

## Advertising under the new state regulations

By S. Anthony Gatto, Esq., NYSAR Legal Counsel

Effective January 2, 2014, new advertising regulations will take effect for real estate brokers and those licensees associated with the broker. Licensees should be aware that the new regulations do not differ that much from the regulations and guidelines currently in place. New items such as teams, logos and Internet advertising were included in the new regulations since such items were not previously addressed. This article will provide an overview of the new advertising regulations and information as to how advertisements will be evaluated by the Department of State (DOS) in the event a complaint is made.

While reading this article, licensees should keep in mind that the DOS, when evaluating advertisements, will look at the advertisement as a whole and whether the advertisement is

dishonest and/or misleading [RPL §441-c(1)].

You may also notice there is no regulation requiring that the broker's name be the same size or larger than that of the licensee or team. Just because the regulations are silent as to "size" issues, it does not mean that the broker's name can be so small that it is only viewable by using a magnifying glass. While a broker's name (or logo) does not have to be larger than that of the licensee or team, the broker's name (or logo) should be easily identifiable by a member of the public. In other words, if a person of average intelligence were to be viewing the advertisement, could that person determine who the broker is without having to squint or try to find the broker's name in some other way.

### New York News

A good rule of thumb to use when determining if the broker's name (or logo) is large enough is to base it on the National Association of REALTORS® Code of Ethics, Article 12, Standard of Practice 12-5. This standard requires that all advertisements identify the REALTORS® firm in a "reasonable and readily apparent manner." Furthermore, the DOS will review the entire advertisement and if it appears the licensee or team is attempting to downplay or "camouflage" the broker's name (or logo), it will most likely result in a violation. In many instances, a licensee should use common sense when determining if an advertisement complies with the regulation. Nothing in the regulations prevents a broker from requiring associated licensees and teams to have the

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## New York State Department of State cites unlicensed property manager

By S. Anthony Gatto, Esq., NYSAR Legal Counsel

In the case of the New York State Department of State v. Nicholas Masterpol, Jr., the issue of licensure as a broker and operating a property management company is addressed. At the time of the alleged violation, Masterpol was licensed with Coldwell Banker Prime Properties. At the same time, Masterpol was also the president of Integrity Property Services, Inc. (Integrity), a company that provided property management services. Integrity was not a licensed brokerage at any time.

In May, 2009, Integrity, through Masterpol, entered into an agreement with Biagio LaRocca to manage and maintain his four-family home in Syracuse. The agreement was for one year and paid Integrity \$50 per unit, per

month and automatically renewed each year unless terminated. All other monies collected were to be forwarded to LaRocca's daughter except for expenditures under \$500 made to contractors for maintenance.

Integrity was terminated as property manager in April 2010 by Germain & Germain (Germain), LaRocca's attorney. LaRocca's daughter alleged that Integrity failed to turn over rents, withheld money and was paid for services not covered under the agreement. She requested a full accounting and receipts for all deductions made to the rents that were collected by Integrity. She also demanded the keys and all paperwork be returned to her within one week or she would file a complaint.

A complaint was filed against Masterpol and Masterpol had attempted to provide an accounting of the monies through his attorney Robert J. Tisdell (Tisdell). There were issues with the accounting provided and Masterpol alleged the property was in such disrepair that there were code violations and 50-percent vacancy. LaRocca's daughter also complained that Masterpol was charging too much for evictions or repairs to the property.

The DOS conducted an investigation and Masterpol did not cooperate. The DOS found that neither Integrity nor Masterpol were licensed as a broker while performing licensed activities as a property manager. Property managers that do more than pro-

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## Advertising continued from page 1

broker's name appear larger (or some other permitted size ratio) than that of the licensee or team. REALTORS® should also be aware that Article 12 of the NAR Code of Ethics sets forth requirements in addition to those contained in the new advertising regulations.

### What is an advertisement?

According to the definition provided in the new regulations, an advertisement is any promotion and solicitation related to licensed real estate activity, including, but not limited to, advertising via mail, telephone, websites, email, electronic bulletin boards, business cards, signs, billboards and flyers. In other words, any activity taken by a licensee for the purpose of promoting a licensed activity should be considered an advertisement. However, commentary made by a duly licensed real estate salesperson, real estate associate broker or real estate broker that is not related to promoting licensed real estate activity is not considered to be an advertisement.

### Who can place an advertisement?

Only a real estate broker is permitted to place or cause to be published advertisements related to the sale or lease of property. Advertisements placed or caused to be published by an associate real estate broker, a real estate salesperson or a team for the sale or lease of property listed with or represented by a real estate broker are not permitted except where the property is listed with or represented by the real estate broker with whom the associate real estate broker, real estate salesperson or team placing the ad is associated and said real estate broker approved placement of the advertisement [19 NYCRR§175.25(b)(1)].

Contrary to what many licensees believe, brokers were always required to approve advertisements and are the only entity permitted to place an advertisement. As a licensee you operate under the broker's license. You have no right to promote yourself without the broker's permission.

**Compliant:** This print advertisement complies with all regulatory requirements.

## Galt Gets You to Sold!



## Jonathon "Jon" Galt

Licensed Real Estate Salesperson  
518-555-2112 (o) 518-555-2121(c)  
jgalt@spindriftrealty.com



**SPINDRIFT REALTY**  
15 Main Street  
Caravan, NY 12345



**Barchetta - \$305,000 - MLS #12345**

Beautifully landscaped with a recently updated kitchen with granite countertops, this charming home has 3 bedrooms including a modern master suite, 2 full baths, 2-car garage and deck overlooking a 1/2-acre fenced well manicured yard. The spacious family room features brick fireplace with granite mantel.

**Non-compliant:** This print advertisement example violates 19 NYCRR§175.25 c(1) of the advertising regulations by not identifying the broker.

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Permission to place an advertisement can be given by the broker in many different ways without violating the advertising regulations. Brokers may require all advertisements placed by a licensee to be reviewed and approved by the broker. Other brokers may draft an office policy setting forth specific criteria an advertisement must contain. The office policy can establish a number of items such as size requirements, specific templates that must be used or a number of other specific items required by the broker. Licensees do not have the right to advertise themselves without obtaining permission from their broker first. This includes, but is not limited to, webpages/Internet advertising, social media pages and traditional print advertising.

### Who can authorize an advertisement of real property?

No property shall be advertised unless the real estate broker has obtained authorization for such advertisement from the owner of the property [19 NYCRR§175.25(b)(2)(a)]. The authorization is not required to be in writing. Real estate brokers shall not advertise property that is subject to an exclusive listing held by another real estate broker without the permission of the listing broker [19 NYCRR§175.25(b)(2)(b)]. Displaying property via an MLS IDX feed is permitted if done pursuant to the rules of the MLS. MLS rules provide all broker members/subscribers with “permission” to utilize the IDX feed by virtue of their membership. Licensees should not “cut and paste” specific properties listed with other brokers. Such a practice absent that broker’s consent is a violation of the advertising regulations.

Licensees are also prohibited from using or reproducing photographs of properties unless they have permission from the copyright holder of the photographs. This includes photos found on the MLS, Trulia, Zillow, Google Earth/Google Maps, and any other medium where photographs of properties are displayed. If you did not hire a photographer, take the photographs yourself or were given permission by the taker or holder, you are in violation of both the advertising regulations and copyright law. Damages for violating copyright law range from \$750 to \$30,000, and could be as much as \$150,000



**SPINDRIFT REALTY**  
**Jonathon “Jon” Galt**  
 Licensed Real Estate Salesperson  
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 SPINDRIFT REALTY  
 15 Main Street, Caravan, NY 12345  
 518-555-2112 (o) 518-555-2121(c)  
 www.spindriftrealty.com



**Compliant:** The business card complies with d(2).



**SPINDRIFT REALTY**  
**Jon Galt**  
 Real Estate Agent  
 jgalt@spindriftrealty.com  
 SPINDRIFT REALTY  
 Caravan, NY 12345  
 www.spindriftrealty.com



**Non-Compliant:** This example of a business card violates: c(3) by using a nickname without the full name; c(4) for not listing the proper license type; and d(2) for no address and phone number.

if the court finds the violation to be willful. If a seller is going to provide photographs of their home for use in advertising, please inquire whether the seller took the photographs or obtained them in some other way. If the photographs were not taken by the seller, you must ascertain whether the seller can provide you with permission to use the photographs.

### Generally, what must advertisements contain?

All advertisements shall indicate that the advertiser is a real estate broker or provide the name of the real estate broker or real estate brokerage and either: (i) the full address of the real estate broker or real estate brokerage or, (ii) the telephone number of the real estate broker or brokerage [19 NYCRR§175.25(c)(1)]. Licensees are required to advertise using the name under which the individual is licensed (you can only advertise your name as it appears on your real estate license). A nickname may be used in an advertisement provided that the full-licensed name is listed clearly and conspicuously [19 NYCRR§175.25(c)(3)].

Advertisements may contain the name of associated licensees as well. If an associated licensee utilizes a title in conjunction with their name, they must correctly and accurately state the type of license held with

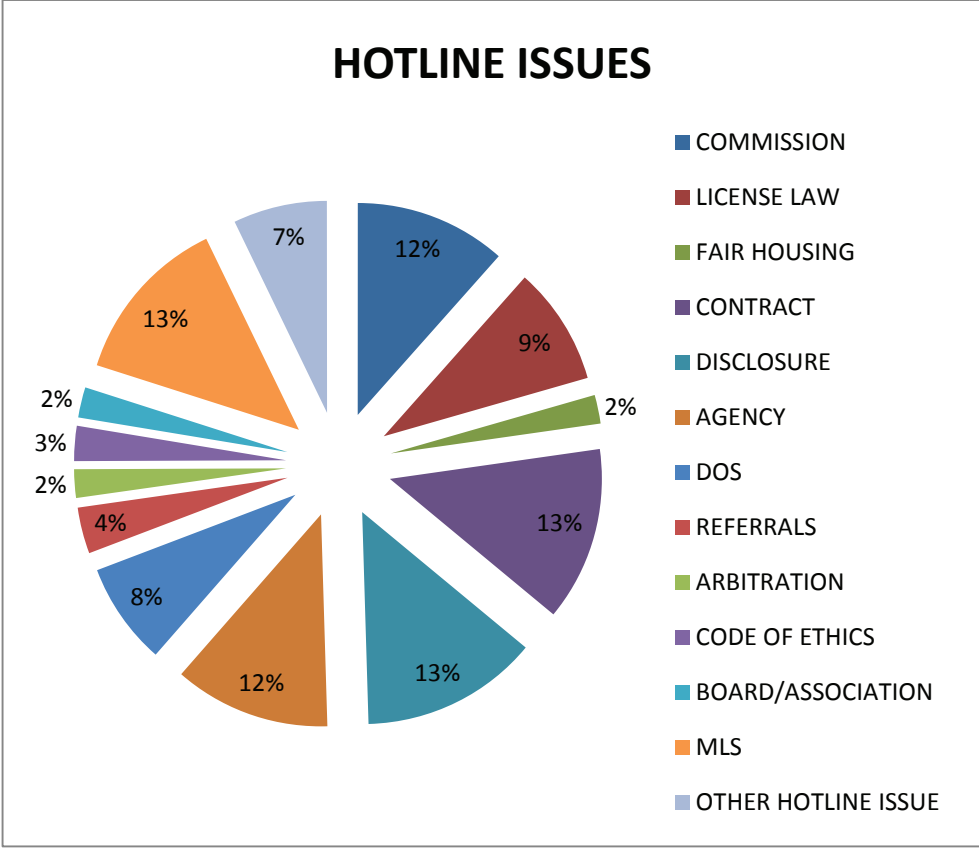
the DOS (real estate broker, associate real estate broker or real estate salesperson). Licensees may abbreviate the type of license held, provided that such abbreviation is not misleading. The use of the titles “sales associate,” “licensed sales agent” or simply “broker” is prohibited. Real estate brokers, associate real estate brokers or real estate salespersons who have additional titles or designations are permitted to advertise such titles or designations [19 NYCRR§175.25(c)(4)].

Logos of licensees or teams are also permitted. Logos must not be misleading or deceptive and should not infringe on another broker, licensee or team logo. When utilizing logos, it is recommended if the broker also has a logo, it should also appear in the advertisement rather than merely having the broker’s name appear in print [19 NYCRR§175.25(c)(8)].

A real estate broker, associate broker, real estate salesperson or team may provide telephone numbers other than that of the brokerage in an advertisement, provided that the advertisement clearly identifies the type of such other telephone number as desk, home, cell phone or otherwise [19 NYCRR§175.25(c)(7)].

Advertisements shall include an honest and accurate description of the property to be  
*See Advertising, page 5*

# NYSAR Legal Hotline call report first quarter 2013



ISSUES		
COMMISSION	95	12%
LICENSE LAW	74	9%
FAIR HOUSING	18	2%
CONTRACT	109	13%
DISCLOSURE	111	14%
AGENCY	98	12%
DOS	64	8%
REFERRALS	29	4%
ARBITRATION	18	2%
CODE OF ETHICS	22	3%
BOARD/ASSOCIATION	19	2%
MLS	106	13%
OTHER HOTLINE ISSUE	59	7%
TOTAL ISSUES .....	822	

**The NYSAR Legal Hotline is available to members  
by calling 518-436-9727 Monday through Friday from 9 a.m. to 3 p.m.**



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sold or leased. All advertisements that state the advertised property is in the vicinity of a geographical area or territorial subdivision shall include as part of such advertisement the name of the geographical area or territorial subdivision in which such property is actually located. Use by real estate brokers, associate real estate brokers and real estate salespersons of a name to describe an area that would be misleading to the public is prohibited [19 NYCRR§175.25(c)(9)]. You must identify the actual geographic location of the property regardless of the seller's demands.

Additional information may be included in advertisements such as the telephone number of the licensee so long as the type of phone number is indicated (cell, home, etc.). Additional contact information such as a post office box is also permitted. Brokers are also permitted to use their residence as a home office as long it is licensed as an office or branch office with the DOS as well as complying with local zoning laws.

**Exceptions to the general rule**

Some types of advertisements have requirements that differ from those set forth above. These exemptions are usually due to the nature of the advertisement or the medium used for advertisements. The different requirements apply to classified advertisements, business cards, web-based advertising, email and for sale signs.

Classified and multi-property advertisements shall indicate that the advertiser is a real estate broker or brokerage or provide the name of the real estate broker or real estate brokerage. Classified and multi-property advertisements may omit the license type of any associate real estate broker or real estate salesperson named in the advertisement [19 NYCRR§175.25(d)(1)]. It should be noted that a "classified" advertisement is one where there is a cost associated for every letter, word or line and complying with the advertising regulations would be cost prohibitive. Classified advertisements refer to

*See Advertising, page 6*

**Compliant:** This team print advertisement complies with the regulations.

**The Dagny Taggart Team: Experts in Sold!**



Jonathon "Jon" Galt

of the **DAGNY TAGGART TEAM**  
 Licensed Real Estate Salesperson  
 518-555-2112 (o) 518-555-2121(c)  
 jgalt@spindriftrealty.com



**SPINDRIFT REALTY**  
 15 Main Street  
 Caravan, NY 12345



**Barchetta - \$305,000 - MLS #12345**

Beautifully landscaped with a recently updated kitchen with granite countertops, this charming home has 3 bedrooms including a modern master suite, 2 full baths, 2-car garage and deck overlooking a 1/2-acre fenced well manicured yard. The spacious family room features brick fireplace with granite mantel.

**Non-compliant:** This example of a team advertisement does not comply because it violates 19 NYCRR§175.25 c(1) by not identifying the broker and the "team name" provision of 19 NYCRR§175.25 e(1) by not including "at/of Spindrift Realty." This ad also violates 19 NYCRR§175.25 c(9) by not identifying the actual geographic area the property is located in.

**The Taggart Team: Experts in Sold!**



Jonathon "Jon" Galt

of the **TAGGART TEAM**  
 Licensed Real Estate Salesperson  
 518-555-2112 (o) 518-555-2121(c)  
 jgalt@spindriftrealty.com



**Barchetta Area - \$305,000 - MLS#12345**

Beautifully landscaped with a recently updated kitchen with granite countertops, this charming home has 3 bedrooms including a modern master suite, 2 full baths, 2-car garage and deck overlooking a 1/2-acre fenced well manicured yard. The spacious family room features brick fireplace with granite mantel.

print media (newspapers) and are not online services (Craigslist and other online sites).

Business cards must contain the business address of the licensee and the name of the real estate broker or real estate brokerage with whom the associate real estate broker or real estate salesperson is associated. All business cards must also contain the office telephone number for the associate real estate broker, real estate salesperson or team [19 NYCRR§175.25(d)(2)]. Licensees are not required to put their licensed status on a business card. However, if a licensee is going to use any other title or designation, their licensed status should be included.

Websites created and maintained by licensees and teams are permitted so long as the broker approves the website. The broker would also be responsible for supervision of the content contained in the website. “Created and maintained” refers to the ability of the licensee or team to control what appears on the website. This may be done directly or through a third party under the direction of the licensee or team.

Every page of such a website shall include the information required by these rules and regulations. In addition, a link to the broker or brokerage website with whom the associate broker, salesperson or team is associated is required on the homepage of the associate broker, salesperson or team website unless the broker or brokerage does not have a website [19 NYCRR§175.25(d)(3)(b)]. Licensees and teams should not minimize or make the broker’s information difficult to see. Placing the broker’s information in the footer of a webpage in a small font, in a color that blends in with the background or requires scrolling down the webpage is not recommended. Such actions may be deemed dishonest and/or misleading, subjecting the licensee and brokerage to discipline by the DOS.

Social media sites, although not technically a “webpage,” also fall under the advertising regulations. Licensees utilizing social media sites must indicate that the advertiser is a

real estate broker or provide the name of the real estate broker or real estate brokerage and either: (i) the full address of the real estate broker or real estate brokerage or, (ii) the telephone number of the real estate broker or brokerage. This can be done on the individual or team home page. If you are using your personal social media site for advertising purposes, it will be subject to the regulations.

In an initial email to a member of the public, a licensee must indicate that the advertiser is a real estate broker or provide the name of the real estate broker or real estate brokerage and either: (i) the full address of the real estate broker or real estate brokerage or, (ii) the telephone number of the real estate broker or brokerage. Such information may be omitted from subsequent email communications to the same recipient.

For sale signs are not required to contain the same information as other advertisements. Unless prohibited by local law, any signage placed upon a property listed for sale or lease must identify the representative broker or brokerage. Signs are not required to include the address or phone number of the broker [19 NYCRR§175.25(d)(5)]. If a licensee is using a directional sign for open houses or other licensed activity, the directional sign is not required to include the name, address or telephone number of the broker. If the licensee includes their name (or the team name) on the directional sign, then the name of the broker must also appear.

### What about teams?

Team names shall either: (i) include the full licensed name of the real estate brokers, associate brokers or real estate salespersons who are part of said team, or (ii) if the names are not included, the team name must be immediately followed by “at/of [full name of the broker/brokerage].” Team names shall use the term “team.” The use of any other terms besides “team,” such as “associate,” “realty” or “group” is prohibited. The use of the name of a non-licensed individual in a team name is prohibited. For 12 months after the adoption

of this regulation, teams that have changed their name to comply with this provision shall be entitled to state in advertisements under their new name that they were “formerly known as” their prior team name [19 NYCRR§175.25(e)(1)]. If any unlicensed individuals are named in advertising for a team, the advertisement must clearly and conspicuously state which individuals are real estate licensees and which ones are not [19 NYCRR§175.25(e)(2)].

Team names should not be misleading or make it appear as if the team is a stand-alone brokerage. Teams are prohibited from entering into agreements with members of the public. When presenting listing agreements, disclosure forms and other items to a member of the public, the individual licensee’s name should appear on those documents, not the team’s name. A team is not a licensed entity and is prohibited from performing any licensed activity under the team name. Advertisements placed by a team must not be done in such a manner where there is confusion between who the team is and who the broker is.

### Advertising properties not listed with the broker

Any advertisement that references or includes information about a property that is not listed with the advertising broker or was not sold by the advertising broker shall prominently display the following disclaimer: “This advertisement does not suggest that the broker has a listing in this property or properties or that any property is currently available.” Such advertisement: (i) shall not suggest, directly or indirectly, that the advertising broker was involved in the transaction and (ii) shall not refer to property currently listed with another broker absent consent provided pursuant to subdivision (b)(2)(b) [19 NYCRR§175.25(d)(6)]. **This section does not permit licensees to advertise another broker’s listing** (unless the broker has given permission). This section addresses advertisements referencing a development, cooperative building, condominium building or other multi-unit/

multi-parcel property. The advertisement would state something like, “Are you looking for a house in Shady Acres, call Spindrift Realty.” If Spindrift did not have a listing in the Shady Acres development, the disclosure would have to be included.

### Other miscellaneous regulations

An associate real estate broker, real estate salesperson or team may provide additional contact information, such as a post office box, in an advertisement [19 NYCRR§175.25(c)(5)].

A residence may be used as an office provided that it is properly licensed by the Department of State [19 NYCRR§175.25(c)(6)]. The municipality would also have to permit a commercial business operating out of a residence.

Advertisements shall not guarantee future profits from any real estate activity [19 NYCRR§175.25(c)(10)].

REALTORS® should be aware of the new regulations and amend their advertisements accordingly. NYSAR successfully advocated for an effective date of January 2, 2014. This was done so all NYSAR members have advanced notice of the new advertising requirements.

*Editor’s Note: Spindrift Realty is a fictitious brokerage. At the time of the publication of this article it was verified that “Spindrift Realty” was not a licensed brokerage in New York. Any similarities to an actual brokerage is coincidental.*

**Compliant:** This for sale sign meets the requirements of 19 NYCRR§175.25 d(5).



The sign features a stylized blue and white logo of a hand holding a house on a wave. To the right, the text reads: **For Sale**, Jonathon “Jon” Galt, [www.spindriftrealty.com](http://www.spindriftrealty.com), SPINDRIFT REALTY, and 518-555-2112.

**Non-compliant:** This for sale violates 19 NYCRR§175.25 d(5) by not identifying the broker. Merely reciting the brokers URL does not meet the requirements of 19 NYCRR§175.25 c(1) unless the broker was named “www.spindriftrealty.com.”



The sign features a stylized blue and white logo of a hand holding a house on a wave. To the right, the text reads: **For Sale**, Jonathon “Jon” Galt, [www.spindriftrealty.com](http://www.spindriftrealty.com), and 518-555-2112.

| New York State Association of REALTORS® |

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## NYSAR Radio

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Visit [NYSAR.com](http://NYSAR.com) for air times and details.





## DOS publishes 1Q 2013 ALJ decisions

The Department of State, Division of Licensing Services (DOS) receives complaints about real estate licensees. The DOS investigates the complaints and if they are found to have merit, a licensee may be subject to a hearing before an administrative law judge (ALJ) to determine whether the licensee violated any law, rule, regulation or other duty expected of a licensee.

The following citations refer to DOS decisions before an administrative law judge. Each decision provides a brief description regarding the subject matter of the violation(s) being heard before the administrative law judge.

NYSAR is providing this information to REALTORS® in an effort to better educate our members as to what constitutes a violation, and how to avoid having a complaint filed against you. Full copies of the decisions are available in the Legal Resources section of NYSAR.com via the court and DOS decisions link.

The following are the first quarter 2013 decisions:

- 32 DOS 13 denial of license
- 36 DOS 13 failure to return unearned commission, failure to satisfy judgment
- 37 DOS 13 unlicensed property manager
- 55 DOS 13 denial of license
- 73 DOS 13 unearned commission, untrustworthy, incompetency
- 77 DOS 13 untrustworthy, lien for commission
- 83 DOS 13 denial of license, unlicensed brokerage
- 121 DOS 13 unlicensed brokerage

## Key West Association of REALTORS® wins federal copyright case

A federal district court in Florida has awarded \$2.7 million to the Key West Association of REALTORS® Inc. in its copyright infringement action against Robert Allen. In finding for the association and imposing such a large award, the court sent a strong message on behalf of copyright owners, said Attorney Steven Robert Kozlowski, who represented KWAR in the case.

KWAR brought the copyright infringement action against Allen in 2011. Since at least 2007, KWAR said, Allen has been operating websites, including KeyWestMLS.com, made up almost entirely of content, data and images reproduced from KWAR's MLS.

“Rob Allen was not a member of the association and has never had a license to copy or display the content of the association MLS database,” said KWAR General Counsel Wayne LaRue Smith in a statement. “The association attempted to get Mr. Allen to cease and desist from his infringing activities in 2010, but he ignored the requests. At that point the association was determined to hold Mr. Allen accountable.”

The case closely parallels those being litigated between American Home Realty Network, which operates the Neighborcity website, and two large regional MLSs — Metropolitan Regional Information Systems in the mid-Atlantic region and Regional Multiple Listing Service of Minnesota (dba NorthStar MLS).

Those cases also involve allegations of unauthorized copying of MLS listings for display on a website operated by the defendant, as well as the use of those listings to generate buyer referrals, said National Association of REALTORS® General Counsel Laurie Janik. “The main difference is that the defendant in the Florida case did not even show up to contest the allegations, whereas the cases being brought against [AHRN] are being vigorously defended,”

Janik said.

In the Florida decision, “the court’s imposition of the maximum amount of statutory damages . . . was warranted by the evidence and for the purposes of future deterrence,” Kozlowski said.

### National Case

“Awarding a lesser amount of damages would not serve the purpose of the Copyright Act in deterrence of further wrongful conduct by defendant,” Justice James Lawrence King said in his May 22 decision. “Absent the maximum statutory award of damages, future potential infringers of plaintiff’s MLS copyrights will only see the potential benefit of high commissions from ill-gotten leads. As such, the maximum statutory damage amount is necessitated to deter the future conduct of defendant Allen and others.”

— Stacey Moncrieff, REALTOR® Magazine

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### Unlicensed continued from page 1

vide maintenance services such as negotiating leases, showing apartments and/or collecting rents are required to be a licensed real estate broker and such fees can only be made payable to a real estate broker.

As a result of the number of violations including failure to account for monies, unlicensed activity and incompetency, Masterpol had his license revoked. If he ever applies for licensure again, he will be required to show he paid restitution of \$2,400 plus statutory 9-percent interest.



## Ohio court finds broker liable for salesperson's fraud

An Ohio court has considered a challenge to a jury verdict that held a brokerage vicariously liable for the fraud of a salesperson.

Torri Auer (buyer), a California resident, contacted Ohio real estate salesperson Jamie Paliath (salesperson) about her interest in a duplex. The buyer told the salesperson that she was interested in buying investment property in Ohio and planned to use the rent payments as an income stream.

The salesperson was associated with Home Town Realty of Vandalia, LLC d/b/a Keller Williams Home Town Realty (brokerage). The agreement with the brokerage stated that the salesperson was an independent contractor, and the salesperson was responsible for paying her own costs and recruiting clients. The agreement also specified how commissions would be divided between the parties.

In September 2007, the salesperson took the buyer to the property, as well as several other properties. The buyer saw part of one interior of the properties, but otherwise didn't go inside the other properties. The salesperson told the buyer that extensive work had been done to the interiors of the properties.

The buyer purchased a total of 27 units through the salesperson, based on alleged representations that the properties were undervalued or rented out. One of the properties had been purchased by a company created by the salesperson shortly before she sold it for four times what her company had paid to the buyer. The buyer also contracted with a property management company created by the salesperson, as well as entering into an agreement with a construction company created by the salesperson to perform work on some of the units. The brokerage received commissions from each of the sales.

The buyer received no income from the properties, and only one unit was rented in August 2008. In October 2008, the buyer visited the properties with another licensee and a contractor. She discovered that all of the properties needed extensive work during her visit.

The buyer filed a lawsuit against the salesperson and the brokerage alleging fraud in the inducement in the sale of the properties. During the trial, the brokerage argued that it did not breach its fiduciary duty to the buyer and it had adequately supervised the salesperson. The trial court submitted the case to the jury, and the jury found for the buyer and against the salesperson and the brokerage, awarding the buyer \$135,200. The salesperson and the brokerage appealed.

The Court of Appeals of Ohio, Second District, partially affirmed the jury verdict, but vacated a portion of the award due to insufficient evidence. The court first considered whether the court had properly instructed the jury on the brokerage's liability for the actions of the salesperson. The trial court had instructed the jury that if the salesperson had committed fraud, then the brokerage was vicariously liable for the actions of the salesperson.

The court upheld the trial court's instructions. The brokerage argued that the trial court should have instructed the jury that the salesperson was required to work within the scope of her relationship with the brokerage.

A salesperson is required to work under the supervision of a licensed broker in all of his/her real estate transactions including the requirement that the broker collect all commissions earned from the transactions. While a licensed salesperson can be an independent contractor in its relationship with a brokerage firm and can be treated as such in disputes between the firm and the licensee, the court found that there is a principal/agent relationship in place when the licensee is working with third parties. Because of this duty to supervise its licensees and also because the licensees are acting in the broker's name during their transactions, the trial court ruled that brokers are vicariously liable for intentional torts such as fraud committed by its licensees while they are performing their duties as a salesperson.

In this case, the brokerage's name was listed on the buyer's purchase contracts and the agency disclosure forms, and the brokerage received the commissions from the salesperson's transactions. Based on these facts, the court ruled that the trial court had properly instructed the jury.

Finally, the court partially reversed the damage award made to the buyer. The brokerage argued that the damage award was not supported by the evidence because the buyer had failed to establish the value of the properties at the time the buyer purchased them. While there was evidence to support most of the awards, the buyer had not introduced evidence establishing the value of one property at the time of purchase. Therefore, the court reversed the \$15,000 award for that transaction, but upheld the remainder of the awards against the salesperson and the brokerage.

**Auer v. Paliath**, 2013-Ohio-391, 2013 WL 492728 (Ohio Ct. App. Feb. 8, 2013). [This is a citation to a Westlaw document. Westlaw is a subscription, online legal research service. If an official reporter citation should become available for this case, the citation will be updated to reflect this information].

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### National Case

## Lawsuit over zoning disclosure continues

A Massachusetts court has considered the disclosure obligations for a real estate professional when the owner provides inaccurate information about the property's zoning classification.

In 2004, Paul and Lauren Tribuna (sellers) listed their home for sale with M. Eileen Richards (broker) of Hingham Centre, Ltd. (brokerage). One of the sellers told the broker either that the property was zoned "Residential Business B" (a nonexistent zoning category) or "Business B." The broker advertised the property as Business B, even though there were only residences on the same side of the street as the sellers' property.

Daniel DeWolfe (buyer) is a professional hairdresser who was interested in opening a hair salon. He saw the broker's advertisements and so came to see the property. During his visit, he saw a copy of the town's "Business B" housing ordinance that the broker had made available, and "hairdresser" was listed as a permissible use of a property zoned Business B.

The buyer made an offer for the property, and the sellers accepted the offer. The purchase agreement contained the following provision entitled "Warranties and Representations: The BUYER acknowledges that the BUYER has not been influenced to enter into this transaction nor has he relied upon any warranties or representations not set forth or incorporated in this agreement or previously made in writing, except for the following additional warranties and representations, if any, made by either the SELLER or the Broker(s): NONE."

Following the closing, the buyer learned that the property was zoned Residential B and that operating a hair salon on the property was not permitted.

The buyer filed a lawsuit against the broker and the brokerage, alleging misrepresentation. The trial court ruled in favor of the broker and the brokerage, and the buyer appealed. An appellate court vacated the lower court decision, and the broker and the brokerage appealed that ruling.

The Massachusetts Supreme Judicial Court affirmed the appellate court, reversing the

judgment in favor of the broker and brokerage, and sending the case back to the lower court for further proceedings. The court considered the broker's arguments that she had no duty to confirm the status of the property's zoning and that the "Warranties and Representation" language in the purchase agreement further protected the broker and brokerage from any liability.

The court determined that real estate professionals can be liable for negligent misrepresentation if they fail to exercise reasonable care in making representations to clients. While a real estate professional can usually rely upon the information that he/she receives from his/her client, this does not insulate the real estate professional from claims; instead, the question is whether the real estate professional exercised reasonable care in making the statements in question. If it is unreasonable for the broker to rely upon information provided by the seller, then the broker has a duty to further investigate this information. A jury could determine that it was unreasonable for the broker to rely upon the zoning information received from the sellers, as the broker did not observe any business usage on the property nor were any of the neighboring properties operating as businesses. Therefore, the court agreed with

the appellate court and vacated the judgment in favor of the broker and brokerage.

Next, the court considered whether the "Warranties and Representations" language found in the purchase agreement protected the broker and brokerage from liability. The broker read the language as providing that the buyer did not rely on any warranties or representations when entering into the agreement, since none were listed in the paragraph. Meanwhile, the buyer read the clause as providing that he could only rely on representations contained in the agreement, made in writing, or expressly provided at the end of the agreement, meaning that he could rely upon the advertisements prepared by the broker.

The court ruled that the buyer's construction of the clause was the most plausible, determining that "not" applies to both of the phrases following it because the phrases are linked by the conjunction "or." Based on that construction, the buyer could have relied upon the written representations made by the broker in the advertisements for the property. Therefore, the case was returned to the lower court for further proceedings.

*DeWolfe v. Hingham Ctr., Ltd.*, 985 N.E.2d 1187 (Mass. 2013).

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