professional conduct
  - ▶ courtesies, business etiquette, and
  - ▶ real-life scenarios.
- ▶ NAR establish COE equivalency training options.

# NEW - CODE OF ETHICS

---

- ▶ Only courses offered through or approved by local, state or NAR will qualify for equivalency option
- ▶ “Microsite” that compiles all available for fulfilling the COE Training requirement, including C2EX, NAR-approved online courses and links to association courses
- ▶ Core Standards to be amended to clarify association’s duties regarding COE training

# NEW - CODE OF ETHICS

---

- ▶ What are options for satisfying the COE Training?
  - ▶ Class through local or state association or online NAR course. Local or state board does not have to conduct session; they can partner with a provider. Also, classes taken where course material was approved by state or local board. Shutting down private-school courses (if not approved by local/state board) because they do NOT meet COE objectives.
- ▶ Can a member satisfy the requirement by taking a course by an approved provider at an association that is not their primary board?
  - ▶ YES
- ▶ What is microsite and when will it be developed?
  - ▶ One-stop shop for members to determine best way to satisfy training requirements. Will be developed by the start of the next training cycle

# NEW - CODE OF ETHICS

---

- ▶ Are local Boards required to review each instructor outline to assure it meets the criteria?
  - ▶ YES! If partnering with a provider, then must review to assure it meets learning objectives.
  - ▶ NAR has partnered with a provider to put together training on the new learning objectives. As soon as complete, NAR will make it available
- ▶ What defines “enforce” in Core Standards?
  - ▶ Enforcing COE requirement: make sure all members have taken COE by time-frame set. If not, they are suspended and given some time to do so, and if they don't get it done by that date, they get terminated.
- ▶ Will associations need to adjust and re-certify their bylaws?
  - ▶ YES. Within 60 days.



# CODE OF ETHICS

---

- ▶ FULL C2EX endorsement for it to meet COE requirement. Just COE won't count.
- ▶ Must **MAINTAIN** C2EX endorsement
- ▶ “Partner” is anyone who local board “approves” because class meets learning objectives. Would want list from provider of everyone who took course (as part of partnership agreement)
- ▶ Class through one association, but not a member of that association, it counts as that REALTORS® requirement

# FRIGHTENING FINDINGS



- ▶ 12 Brands (incl. REMAX, CB, Sotheby's, Century 21)
- ▶ 25 UNDERCOVER TESTERS TRAINED
- ▶ 93 REAL ESTATE AGENTS TESTED
- ▶ 240 HOURS OF MEETINGS SECRETLY RECORDED
- ▶ 5,763 HOUS LISTING ANALYZED
- ▶ A 2-YEAR NEWSDAY INVESTIGATION UNCOVERED WIDESPREAD EVIDENCE OF UNEQUAL TREATMENT BY REAL ESTATE AGENTS ON LONG ISLAND
  - ▶ 19% OF THE TIME AGAINST ASIANS
  - ▶ 39% OF THE TIME AGAINST HISPANICS
  - ▶ 49% OF THE TIME AGAINST BLACKS

# ANALYZED BY EXPERTS IN FAIR HOUSING

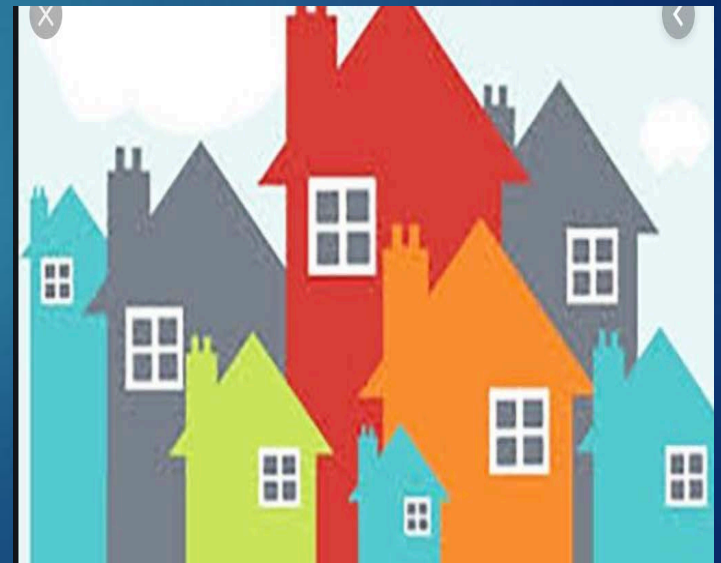
- ▶ Fred Freiber: Co-Founder of Fair Housing Justice Center who lead a national testing program for the DOJ's Civil Rights Division and who has coordinated more than 12,000 fair housing tests



- ▶ Robert Schwemm: Professor of law at University of Kentucky College of Law and author of Housing Discrimination: Law and Litigation, a widely accepted treatise on the subject.

# Evidence of Discrimination

- ▶ Frequently direct white customers towards area with the highest white representations and minority buyers to more integrated areas
- ▶ Avoided business in communities with overwhelmingly minority populations
- ▶ Gave minority testers far less options
- ▶ Refused to provide house listings or home tours to minority testers unless financial qualifications were first established. Not so with white testers.



# TO WHITE TESTERS/NOT TO MINORITIES

---

- ▶ “Follow the schools buses and see the moms that are hanging out on the corners”
- ▶ “In East Hampton..the Hispanic community came in – and they really took over the Springs.”
- ▶ “Be sure to look into the gang violence in the neighborhood for your safety”
- ▶ You don’t want to live there – it a very mixed neighborhood: black, whites, Latinos, Indians, Koreans.”
- ▶ “I’m not going to send you listing in {certain area}unless you just want o walk up the street to buy your crack”

# NAR's Fair Housing Action Plan,

- ▶ Emphasizes
  - ▶ (A)ccountability
  - ▶ (C)ulture Change, and
  - ▶ (T)raining in order to ensure Realtors® are doing everything possible to protect housing rights in America.
- ▶ Work closely with State Associations to ensure that state licensing laws include effective fair-housing training requirements and hold real estate agents accountable to their fair housing obligations;
- ▶ Launch a Public-Service Announcement Campaign that reaffirm NAR's commitment to fair housing, and how consumers can report problems;



# NAR's Fair Housing Action Plan

---

- ▶ Integrate fair housing into all REALTOR® conferences and engagements (to include a fair housing theme throughout the May Midyear Meeting);
- ▶ Explore the creation of a voluntary self-testing program, in partnership with a fair housing organization, as a resource for brokers and others who want confidential reports on agent practices so they can address problems;
- ▶ Create more robust fair housing education, including unconscious-bias training, and education on how the actions of REALTORS® shape communities.

# NAR's Fair Housing Action Plan

- ▶ Conduct a national study to determine what factors motivate discrimination in sales market
- ▶ Profile leaders who exemplify the best fair housing practices and workplace diversity
- ▶ Develop materials to help REALTORS® provide consumers with information on schools that avoids fair housing pitfalls.







034 x 864

# HOT LINE ISSUES

# GROSS RECEIPTS TAX

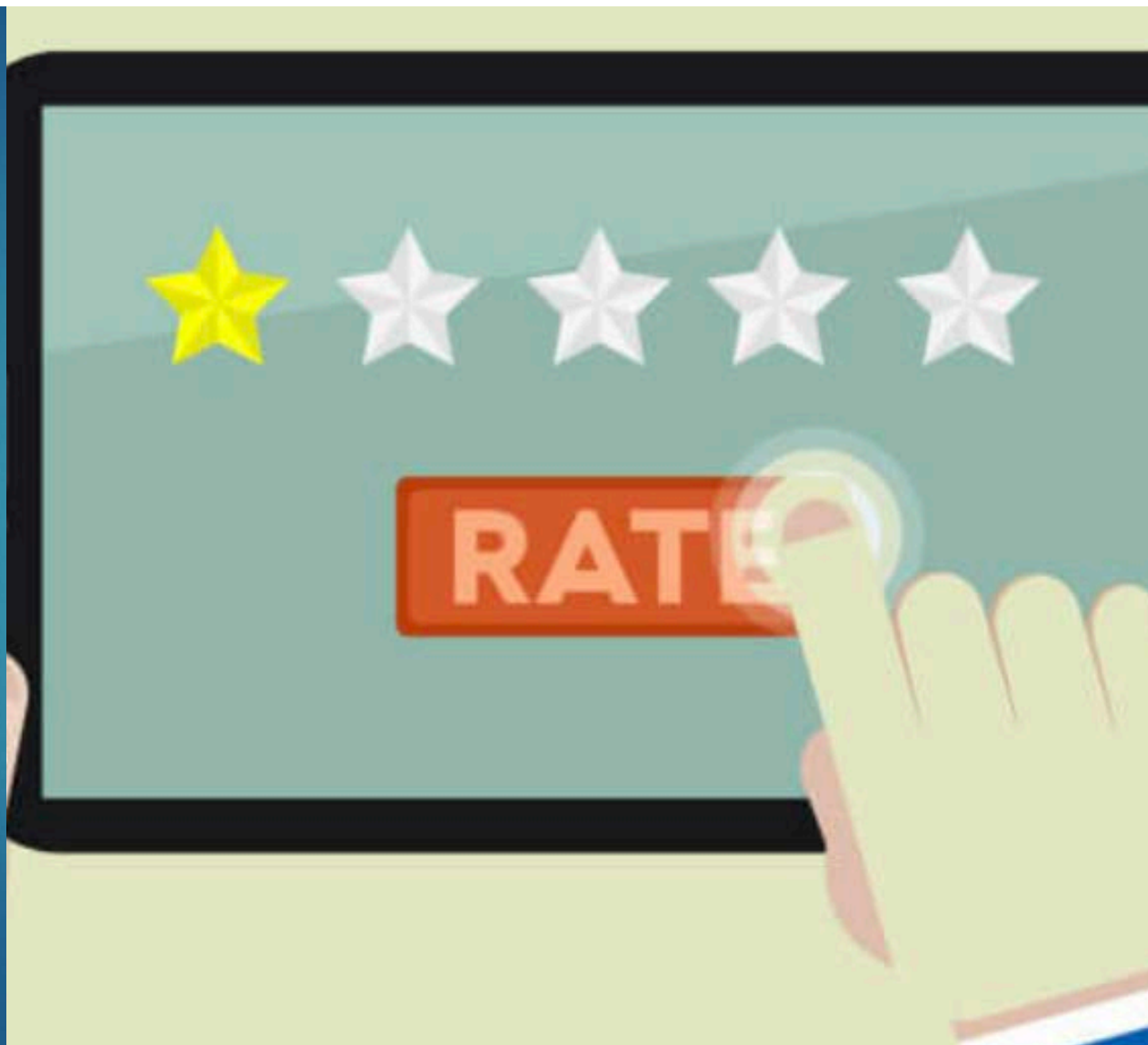
## ▶ REFERRAL FEES

- ▶ ACCORDING TO TAX AND REV. – TWO DIFFERENT TRANSACTIONS
- ▶ MEANS TAX ON COMMISSION AND TAX ON REFERRAL
- ▶ BUT ONLY COLLECT ONE TAX
- ▶ SO SOMEONE IS EATING SECOND GRT



# PAYING FOR REVIEWS

- ▶ COMPENSATING FOR BROKER REVIEWS – “LIKES”
  - ▶ MAY BE VIOLATING GENERAL ADVERTISING RULES, UNLESS...
  - ▶ VIOLATING FTC RULES UNLESS COMPENSATION IS DISCLOSED



# BUYING/SELLING/RENTING OUTSIDE OF YOUR BROKERAGE

## ❖ TO CONSIDER

❖ INSURANCE – DO YOU HAVE IT?

❖ LIKELY “NO” – CHECK WITH CARRIER(S)

❖ YOUR LICENSE – WILL IT BE IMPACTED?

❖ MAYBE

❖ LIABILITY FOR BROKERAGE

❖ MAYBE

***Vihstadt vs.***

***NM Real Estate Commission - 1988***

- ▶ Because Vihstadt was not acting as a real estate broker during the sale of the real estate contract, we conclude that the Commission lacked jurisdiction.

# **Fred W. Poorbaugh vs. New Mexico Real Estate Commission**

- ▶ Section 67-24-29 provides that the Commission can revoke a broker's license if, while engaged in any activity **as a broker**, he is guilty of any of the acts enumerated in the section.
- ▶ We hold that under the NM statute if Poorbaugh ***represented to either the buyer or seller that he was acting as a broker***, the Commission has jurisdiction.
- ▶ Whether Poorbaugh made such a representation is a factual determination to be made by the trier of fact.
- ▶ **A licensed broker has the burden of showing that there is no possibility of misunderstanding or confusion as to his status when he purports to act for himself.**

# 16.61.32.8. Advertisements

- ▶ A broker advertising to, sell, or exchange real property which the broker owns or partially owns shall indicate within such advertising, including signs, that the broker owns the real property.
- ▶ Disclosure of such ownership must also be made in the listing contract, purchase agreement, or exchange agreement.
- ▶ If an owner-broker engages a third party broker to list the owner-broker's property, the third party broker is not required to make an owner-broker disclosure in advertising and signs, but such disclosure is required in the listing contract, purchase agreement or exchange agreement.
- ▶ A broker advertising to rent or lease real property which the broker owns or partially owns is not required to disclose such ownership in advertising and signs, but is required to make such disclosure in rental or lease agreements.

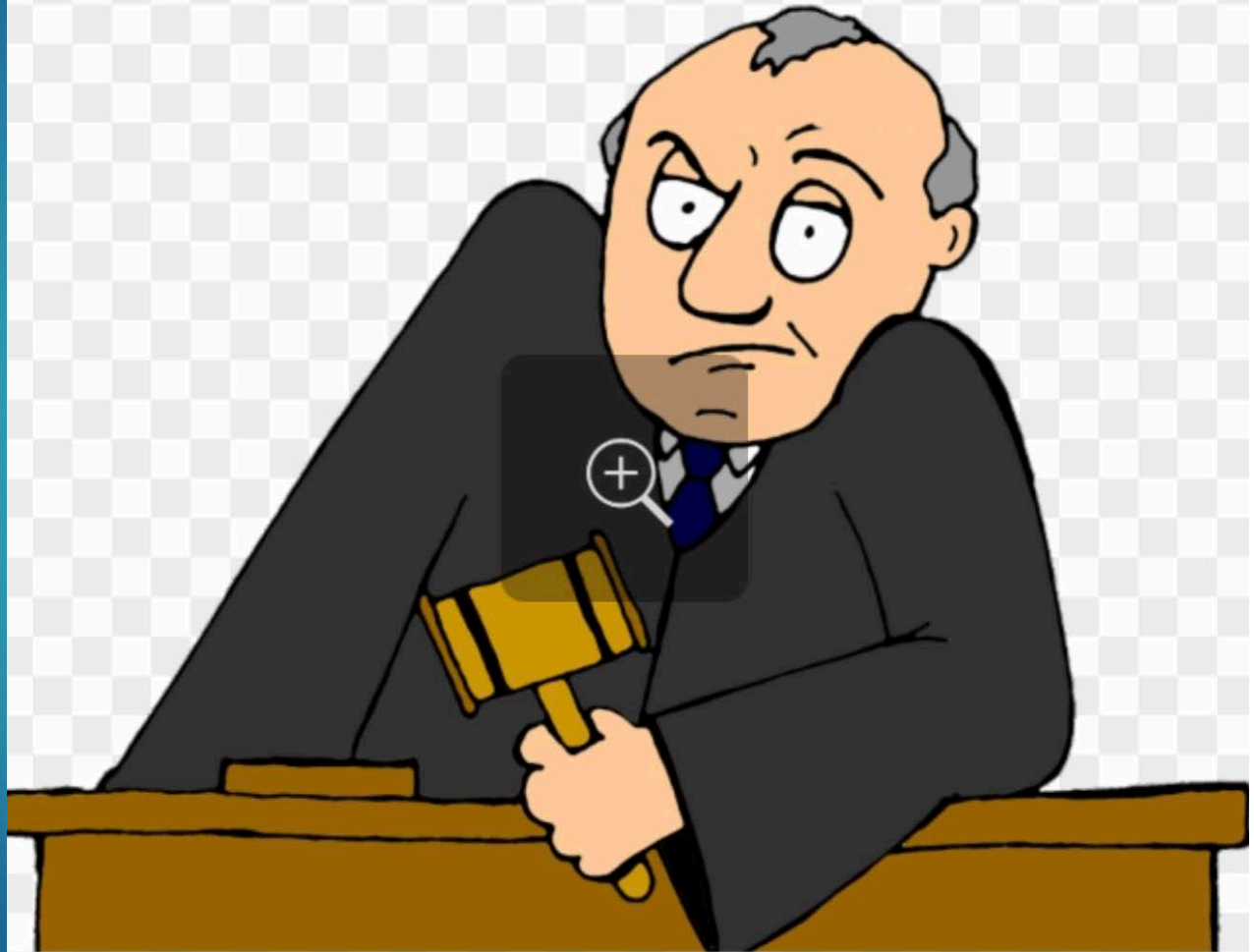
# BLURRING THE LINES



- ▶ COULD CREATE JURISDICTION FOR REC AND LIABILITY FOR BROKERAGE
  - ▶ HANDING OUT BUSINESS CARD
  - ▶ VOICEMAIL WITH BROKERAGE NAME
  - ▶ USING FORMS WITH BROKER NAME
  - ▶ DROPPING PAPERWORK/PAYMENTS OFF WITH BROKERAGE
  - ▶ IDENTIFYING AB/BROKERAGE ON PAPERWORK/CONTRACTS



# CASE LAW



# NEGLIGENT REFERRAL

- ▶ Buyer and Seller are under contract. During the inspection phase, Buyer's home inspector identifies problems with the roof and asks Seller to repair.
- ▶ Listing Broker Dave recommends two roofers. Seller gets bids from both and chooses the lesser expensive of the two.
- ▶ In repairing the roof, the roofer uses a torch, and in so doing, sets the house on fire. House burns to the ground.
- ▶ Value of the destroyed improvements (the house): \$280,000.
- ▶ Good news: homeowner's insurance steps in and covers Seller's loss.
- ▶ Bad news: insurance companies have something called "subrogation rights". This means that if some third party (such as the roofer) caused the damages, the insurance company has the right to pursue those damages against the roofer. And this insurance company does.

# NEGLIGENT REFERRAL

- ▶ But in this case, roofer is not licensed, has no insurance, bond or money.
- ▶ Insurance company looks to AB who referred this roofer to the Seller and to QB
- ▶ Claim against AB is “negligent referral” and the allegation is that AB failed to do his due diligence to confirm that the roofer had the proper licensure and insurance for the job he was doing as required by New Mexico law.
- ▶ Claim against QB? Failure to Supervise? Failure to properly train AB in the art of referring?

# BUT WAIT! IT GETS BETTER!

- ▶ AB and his QB call their E and O Insurance Company and that company denies the brokers' claims citing to an exclusion for "claims alleging, arising from or related to the physical injury to, destruction or loss of use of tangible property."
- ▶ In short, **NO** E and O Coverage for either broker.
- ▶ Business insurance has kicked in (for now) to defend. Initially, only defended QB, now defending AB
- ▶ NAR Testimony - 183 A BROKER WILL DO FOR YOU!

# NEGLIGENT REFERRAL

- ▶ Smaller town in southern New Mexico with a shortage of home inspectors.
- ▶ Listing Broker gives the Buyer the name of ONE home inspector.
- ▶ Buyer, relying on home inspection report, purchases house.
- ▶ After closing, Buyer finds many problems with the house that the home inspector just “missed”.
- ▶ The cost of repair: \$30,000.
- ▶ Buyer brings suit against inspector who has no insurance and no money, so Buyer joins Broker in the lawsuit.

# NEGLIGENT REFERRAL

- ▶ If you are referring home inspectors, handymen, contractors, lenders, title companies, attorneys, surveyors or any third-party service providers, you are at risk of being sued for negligent referral.
- ▶ To be liable for negligent referral, the judge or jury must find that broker acted **negligently** in referring that vendor. In other words, just because vendor caused harm to the consumer does not in itself create liability for broker; must prove more.
- ▶ Evidence that broker acted negligently may include:
  - ▶ fact that vendor did not possess license, certification, insurance and/or bonding required by local, state or federal law for the job to be done . Other evidence of negligence may b
  - ▶ fact that vendor had multiple lawsuits and or complaints filed against him/her for work performed for other consumers
  - ▶ broker was aware of other dissatisfied consumers, even if complaints/lawsuits were not formally filed.

# NEGLIGENT REFERRAL

- January 1, 2019, the NMREC's new Vendor Certification Rule (New VC Rule) took effect, which requires **brokers** "**hiring**" third-party vendors to only hire vendors who are licensed, certified, insured and bonded as required by law.
- While New VC Rule is found in the Property Management Section of the NMREC Rules, it is not limited to property managers (as the term "brokers", not "property managers", was used in the New VC Rule).
- Term "hiring" is not defined in the rules, but the general definition (to which courts will typically defer if there is no definition in the rule/statute) is to "engage the personal service of...for a set sum." Arguably, buyer and sellers' brokers do not typically "hire" vendors.

# NEGLIGENT REFERRAL



- ▶ May make referrals/recommendations and sometimes even set up appointments, but it is the buyer or seller who chooses the vendor and pays the vendor (in most cases), so (arguably) it is the buyer or seller who hires the vendor and the new rule does not apply in these-type situations.
- ▶ Applicability of the New VC Rule to these type scenarios is (arguably) irrelevant, because the cause of action of negligent referral stems from common law (case law) which long pre-dates the New VC Rule.
- ▶ Historically, most jurisdictions have only recognized claims for negligent referral in the area of medical malpractice; however, the claim is being extended to attorneys and real estate brokers.



# MITIGATING YOUR RISK:

- NMAR has taken steps to assist brokers in avoiding these type law suits. First, Paragraph 15 of the LA, (1106) and Paragraph 23 of PA (2104) address this:

***SERVICE PROVIDER RECOMMENDATIONS.*** *If Broker(s) recommends a builder, contractor, escrow company, title company, pest control service, appraiser, lender, home inspection company or home warranty company or any other person or entity to Seller or Buyer for any purpose, such recommendation shall be independently investigated and evaluated by Seller or Buyer, who hereby acknowledges that any decision to enter into any contractual arrangement with any such person or entity recommended by Broker shall be based solely upon such independent investigation and evaluation.*

- ▶ Secondly, to assist brokers in determining if a particular home inspector, handyman or contractor has the proper credentials and/or insurance for job for which they are being referred, NMAR has created the Vendor Certification, Form 6107.

# MITIGATING YOUR RISK:

- ▶ **Home Inspector Trade Associations:** Most home inspectors who belong to one of the two major Home inspector Trade Associations, the American Society of Home Inspectors (ASHI) and the International Association of Home Inspectors (InterNASHI) will have E and O insurance. Though not required by either organization, it is promoted. Both organizations require continuing education hours and testing.
- ▶ According to InterNASHI website, InterNASHI has a program, which will indemnify any licensed real estate agent in an amount up to \$10,000 if a third party successfully sues the agent for negligent referral of an InterNACHI inspector. According to InterNASHI's website, this protection is offered at no cost to agents who register. <https://www.nachi.org/agent-indemnification.htm>.



# ADDITIONAL THOUGHTS

- ▶ **Home Inspector Licensing:** Effective January 1, 2020
- ▶ The Act requires
  - ▶ all Home Inspectors to be licensed and insured
  - ▶ each home inspector pass a nationally recognized test and take continuing education
- ▶ **Radon:**
  - ▶ Radon mitigation companies must be licensed as general contractors if they will be cutting, coring, boring, or drilling through concrete
  - ▶ A high majority of homes requiring Radon mitigation work require this type of work to successfully complete a Radon mitigation installation.
  - ▶ Additional information regarding Radon testing and mitigation, as well as, local certified companies that provide these services can be found [HERE](#)
  - ▶ <https://nrpp.info/pro-search>

# DON'T MAKE REFERRALS

- ▶ Especially when it comes to inspections and/or repairs on the property!
- ▶ The Internet is ripe with websites where consumers can research contractors and vendors for any project. **Suggest that the consumer conduct their own research!** – **IF YOU CAN'T RESIST.....**
- ▶ Always provide the name of multiple providers;
- ▶ Confirm that vendor being referred has the proper licensure and insurances for the job for which he/she is being referred; [New Mexico Courts](#)
- ▶ Check with the accrediting agency and the for complaints filed against the vendor;
- ▶ Check with your insurance company to determine if you have coverage for negligent referrals generally, but more specifically, coverage for negligent referral in the context of property damage.

# ESCROW COMPANIES

- GOVERNED BY NM ESCROW ACT
- FINANCIAL INSTITUTIONS DIVISION (FID)
- INVESTIGATIONS BY FID – LAST 5 YEARS
  - ROSWELL (CURRENTLY)
  - FARMINGTON - CLOSED
  - DEMING - CLOSED
- REQUIRED BY ESCROW ACT – SURETY BOND - \$100,000

# ESCROW COMPANIES

- OTHER INSURANCE – **VOLUNTARY!** FOR EXAMPLE:
  - **General Liability** (Injury To Other People or Property) - \$4,000,000
  - **Professional Liability** – Professional Advice and Service - \$1,000,000
  - **Crime** – (Including, **Employee Theft**) - \$1,000,000
  - **Employment Practices** – (Wrongful Termination, Sexual Harassment Discrimination) - \$1,000,000
  - **Cyber Liability** - \$1,000,000

INFORMATION  
COURTESY OF SECURITY ESCROW  
ALBUQUERQUE, NM  
NM'S OLDEST ESCROW COMPANY





# **NM REAL ESTATE COMMISSION PROPOSED RULE CHANGES**

# REAL ESTATE COMMISSION PROPOSED RULE CHANGES

- Consider allowing associate brokers to earn continuing education credit for the Qualifying Broker Refresher Course. The course is currently required of qualifying brokers as a condition of license renewal or reinstatement of qualifying broker. However, because the course is a qualifying broker requirement as opposed to a continuing education requirement, it is a no-credit course.
- Resolve ambiguities in the Transaction Coordinator rule.
- Review and revise qualifying broker supervisory requirements.



## REAL ESTATE COMMISSION PROPOSED RULE CHANGES

- Move seller and buyer broker disclosure language from the Real Estate Advertising rule to the Brokerage Relationships and Broker Duties rule.
- Amend the definition of property management to cover brokers managing Homeowners Associations.
- Define the term “residential” in the context of residential property management.
- Consider a rule change allowing brokers to carry over continuing education credit hours to a subsequent licensing cycle.

# REAL ESTATE COMMISSION PROPOSED RULE CHANGES

- Add language that would close a loophole in Part 13 that currently allows brokers to earn continuing education credit for attending their own disciplinary hearing.
- Restore previously existing language to Part 19 that would require written disclosure to all brokers involved in a transaction that there is a limited service broker involved in the transaction.
- Remove language from Part 19 that requires brokers to disclose all written agreements that a broker or brokerage has in a transaction.

# REAL ESTATE COMMISSION PROPOSED RULE CHANGES

- What the rule language would look like if the salesperson exam were substituted for the broker exam as the entry-level exam for associate broker candidates in Part 3.
- Language that would require property managers to take the Uniform Owner Resident Relations Act only once upon the execution of a Property Management Declaration instead of during every three-year renewal cycle.
- A rule change that would amend Part 13 to expand from 10 hours to 12 hours the continuing education credit that an approved instructor can earn by teaching Commission approved courses. This change would take into account those approved Core Course instructors who teach the 4-hour Core Course at least three times during their renewal cycle.

# REAL ESTATE COMMISSION PROPOSED RULE CHANGES



- Clarifying that the Supervisory Affidavit for QBs is actually an acknowledgment of QB responsibilities, including supervisory responsibilities in Part. 3.
- Adding language to Part 32 to require that a broker buying property for their own portfolio disclose that they are a broker.



# NMAR LEGAL HOT LINE

(505) 821-1583 (ABQ AREA)

OR

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

[LEGALHOTLINE@NMREALTOR.COM](mailto:LEGALHOTLINE@NMREALTOR.COM)



MONDAY – FRIDAY  
9:00 TO 1:00 PM





*THANK  
you!*