

2021 MONTHLY
LEGAL UPDATE

FREE

FEBRUARY 17

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New York State Association of REALTORS® , Inc.

Welcome!!!

- Today is the first official day of Spring Training
- 28 days until St. Patrick's Day
- 31 days until Spring
- Free Legal Update CE credit

Welcome!!!

- 1 credit of CE under “legal updates” for registrants
- Monthly updates will be the same unless something new arises

Welcome!!!

- Members may take for CE credit once every license renewal cycle
- Update will be recorded and livestreamed for those not seeking CE
- Information will be disseminated through other courses as well

IS NY STILL UNDER A STATE OF EMERGENCY?

When Will the State of Emergency Expire?

- The current State of Emergency (SoE) is extended until 2/26/2021
- SoE needed to keep restrictions in place
- Without SoE everything will be as it was before March 2020

When Will the State of Emergency Expire?

- Extensions highly likely to continue as COVID-19 is still a public health risk
- Vaccination roll out and population vaccinated will have greatest impact on extensions

When Will the State of Emergency Expire?

- NYSAR is unaware of any possible modifications under Phase 2 due to new gathering guidelines effective in March.

When Will the State of Emergency Expire?

All guidance
under Phase 2
still in effect

When Will the State of Emergency Expire?

There has been
no “relaxation”
of the guidance

When Will the State of Emergency Expire?

- NO COLD CALLS
- The law is not industry specific and is triggered statutorily by the SoE
- Only when the SoE is lifted will cold calling be permitted

General Business Law §399-z(5-a)

“It shall be unlawful for any telemarketer doing business in this state to knowingly make an unsolicited telemarketing sales call to any person in a county, city, town or village under a declared state of emergency or disaster emergency as described in sections twenty-four or twenty-eight of the executive law.”

General Business Law §399-z(1)

- h. “Telemarketer” means any person who, for financial profit or commercial purposes in connection with telemarketing, makes telemarketing sales calls to a customer when the customer is in this state or any person who directly controls or supervises the conduct of a telemarketer. For the purposes of this section, “commercial purposes” shall mean the **sale or offer for sale of goods or services**;
- j. “Telemarketing sales call” means a **telephone call made by a telemarketer** or by any outbound telephone calling technology that delivers a prerecorded message **to a customer or to a customer's voicemail or answering machine service for the purpose of inducing payment or the exchange of any other consideration for any goods or services**;

What about door to door marketing?

- It is NYSAR opinion that unsolicited door to door activity is contrary to the Phase 2 guidance
- There are no provisions in the Phase 2 guidance permitting such activity
- This includes “flyers” and hang tags

State of Emergency & NYSAR

- Legal Hotline calls have more than doubled
- NYSAR in regular contact with various NYS agencies

State of Emergency & NYSAR

- Members utilize NYSAR COVID resources (videos, articles, FAQ's)
- NYSAR provided forms distributed to local boards and brokers:
 - COVID-19 Disclosure Form
 - Health and Travel Screening Questionnaire

State of Emergency & NYSAR

- Thank you to NYSAR members that followed and continue to follow the guidance from ESD and DOH
- Due to your diligence, NYSAR has been able to show our members are responsible

State of Emergency & NYSAR

- NYSAR has advocated that in the event of another shutdown (pre-phase 2 or red zone) that in-person real estate activity continue with PPE
- NYSAR is unaware of any COVID related exposures in real estate using PPE

State of Emergency & NYSAR

For up to date information on real estate matters related to COVID-19, please go to:

<https://nysarcovidupdates.com/>

LITIGATION UPDATE:

NYSAR V. DOS
CHIP/RSA V CITY OF NY

Guidance Document

- Effective 2/4/2020
- DOS interpretation of Tenant Protection Act
- Only addresses DOS disciplining licensees

Guidance Document

- The guidance document (GD) only applies to residential rentals
- Landlord's agents are treated the same as landlords in the eyes of DOS

Lawsuit

- TRO is still in effect
- DOS has filed their opposition papers
- We have until 10/28 to file our response
- Hearing may be in November
- The TRO can only be lifted by judicial order

What is at Stake?

- The common practice of the tenant paying the commission of the landlords agent will be prohibited.
- This is a small step down a dangerous path.
- Future laws, rules or regulations and liberal interpretations could impact commissions across the entire industry.
- NYSAR has always advocated against government interference related to commissions.

If We Lose...

- A landlord's agent will only be able to collect a commission from the landlord
- A landlord's agent is prohibited from collecting a commission from the tenant
- The prohibition only applies to landlord's agents

What Should I Do?

- Is there an agreement where the landlord agrees to pay the landlords agent?
- Not all landlords have included the cost of commissions into rent calculations

Tenant's Agent

- A tenant's agent may still collect a commission from:
 - Tenant
 - Landlord's agent
 - Landlord

CHIP/RSA V CITY OF NY

- Lawsuit challenging Rent Control/Rent Regulation
- Lower court decision against
- Case appealed to 2nd Cir. Ct. of Appeals
- NYSAR submitted an amicus curiae brief on Friday
- Sup. Ct. US recently agreed to hear a case on “takings”

CHIP/RSA V CITY OF NY

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NEW DISCLOSURE FOR RENTALS

NYS Exec Law §296-Amended

- Amends Exec Law §296 (Human Rights Law)
- Effective March 2, 2021
- Only applies to “housing accommodations”
- Includes publicly assisted (2-a) and private housing (18-a)
- Regulations from DHR have not been published yet
- Some issues are still pending

NYS Exec Law §296-Amended

- Applies to:
 - Owner
 - Lessee/Sub-Lessee
 - Assignee
 - Managing Agent
 - Real estate licensees (other person having right of ownership, possession or the right to rent)

NYS Exec Law §296(18-a)

Every owner, lessee, sub-lessee, assignee, or managing agent of, or other person having the right of ownership of or possession of or the right to rent or lease housing accommodations SHALL DISCLOSE to all tenants and prospective tenants of their right to request reasonable modifications and accommodations if they have a disability pursuant to subdivision eighteen of this section.

NYS Exec Law §296(18-a)

Such disclosure shall be made in writing in such form and manner as the division may by regulation prescribe and provided to **all current tenants** **WITHIN THIRTY DAYS OF THE BEGINNING OF THEIR TENANCY, or THIRTY DAYS FROM THE EFFECTIVE DATE OF THIS SUBDIVISION** **for current tenants.**

NYS Exec Law §296-Amended

- Licensees required to provide form at first substantive contact
- What is “first substantive contact”

First Substantive Contact

- No “bright line” definition
- Historically warm body approach
- Open houses
- Telephone contact
- Email, internet, etc.

Substantive Contact

- Warm body approach not only method
- Phone, internet, fax, email other electronic communication mediums currently in use of to be developed

NYS Exec Law §296(18-a)

Such disclosure shall also be conspicuously posted in such form and manner as the division may by regulation prescribe on every vacant housing accommodation that is available for rent.

NYS Exec Law §296-Amended

- Requires disclosure to all current and potential tenants of right to reasonable accommodation for disability
- Disclosure form to be developed by DHR
- This is a different form than the Housing and Antidiscrimination Disclosure Form and Notice

NYS Exec Law §296-Amended

- “...disclose to all tenants and prospective tenants of their right to request reasonable modifications and accommodations if they have a disability...”
- “If they have a disability” does not mean the disclosure is only required if the tenant/potential tenant has a disability

NYS Exec Law §296-Amended

- Disclosure must be in writing
 - NYSAR is of the opinion electronic delivery will be permitted. This still qualifies as “in writing”
 - Method of electronic delivery and/or acknowledgement of disclosure is still unknown

NYS Exec Law §296-Amended

- What if I have a client/customer already but potential tenant has not signed a lease prior to 3/2/2021?
 - Provide the client/customer with the disclosure form the next time you have contact

NYS Exec Law §296-Amended

- Required to be given to current Tenant that has not yet occupied “housing accommodation” within 30 days of the beginning of tenancy
 - Tenant already has signed lease but has not taken occupancy as of effective date of law (3/2/2021)

NYS Exec Law §296-Amended

- Current tenants within 30 days of effective date
 - No later than April 1, 2021
 - All tenants currently occupying leased “housing accommodations”

NYS Exec Law §296-Amended

- Disclosure must be posted in every vacant housing unit available for rent
 - To be developed by DHR
 - In addition to required “Housing and Anti-Discrimination Notice”

NYS Exec Law §296-Amended

- As a best practice, licensee should provide form for every tenant if they are within 30 days of desired move in date
- Landlord/Broker must retain form for 3 years

NYS Exec Law §296-Amended

- NYSAR will notify members when the disclosure form and notice have been published by DHR

Accommodation Sometimes Called Modification

a change, exception, or adjustment to a rule, policy, practice, or service that may be necessary for a person with disabilities to have an equal opportunity to use and enjoy a dwelling, including public and common use spaces, or to fulfill their program obligations.

Reasonable Accommodations

- Any change in the way things are customarily done that enables a person with disabilities to enjoy housing opportunities or to meet program requirements is a reasonable accommodation.
- In other words, reasonable accommodations eliminate barriers that prevent persons with disabilities from fully participating in housing opportunities, including both private housing and in federally-assisted programs or activities.
- Housing providers may not require persons with disabilities to pay extra fees or deposits or place any other special conditions or requirements as a condition of receiving a reasonable accommodation.

Reasonable Accommodations

- Since rules, policies, practices, and services may have a different effect on persons with disabilities than on other persons, treating persons with disabilities exactly the same as others will sometimes deny persons with disabilities an equal opportunity to enjoy a dwelling or participate in the program.
- Not all persons with disabilities will have a need to request a reasonable accommodation. However, all persons with disabilities have a right to request or be provided a reasonable accommodation at any time.

Examples of Reasonable Accommodations

- Assigning an accessible parking space for a person with a mobility impairment
- Permitting a tenant to transfer to a ground-floor unit
- Adjusting a rent payment schedule to accommodate when an individual receives income assistance
- Permitting an applicant to submit a housing application via a different means

Reasonable Modifications

- Under the Fair Housing Act, a reasonable modification is a structural change made to existing premises, occupied or to be occupied by a person with a disability, in order to afford such person full enjoyment of the premises.
- Reasonable modifications can include structural changes to interiors and exteriors of dwellings and to common and public use areas.

Examples of Reasonable Modifications

- Adding a grab bar to a tenant's bathroom
- Installation of a ramp into a building
- Lowering the entry threshold of a unit

HUD

Under the Fair Housing Act, prohibited discrimination includes a refusal to permit, at the expense of the person with a disability, reasonable modifications of existing premises occupied or to be occupied by such person if such modifications may be necessary to afford such person full enjoyment of the premises.

HUD FHEO Website

https://www.hud.gov/program_offices/fair_housing_equal_opp

FAIR HOUSING/ DISCRIMINATION

WHAT IS COMING OUR WAY

DISCLAIMER

The following bills have been passed by the NYS Senate but have not been passed by the Assembly.

Current Legislation Passed NYS Senate

- **S.538-B (Kaplan)/No Same As**
- Status: Senate Floor, Cal. #225
- Adds 2 hrs. of “implicit bias” education within the 22.5 hours CE requirement for license renewal.

Current Legislation Passed NYS Senate

- **S.2132-B (Skoufis)/No Same As**
- Status: Senate Floor, Cal.# 229
- Increases pre-licensing broker and salesperson course hours, requires affirmation of instructors' compliance in course education, adds broker supervision education in brokers qualifying course, directs the DOS to promulgate rules regarding the content and instruction of fair housing education, and a DOS notice and public hearing requirement.

Current Legislation Passed NYS Senate

- **S.112 (Kaplan)/No Same As**
- Status: Senate Floor, Cal. #124
- Requires the Attorney General to conduct yearly fair housing testing to identify any potential discrimination and provide a report annually.

Current Legislation Passed NYS Senate

- **S.2133-A (Skoufis)/No Same As**
- Status: Senate Floor, Cal. #231
- Adds an additional \$30 surcharge to the license fee for real estate brokers and an additional \$10 surcharge to the license fee for real estate salespersons “to be used for statewide fair housing testing efforts” overseen by the NYS Attorney General.

Current Legislation Passed NYS Senate

- **S.945-B(Gaughran)/No Same As**
- Status: Senate Floor, Cal. #226
- Increases fines for real estate license violations from \$1,000 to \$2,000. The additional fine amount is dedicated to an “Anti-discrimination in Housing Fund” within the DOS to support Fair Housing Testing

Current Legislation Passed NYS Senate

- **S.1448(Hoylman)/No Same As**
- Status: Senate Floor, Cal. #227
- Directs the Secretary of State to promulgate rules and regulations requiring real estate brokers and salespersons to legibly write his or her name and license number on any document requiring a signature.

Current Legislation Passed NYS Senate

- **S.715 (Thomas)/No Same As**
- Status: Senate Floor, Cal. #130
- Authorizes civil penalties and punitive damages for violations of Human Rights Law related to the sale or rental of housing.

Current Legislation Passed NYS Senate

- **S.2131-A (Skoufis)/No Same As**
- Status: Senate Floor, Cal. #229
- Requires standard operating procedure for prerequisites that prospective homebuyers must meet prior to services for each brokerage regarding ID, exclusive brokerage agreements and financing pre-approval. The DOS is given discretion regarding compliance procedures and requires a notice and public comment period.

Current Legislation Passed NYS Senate

- **S.2157-A (Thomas)/No Same As**
- Status: Senate Floor, Cal. #232
- Requires two years' experience as an associate broker before designation as an office manager.

Current Legislation Passed NYS Senate

- **S.2525-A (Kavanaugh)/No Same As**
- Status: Senate Floor, Cal. #233
- Requires brokers to collect and annually disclose to the DOS transactional data; provides an option for clients to voluntarily disclose demographic would also be reported to the DOS.

Current Legislation Passed NYS Senate

- **S.1353 (Kavanagh)/No Same As**
- Status: Senate Floor, Cal. #112
- Creates an obligation to affirmatively further fair housing for all state agencies administering housing programs or enforcing housing laws and all localities administering housing programs and receiving funds from the state for such activities.

COMPLYING WITH ADVERTISING ON SOCIAL MEDIA PLATFORMS WITH LIMITED CHARACTERS

Advertising on Social Media

- Make every attempt to comply on social media site
- If there is room to comply you should
- Alternatives are only permitted if “traditional” compliance is impossible

Advertising on Social Media

- Requirements for Social Media sites are the same as web based advertisements

Advertising on Social Media

- John Smith, a licensed real estate salesperson, uses a mobile app to advertise an exclusive listing. The app limits how many characters may be sent in each advertisement
 - Mr. Smith could have complied with the regulation by “threading” his advertisements and necessary disclosures to make clear that multiple successive messages that exceed the character limitations actually act as one advertisement.

Advertising on Social Media

- John Smith, a licensed real estate salesperson, uses a mobile app to advertise an exclusive listing. The app limits how many characters may be sent in each advertisement
 - As an alternative, the Department would permit Mr. Smith to provide a clear, conspicuous and unambiguous link within the same advertisement to a separate page where all the required disclosures are made. For a link to be acceptable, it must clearly and conspicuously disclose the link's purpose and cannot simply state “click here for more information”.

Methods of Compliance

- Try to comply with all advertising requirements and disclosures on your SM homepage
- If you can comply you should
- If it is impossible to comply, the following options are available:
 - Pinning
 - Threading
 - Clear, conspicuous and unambiguous link to the required disclosures
 - clearly and conspicuously disclose the link's purpose
 - cannot simply state “click here for more information”

NAR CHANGES



NAR CHANGES

- NAR/DOJ Settlement
- 10-5
- Clear Cooperation

NAR/DOJ SETTLEMENT

NAR/DOJ SETTLEMENT

- NAR admitted no liability, wrongdoing or truth of any allegations by the DOJ.
- No fines or any payments are required.
- Allows NAR to remain focused on supporting members as they preserve, protect and advance the American dream of homeownership.

NAR/DOJ SETTLEMENT-COMMISSIONS

NAR must adopt one or more Rules that:

- **Repeal any Rule that prohibits, discourages, or recommends against an MLS or MLS Participant publishing or displaying to consumers any MLS database field specifying compensation offered to other MLS Participants.**
- **Require all Member Boards and MLSs to repeal any Rule that prohibits, discourages, or recommends against an MLS or MLS Participant publishing or displaying to consumers any MLS database field specifying compensation offered to other MLS Participants.**
- **Require all MLS Participants to provide to Clients information about the amount of compensation offered to other MLS Participants (Fiduciary Duty?)**

NAR/DOJ SETTLEMENT-ADVERTISING AS “FREE”

NAR must adopt one or more Rules that:

- Repeal any Rule that permits all MLSs and MLS Participants, including buyer Brokers, to represent that their services are free or available at no cost to their Clients;
- Require all Member Boards and MLSs to repeal any Rule that permits MLSs and MLS Participants, including buyer Brokers, to represent that their services are free or available at no cost to their Clients
- Prohibit all MLSs and MLS Participants, including buyer Brokers, from representing that their services are free or available at no cost to their Clients.

NAR/DOJ SETTLEMENT-FILTERING MLS LISTINGS

NAR must adopt one or more Rules that:

- Require all Member Boards and MLSs to prohibit MLS Participants from filtering or restricting MLS listings that are searchable by or displayed to consumers based on the level of compensation offered to the buyer Broker or the name of the brokerage or agent
- Repeal any Rule that permits or enables MLS Participants to filter or restrict MLS listings that are searchable by or displayed to consumers based on the level of compensation offered to the buyer Broker, or by the name of the brokerage or agent.

NAR/DOJ SETTLEMENT-LOCKBOX ACCESS NON-MEMBERS

NAR must adopt one or more Rules that:

- Require that require all Member Boards and MLSs to allow any licensed real estate agent or agent of a Broker, to access, with seller approval, the lockboxes of those properties listed on an MLS.

NAR/DOJ SETTLEMENT

- Real estate licensees have a duty to cooperate regardless of REALTOR board/association or MLS membership
- Both NYS law and NAR Article 3 require a licensee to cooperate with another licensee

NAR/DOJ SETTLEMENT-WHAT'S NEXT?

- No immediate action required
- Finalize proposed rule changes
- NAR Board of Directors Meeting in Spring 2021 to approve rule changes
- Implementation of final rules

Updated Information will be available on a dedicated page on the NAR website.

<https://www.nar.realtor/2020-nar-doj-agreement-regarding-mls-rules>

10-5

History Behind 10-5

- The NAR Professional Standards Committee met on October 5, 2020, to consider recommendations from its Interpretations and Procedures Advisory Board on the Code of Ethics' applicability to discriminatory speech and conduct.
- The Committee approved the Advisory Board's recommendations, and six of them were presented to and approved by the NAR Board of Directors at their November 13, 2020 meeting.
- Two of the changes will be effective immediately.

New Standard of Practice 10-5

- Flows from requirement to not deny equal professional services or be parties to a plan to discriminate.
- The public posting of hate speech would reveal bias against protected classes.
- Thus, public posting of hate speech could result in REALTORS® not taking clients from certain protected classes or not treating clients equally.
- Such actions would violate the Fair Housing Act due to overt discrimination or disparate impact.

New Standard of Practice 10-5

REALTORS[®] must not use harassing speech, hate speech, epithets, or slurs based on race, color, religion, sex, handicap, familial status, national origin, sexual orientation, or gender identity.

Merriam Webster Definitions

Hate Speech: speech that is intended to insult, offend, or intimidate a person because of some trait (as race, religion, sexual orientation, national origin, or disability).

New Standard of Practice 10-5

Epithet: 1a: a characterizing word or phrase accompanying or occurring in place of the name of a person or thing; b: a disparaging or abusive word or phrase

New Standard of Practice 10-5

Slur: 1a: an insulting or disparaging remark or innuendo: ASPERSION; b: a shaming or degrading effect: STAIN, STIGMA

29. Applicability of the Code of Ethics to ~~non-real estate-related activities~~

~~While REALTORS® are encouraged to follow the principles of the Code of Ethics in all of their activities, a~~ A REALTOR® shall be subject to disciplinary action under the Code of Ethics ~~only~~ with respect to ~~real estate-related~~ all of their activities. ~~and transactions involving the REALTOR®.~~

Broader Definition of Public Trust

- **Expanded definition includes all discrimination against the protected classes under Article 10 and all fraud.**
- **Associations would be required to share with the state licensing authority final ethics decisions holding REALTORS® in violation of the Code of Ethics in instances involving real estate-related activities and transactions and where there is reason to believe the public trust, as expanded, may have been violated.**

Broader Definition of Public Trust

The "public trust", as used in this context, refers to demonstrated misappropriation of client or customer funds or property, ~~willful~~ discrimination against the protected classes under the Code of Ethics, or fraud ~~resulting in substantial economic harm.~~

Changes are not Retroactive

Standard of Practice 10-5 (and all other changes) apply only to conduct that occurs November 13, 2020 and thereafter.

What about my Rights?

- **Membership as a REALTOR is voluntary**
- **REALTOR association is not a government entity**
- **NYS has precedent set by the Unified Court System**
- **Memorandum dated February 3, 2021 sets new policy**
- **More restrictive than 10-5**

NYS UCS Policy

All UCS personnel are hereby reminded that engaging in conduct that is threatening, harassing, demeaning, bullying, or disparaging on the basis of race, color, national origin, religion, sex, sexual orientation, age, marital status, disability, genetic status, gender identity or expression, or domestic violence status, whether in-person, online or through any other verbal, written or electronic means, is a violation of UCS policies and Rules. Such discriminatory, harassing, threatening, or disparaging communications or materials include, but are not limited to, epithets, slurs, negative stereotyping, demeaning jokes, and vulgar, profane, insulting, or offensive language or content showing hostility or aversion toward an individual or

- **FAQs regarding the policies passed by the NAR Board of Directors:**
<https://www.nar.realtor/national-leadership/committee-members-liaisons/code-of-ethics-professional-standards-policies>
- **Videos:**
Interpretations and Procedures Advisory Board member Bruce Aydt (MO) explain the Advisory Board's recommendations.
2020 Chair of NAR's Professional Standards Committee Matt Difanis (IL) addresses whether the status quo is even a problem with respect to housing discrimination and racial equity issues.
REALTORS® sharing their experiences on Race, Real Estate, and Association Leadership.
- **Monthly Training Sessions:**
Sign up for NAR's free monthly training sessions that provide guidance on the recent changes to the Code of Ethics and an opportunity to ask questions of our policy experts. Recordings of past sessions are available on this page as well:

www.nar.realtor/events/breaking-down-the-changes-to-the-code

Clear Cooperation

Clear Cooperation

- **Adopted in November 2019, by the NAR Board of Directors (729-70) to provide crucial protection for consumers.**
- **Provides greater transparency and competition between real estate listings and between brokers while still addressing privacy concerns.**
- **Applies to listings that are publicly marketed and has no impact on properties sold exclusively within the listing brokerage.**
- **Promotes equal opportunity for all and Fair Housing!**
- **Remains in effect and is not altered in any way by current challenges**

Clear Cooperation

- *Section 1.01 – Clear Cooperation*
- *Within one (1) 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. (Adopted 11/19)*
- ***Note: Exclusive listing information for required property types must be filed and distributed to other MLS Participants for cooperation under the Clear Cooperation Policy. This applies to listings filed under Section 1 and listings exempt from distribution under Section 1.3 of the NAR model MLS rules if it is being publicly marketed, and any other situation where the listing broker is publicly marketing an exclusive listing that is required to be filed with the service and is not currently available to other MLS Participants.***

Clear Cooperation

- *Section 1.3 Exempt Listings*
- *If the seller refuses to permit the listing to be disseminated by the service, the participant may then take the listing (office exclusive) and such listing shall be filed with the service but not disseminated to the participants. Filing of the listing should be accompanied by certification signed by the seller that he does not desire the listing to be disseminated by the service.*

Clear Cooperation-Seller Opt Out

- The new policy does not include an “opt out.” Any listing that is “publicly marketed” must be filed with the service and provided to other MLS Participants for cooperation within (1) one business day.

Clear Cooperation-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-Are Office Exclusives Prohibited?

- No. "Office exclusive" listings are an important option for sellers concerned about privacy and wide exposure of their property being for sale.
- 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.
- If office exclusive listings are displayed or advertised to the general public, however, those listings must also be submitted to the MLS for cooperation.

Clear Cooperation-Private Listing Networks

"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-Coming Soon/Off-Market Properties

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-Coming Soon/Off-Market Properties

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. The most common implementations do not allow for showings of the listing until its status is changed to active, and any showings of the listing would immediately trigger that status change.

Clear Cooperation

If you promote the property to anyone other than licensees associated with your brokerage or their clients/customers the exclusive listing must be filed with the MLS pursuant to Clear Cooperation

Challenges to Clear Cooperation

- *Top Agent Network v. National Association of REALTORS® et al*
- Filed on May 11, 2020
- Plaintiff asserts that the Clear Cooperation Policy is anticompetitive
- On May 27, 2020, the Court denied Plaintiff's Motion for TRO Injunction
- On July 16, the Court denied Plaintiff's Motion for Preliminary Injunction
- On December 3, the Court granted Defendants' Motion to Dismiss.
- On January 13, 2021, TAN filed a Second Amended Complaint. NAR's Motion to Dismiss is due February 15th.

Challenges to Clear Cooperation

- *The PLS.com, LLC v. National Association of REALTORS® et al (CDCA)*
- Filed on May 28, 2020
- California Regional MLS, Midwest Real Estate Data, LLC., and Bright MLS, Inc. are also named defendants
- The Plaintiff asserts that the Clear Cooperation Policy is anticompetitive
- Plaintiff seeks a permanent injunction
- Status: Case dismissed with leave to amend

Challenges to Clear Cooperation

- NAR is confident they will prevail in the remaining case
- Clear Cooperation is viewed as being pro-competitive (PLS)

NYC SEXUAL HARASSMENT TRAINING FOR INDEPENDENT CONTRACTORS

NYS FAQ's

4. Are employers required to have their independent contractors complete annual sexual harassment prevention training?

Yes. Similar to employees and interns, if an independent contractor works for an employer of 15 or more people and works (a) more than 80 hours in a calendar year AND (b) for at least 90 days (does not need to be consecutive), then the independent contractor must be trained. If an independent contractor worked less than 90 days, or less than 80 hours in a calendar year, they do not need to be trained.

NYS FAQ's

5. Do independent contractors count as “employees” for the purposes of calculating the 15-employee minimum?

Yes. Independent contractors – regardless of the number of days or hours they work – are considered employees for the purposes of determining whether an employer is obligated to provide the annual sexual harassment training.

NYS FAQ's

8. How does the training requirement apply to employees and employers based outside of New York City?

- Any employees who work or will work in New York City for more than 80 hours in a calendar year AND for at least 90 days must be trained, regardless of whether the employer is based in New York City.
- If an employee is based elsewhere but regularly interacts with other employees in New York City, even if they are not physically present in the City, they should be trained.

Good News

NYC provides the training for free

<https://www1.nyc.gov/site/cchr/law/sexual-harassment-training.page>

MANDATORY CE REQUIREMENT EFFECTIVE 7/1/2021

Continuing Education

- Currently, non-exempt licensees must complete 22 ½ hours of CE every 2 years
- Included in the 22 ½ hours are 3 hours of Fair Housing and 1 hour of Agency (unless 1st renewal, then 2 hours of Agency)
- Brokers licensed for 15 consecutive years prior to 7/1/2008 are currently exempt from CE

Continuing Education

- During the Fall 2018 NYSAR business meetings, multiple committees approved proposed legislation to increase the “core” requirements of CE
- The same committees also supported the elimination of the grandfathering clause
- It was NYSAR’s opinion that every licensee needs to take CE and no other licensed profession has a grandfathering exemption

Continuing Education

- NYSAR drafted proposed amendments to the Real Property Law
- Proposed amendments were introduced before the legislature
- Passed Assembly on 5/30/19, passed Senate on 6/20/19
- Delivered to Governor on 10/11/2019

Continuing Education

- Governor Cuomo signed into law on 10/23 to:
 - Include 2.5 hours of ethical business practices
 - Include 1 hour of legal updates
 - This is part of the total 22.5 hours required
 - Fair Housing and Agency are still required
 - Eliminate the “grandfathering exemption” for all licensees

Continuing Education Removed Text

~~The provisions of this paragraph shall not apply to any licensed real estate broker who is engaged full time in the real estate business and who has been licensed under this article prior to July first, two thousand eight for at least fifteen consecutive years immediately preceding such renewal.~~

Continuing Education RPL 441(3)(a)

3 hours of instruction pertaining to fair housing and/or discrimination in the sale or rental of real property or an interest in real property, at least 2 ½ hours of instruction pertaining to ethical business practices, at least 1 hour of instruction pertaining to recent legal matters governing the practice of real estate brokers and salespersons in New York which may include statutes, laws, regulations, rules, codes, department of state opinions and decisions, and court decisions and at least 1 hour of instruction pertaining to the law of agency except in the case of the initial 2-year licensing term for real estate salespersons, 2 hours of agency related instruction must be completed

Continuing Education

- Changes would not go into effect until 7/1/2021
- Every single licensee currently grandfathered would be required to complete 22.5 hours of CE
- No exemptions means no exceptions (except for attorneys)
- NYSAR and local Realtor boards/associations will most likely offer the 2 ½ hours of ethical business practices that will also satisfy the NAR requirement

INDEPENDENT CONTRACTOR STATUS

Independent Contractor Status

- Department of Labor (DOL) released the final independent contractor rule
- The rule does not change real estate licensees classification as independent contractors
- It does not preempt NY law classifying real estate professionals as independent contractors

Independent Contractor Status

NAR submitted a comment on the proposed rule in October, largely advocating for minimal disruption to the real estate industry that greatly benefits from the ability to be classified as an independent contractor. Many states and some federal laws have codified the ability of real estate professionals to be classified as independent contractors, but there continues to be ongoing scrutiny and challenges to this status. NAR supports DOL's efforts to provide a clear and consistent standard for evaluating a worker's status, while preserving existing worker classification authority that allows real estate professionals to be independent contractors.

NYS Statutory Independent Contractor Status

- NYSAR advocated for a “carve out” to the Labor Law for licensees
- NYS Labor Law §511(19)
- 511(19) sets forth specific requirements for statutory IC protection
- NYSAR has developed IC agreements based on 511(19)
- NYSAR has also developed NYC IC form to comply with NYC laws
- NYSAR forms are available on [NYSAR.com](https://www.nysar.com)

Labor Law 511(19)

- The term “employment” shall not include the services of a licensed real estate broker or sales associate if it be proven that:
 - (a) substantially all of the remuneration (whether or not paid in cash) for the services performed by such broker or sales associate is directly related to sales or other output (including the performance of services) rather than to the number of hours worked;
 - (b) the services performed by the broker or sales associate are performed pursuant to a written contract executed between such broker or sales associate and the person for whom the services are performed within the past twelve to fifteen months; and
 - (c) the written contract provided for in paragraph (b) herein was not executed under duress and contains the following provisions:

Independent Contractor Status

(i) that the broker or sales associate is engaged as an independent contractor associated with the person for whom services are performed pursuant to article twelve-A of the real property law and shall be treated as such for all purposes, including but not limited to federal and state taxation, withholding, unemployment insurance and workers' compensation;

Independent Contractor Status

(ii) that the broker or sales associate (A) shall be paid a commission on his or her gross sales, if any, without deduction for taxes, which commission shall be directly related to sales or other output; (B) shall not receive any remuneration related to the number of hours worked; and (C) shall not be treated as an employee with respect to such services for federal and state tax purposes;

Independent Contractor Status

(iii) that the broker or sales associate shall be permitted to work any hours he or she chooses;

Independent Contractor Status

(iv) that the broker or sales associate shall be permitted to work out of his or her own home or the office of the person for whom services are performed;

Independent Contractor Status

(v) that the broker or sales associate shall be free to engage in outside employment;

Independent Contractor Status

(vi) that the person for whom the services are performed may provide office facilities and supplies for the use of the broker or sales associate, but the broker or sales associate shall otherwise bear his or her own expenses, including but not limited to automobile, travel, and entertainment expenses;

Independent Contractor Status

(vii) that the person for whom the services are performed and the broker or sales associate shall comply with the requirements of article twelve-A of the real property law and the regulations pertaining thereto, but such compliance shall not affect the broker or sales associate's status as an independent contractor nor should it be construed as an indication that the broker or sales associate is an employee of the person for whom the services are performed for any purpose whatsoever;

Independent Contractor Status

(viii) that the contract and the association created thereby may be terminated by either party thereto at any time upon notice given to the other.

Independent Contractor Status

- NYSAR strongly recommends that brokers use NYSAR IC agreement
- The form was taken from 511(19) verbatim
- Brokers that add anything to the NYSAR IC agreement should have changes reviewed by their attorney

Independent Contractor Status

- Best Practice: put other information in a separate agreement/office policy etc.
- The more you add to the IC agreement, the greater the chance of misclassification
- If you fail to have form signed every 12-15 months broker loses statutory protections

REGULATIONS HOUSING DISCRIMINATION

Fair Housing Regulations

- 19 NYCRR 175.28 Disclosure of Fair Housing Laws
- 19 NYCRR 175.29 Posting of Fair Housing Laws
- 19 NYCRR 177.9 Recording of Fair Housing Instruction

19 NYCRR 175.28 Disclosure

(a) A real estate broker shall be responsible to ensure that each individual licensed pursuant to Article 12-A of the New York Real Property Law and associated with such broker provides to a prospective purchaser, tenant, seller, or landlord upon first substantive contact a disclosure notice

19 NYCRR 175.28 Disclosure

(b) The disclosure notice required pursuant to paragraph (a) of this section, may be provided...by any of the following means: email, text, electronic messaging system, facsimile, or hardcopy. An electronic communication containing a link to the disclosure notice...shall be permissible, provided the communication also contains text...that the link contains information regarding the New York State Human Rights Law.

19 NYCRR 175.28 Disclosure

(c) The disclosure notice...may be provided...by any of the following means: email, text, electronic messaging system, facsimile, or hardcopy. An electronic communication containing a link to the disclosure notice...shall be permissible, provided the communication also contains text...that the link contains information regarding the New York State Human Rights Law.

Acknowledgement and document retention

Hardcopy:

obtain a signed acknowledgment from the prospective buyer, tenant, seller, or landlord. Such signed disclosure notice shall be retained for not less than three years.

Acknowledgement and document retention

Electronic means:

if by email, text, electronic messaging system, or facsimile, a duplicate copy must be retained for not less than three years.

Acknowledgement and document retention

Refusal to sign: (same as agency)

If consumer declines to sign the licensee shall set forth under oath or affirmation a written declaration of the facts regarding when such notice was provided and shall maintain a copy of the declaration for not less than three years.

Broker Liability 175.28(e)

A real estate broker shall be jointly liable for any violation of this section committed by any licensed individual associated with such broker.*

*Brokers are already liable, including it doesn't increase liability

19 NYCRR 175.29(a) Posting of FH Laws

A real estate broker shall display and maintain at every office and branch office operated by such broker a notice, furnished by the Department, indicating the substantive provisions of the New York State Human Rights Law relative to housing accommodations. The notice shall set forth how Human Rights Law complaints may be filed and such other information as the Department deems pertinent.

19 NYCRR 175.29(b) Posting of FH Laws

- The notice required by paragraph (a) of this section shall be:
 1. prominently displayed in the window of such office and any branch office maintained by such broker if such broker also provides listings or other postings in the window of such location and must be visible to persons on that portion of the sidewalk adjacent to such office or branch office.

19 NYCRR 175.29(b) Posting of FH Laws

- The notice required by paragraph (a) of this section shall be:
 2. If any office or branch office is not accessible from the sidewalk or if postings are otherwise prohibited by any other applicable law, then the notice required pursuant to paragraph (a) of this section shall be prominently posted in the same location the business license is posted pursuant to subdivision 3 of section 441-a of article 12 of the Real Property Law.

19 NYCRR 175.29(c) Posting of FH Laws

All websites created and maintained by real estate brokers, associate real estate brokers, real estate salespersons and any real estate team, as such term is defined by section 175.25 of this title, shall prominently and conspicuously display on the homepage of such website a link to the Department's notice as required by paragraph (a) of this section, which shall be made available by the Department.

19 NYCRR 175.29(d) Posting of FH Laws

A real estate broker, licensed real estate salesperson, or licensed associate broker shall have displayed at all open houses of all real property the notice required by paragraph (a) of this section. In addition, a real estate broker, licensed real estate agent, or licensed associate broker shall have available at all open houses and showings of all real property the notice required by paragraph (a) of section 175.28 of this part.

19 NYCRR 175.29(e) Posting of FH Laws

A real estate broker shall be jointly liable for any violation of this section committed by any licensed individual associated with such broker.*

*Brokers are already liable, including it doesn't increase liability

19 NYCRR 177.29(a) Recording of FH Instruction

Every entity approved to provide instruction pertaining to fair housing and/or discrimination in the sale or rental of real property or an interest in real property shall cause a recording to be created of each course in its entirety. Such recording shall contain both video and audio of the instruction.*

*NYSAR will be advocating for audio or video

19 NYCRR 177.29(b) Recording of FH Instruction

The recording required by paragraph (a) of this section shall be maintained by the approved entity for at least one year following the date such course was provided to an enrolled student. If the entity knows or suspects that the recording is or will be the subject of litigation, then the approved entity shall maintain such recording as required by law.

19 NYCRR 177.29(c) Recording of FH Instruction

The recording required by paragraph (a) of this section may be subject to audit by the Department pursuant to section 177.11 of this part.

19 NYCRR 177.11 Auditing

A duly authorized designee of the department may audit any course offered and may verify attendance and inspect the records of attendance of the course at any time during its presentation or thereafter.

Legal Hotline
Monday-Friday
9:00a.m.-4:00p.m.
518-436-9727