



SELLER NOTICE - WITH PURCHASE CONTRACT

For a Limited Service Listing

WebMLS, Realtors has been notified via the listing agent and/or the MLS that the listing agent of your property has requested that offers be delivered directly to you as opposed to being delivered to your agent at his/her office as is more the norm for our area.

In our attempt to comply with this request, we are delivering the attached paperwork directly to you for your analysis.

As the buyer's agent in this transaction, we have a fiduciary relationship with the buyer and do not represent you (the seller), as noted on the attached State of Ohio Disclosure of Agency Relationship form. It is therefore inappropriate for our WebMLS agent to discuss strategy or advise you in any way on your options as a seller. Should you need such assistance in evaluating the offer, we urge you to contact your listing agent or personal legal counsel.

If your listing agent refuses to provide you assistance, you may contact the Ohio Division of Real Estate. The Division accepts consumer complaints regarding the conduct of real estate licensees. More information on the complaint process is available on the Division website at www.com.state.oh.us/real.

Thank you for your understanding of our situation. We hope that we will be able to bring this transaction to a satisfactory conclusion to the benefit of all parties.

WebMLS, Realtors

By: _____ Date: _____
WebMLS, Realtors Sales Associate

Taft signs minimum service legislation

Source: August 2006 OHIO REALTOR

**by Peg Ritenour
Vice president
Legal Services**

On July 11, Gov. Bob Taft signed HB 150 into law. This legislation, which has been referred to as the "minimum services bill," becomes effective on October 9.

The purpose of this legislation is to clarify some of the issues involving new real estate brokerage models in the market place. Such business models are often referred to as "fee-for-service," "flat-fee," "minimum service," or "MLS entry-only brokerages."

Regardless of the label placed on them, these arrangements all involve the situation in which a real estate broker performs fewer services than does a traditional broker, and as a result, the seller usually pays a lower fee. For example, the seller may opt to do their own marketing, handle their open houses and showings and may even negotiate the purchase contract themselves. In some instances, such as the sale of a builder's new construction, the only service the builder seeks from the real estate broker is to put the property in the MLS.

It is important to understand that nothing in HB 150 prohibits such arrangements. Instead, it provides clarity in the license law regarding those duties that licensees must provide to a client, and which ones the client may waive and do for themselves. It also assures that consumers understand the services they will receive. Finally, it clarifies certain issues with respect to negotiations and advertising.

Duties of real estate licensees

HB 150 codifies the position of the Division of Real Estate and Professional Licensing that all licensees owe their client the full fiduciary duties outlined in the Ohio Revised Code. This is true regardless of whether a broker enters into a minimum service agreement, an exclusive right to sell or an exclusive agency agreement. The fiduciary duties of all licensees, which cannot be waived, are as follows:

- Exercise reasonable skill and care in representing the client and carrying out the responsibilities of the agency relationship;
- Perform the terms of any written agency agreement;
- Follow any lawful instructions of the client;
- Be loyal to the interest of the client;
- Comply with all requirements of Ohio real estate licensing laws and other applicable statutes, rules, and regulations, including state and federal fair housing laws;
- Disclose any material facts of the transaction of which the licensee is or should be aware;
- Advise the client to obtain expert advice related to material matters when necessary or appropriate;
- Account in a timely manner for all moneys and property received in which the client has or may have an interest;
- Keep all confidential information confidential, unless permitted to disclose the information pursuant to ORC 4375.74(B). This includes the duty to not disclose confidential information to any licensee who is not an agent of the client.

Waiver of duties

HB 150 adds other certain specific duties that a licensee is required to perform in the course of representing a client. However these duties can be waived by a client. This would be done, for example if the seller was going to handle their own negotiations under a minimum service listing agreement. In this case HB 150 requires the client to specifically waive the duty(s) on a new form the Division of Real Estate must adopt.

The following are the duties of a licensee that can be waived by a client under HB 150:

- Accept delivery of and present any offer or counter offer;
- Answer the client's questions and provide information regarding any offers and counteroffers (within the scope of knowledge required for licensure);
- Assist the client in developing, communicating and presenting any offers and counteroffers;
- Answer the client's questions regarding the steps the client must take to fulfill the terms of any contract (within the scope of knowledge required for licensure);

As previously stated, if a real estate licensee is not going to perform any of the above duties, the client must waive those duties in writing, by signing a "Waiver of Duties Statement." This form, like others developed by the Ohio Division of Real Estate and Professional Licensing, will be mandatory and cannot be changed by licensees.

It should be noted that this form will only be necessary if a licensee does not intend to perform any of the above duties. If a licensee is planning on providing these duties, as is typically done under an agency relationship, this form does not need to be used.

Negotiations

HB 150 will also provide greater clarity in Ohio license law with respect to negotiations. Current law prohibits a licensee from negotiating with another broker's client, even if consent is given. HB 150 will allow a licensee to negotiate directly with a consumer who is using the services of a limited service broker as long as that consumer's broker authorizes such direct negotiations in writing. Such written consent could be provided in an e-mail, letter, or through the MLS.

HB 150 also clarifies what constitutes "negotiations" under the license law. It defines negotiations as doing any of the following:

- Delivering or communicating an offer, counteroffer or proposal;
- Discussing or reviewing the terms of any offer, counteroffer or proposal; or
- Facilitating communication regarding an offer, counteroffer, or proposal and preparing any response as directed.

Under this definition a licensee who has been given written authorization by a broker to "negotiate" directly with his/her client may engage in the above interactions without violating license law. Further, HB 150 clarifies that negotiations conducted pursuant to such instruction does not create or imply an agency relationship with that party. This provision is designed to protect licensees from allegations of acting as an undisclosed dual agent.

Advertising

The final provision of HB 150 deals with the issue of advertising property using the term "for sale by owner." The legislation codifies the Division's position that such a term cannot be used in advertising by a broker that has an exclusive right to sell agreement on the property. Such advertising by a licensee is considered to mislead the public to believe the owner is not exclusively represented when he/she is.

Minimum Services Law takes effect October 2006

(Source: September, OHIO REALTOR)

by Lorie Garland
Assistant Vice President
Legal Services

Last month's OHIO REALTOR reviewed the changes to the license law brought about by House Bill 150 which becomes effective in October 2006. This month's article provides Q & A's regarding these changes. More information on the new "Waiver of Duties Statement" required by HB 150 will be addressed in this article.

Q. What is the effective date of HB 150?

A. HB 150 becomes effective on Oct. 9, 2006.

Q. HB 150 permits a licensee's client to waive specific duties the licensee owes the client. Can a licensee obtain a client's waiver of the fiduciary duties owed the client?

A. No. Ohio Revised Code 4735.62 lists the fiduciary duties a licensee owes his seller or buyer client. Ohio Revised Code 4735.621(A) provides that those fiduciary duties may not be waived by a client.

Q. What are the fiduciary duties a licensee owes his client?

A. The fiduciary duties listed in Ohio Revised Code 4735.62 are the following:

1. Exercising reasonable skill and care in representing the client and carrying out the responsibilities of the agency relationship;
2. Performing the terms of any written agency agreement;
3. Following any lawful instructions of the client;
4. Performing all duties specified in this chapter in a manner that is loyal to the interest of the client;
5. Complying with all requirements of this chapter and other applicable statutes, rules, and regulations, including the Ohio fair housing law, division (H) of section 4112.02 of the Revised Code and the federal fair housing law, 42 U.S.C.A. 3601;
6. Disclosing to the client any material facts of the transaction of which the licensee is aware or should be aware in the exercise of reasonable skill and care and that are not confidential information pursuant to a current or prior agency or dual agency relationship;
7. Advising the client to obtain expert advice related to material matters when necessary or appropriate;
8. Accounting in a timely manner for all moneys and property received in which the client has or may have an interest;
9. Keeping confidential all confidential information, unless the licensee is permitted to disclose the information pursuant to division (B) of section 4735.74 of the Revised Code. This requirement includes not disclosing confidential information to any licensee who is not an agent of the client.

Q. What are the duties of a licensee that can be waived by a client?

A. HB 150 provides specific duties that a licensee owes a seller or buyer client. These specific duties can be waived. Ohio Revised Code 4735.63 lists the specific duties a licensee owes a seller client. Those duties include the following:

1. Seek a purchase offer at a price and with terms acceptable to the seller. Unless the seller so directs, the licensee is not obligated to seek additional offers if the property is subject to a contract of sale, lease, or letter of intent to lease;
2. Accept delivery of and present any purchase offer to the seller in a timely manner, even if the property is subject to a contract of sale, lease, or letter of intent to lease;
3. Within the scope of knowledge required for licensure, answer the seller's questions and provide information to the seller regarding any offers or counteroffers;
4. Assist the seller in developing, communicating, and presenting offers or counteroffers;
5. Within the scope of knowledge required for licensure, answer the seller's questions regarding the steps the seller must take to fulfill the terms of any contract.

Ohio Revised Code 4735.65 lists the specific duties a licensee owes a buyer client. Those duties include the following:

1. Seek a property at a price and with purchase or lease terms acceptable to the purchaser. Unless the client so directs, the licensee is not obligated to seek additional purchase or lease possibilities if the purchaser is a party to a contract to purchase property, or has entered into a lease or has extended a letter of intent to lease;
2. Within the scope of knowledge required for licensure, answer the purchaser's questions and provide information to the purchaser regarding any offers or counteroffers;
3. Assist the purchaser in developing, communicating, and presenting offers or counteroffers;
4. Present any offer to purchase or lease to the seller or the seller's agent in a timely manner, even if the property is subject to a contract of sale, lease, or letter of intent to lease, and accept delivery of and present any counteroffers to the purchaser in a timely manner;
5. Within the scope of knowledge required for licensure, answer the purchaser's questions regarding the steps the purchaser must take to fulfill the terms of any contract.

Q. How does a licensee obtain a client's waiver of a specific duty(s)?

A. HB 150 provides that a licensee must perform the duties required under Ohio Revised Code Sections 4735.63 or 4735.64 unless the client agrees to waive these duties by signing a waiver of duties statement. The Division of Real Estate and Professional Licensing is required to adopt this new waiver of duties statement. A licensee will be required to use this new state form if a client is waiving a duty(s) listed in Ohio Revised Code Sections 4735.63 or 4735.64. The new "Waiver of Duties Statement" is in the process of being formally adopted. Next month's OHIO REALTOR will provide additional information on this new state form.

Q. Does HB 150 effect the license law prohibition of negotiating directly with a seller or buyer under a written exclusive agency agreement with another broker?

A. HB 150 makes an exception to the prohibition of negotiating directly with another broker's client. The exception applies if that broker has given written authorization to negotiate directly with his client. This exception is provided in Ohio Revised Code 4735.75.

Q. How does a buyer's agent obtain the listing broker's written authorization to negotiate directly with the seller?

A. The broker's written authorization could be provided in an e-mail, letter, print advertising or through the MLS.

Q. If a buyer's agent is given written authorization from the listing broker to negotiate directly with the seller what does that authorize the buyer's agent to do?

A. HB 150 provides that "negotiate" means any of the following:

1. Delivering or communicating any offer, counteroffer or proposal;
2. Discussing or reviewing the terms of any offer, counteroffer or proposal;
3. Facilitating communication regarding an offer, counteroffer, or proposal and preparing any response as directed.

Q. If a buyer's agent, after obtaining written authorization from the listing broker, negotiates directly with the seller could an implied agency relationship exist between the seller and the buyer's agent?

A. No. Ohio Revised Code 4735.75 specifically provides that negotiations conducted by a licensee pursuant to the exclusive broker's authorization will not create or imply an agency relationship between the licensee and that broker's client.

Q. If it is noted in the MLS to deliver any offer directly to the seller can a buyer's agent prepare a counteroffer pursuant to the seller's request?

A. Delivering an offer and preparing a counteroffer are activities that fall within the license law definition of "negotiate." A buyer's agent can only perform negotiation activities directly with the seller if the listing broker has provided written authorization to conduct that activity. In the situation you describe the listing broker has only provided written authorization to deliver the offer but not to prepare a counteroffer. Therefore the buyer's agent should not prepare the counteroffer for the seller unless such negotiation is specifically authorized by the listing broker.

Q. Can a listed property be advertised by the listing broker as a "for sale by owner"?

A. Ohio Revised Code 4735.16(B)(2) prohibits a broker who is representing a seller under an exclusive right to sell listing agreement from advertising the property as a "for sale by owner" or otherwise mislead the public to believe that the seller is not represented by a broker.

Waiver of Duties form effective Oct. 9

Source: October 2006 OHIO REALTOR

by Lorie Garland
Vice president
Legal Services

Last month the OHIO REALTOR reviewed changes to the license law provisions when House Bill 150 becomes effective on October 9. This bill clarifies that the fiduciary duties owed a client cannot be waived. However, HB 150 does allow a client to waive a licensee's obligation to perform the specific duties provided in ORC 4735.63 and 4735.65 which are owed to a buyer or seller.

In order to obtain a client's waiver of a specific duty(s), a new Waiver of Duties form must be executed. HB 150 requires the Superintendent (with the approval of the Ohio Real Estate Commission) to establish this new state form by rule. The "Waiver of Duties Statement" has been developed and is in the process of being formally adopted. This process will not be completed until after the effective date of HB 150. However, the Waiver of Duties Statement can be used by licensees beginning on October 9. The Waiver of Duties Statement is available on the OAR's website, www.ohiorealtors.org and the Division of Real Estate and Professional Licensing's website www.com.state.oh.us/real.

The following are Q & A's regarding the new Waiver of Duties Statement.

Q. Why are a licensee's fiduciary duties listed on the Waiver of Duties Statement?

A. ORC 4735.621 specifies that certain information must be included in the form. A list of a licensee's fiduciary duties is one of the required sections. In addition, by statute the Waiver of Duties Statement must also contain the following:

1. A list of those duties contained in section 4735.63 or 4735.65 of the Revised Code, set forth in a manner that allows for the parties to indicate which of those duties are being waived;
2. A statement that no other licensee is required to perform the waived duty on behalf of the client;
3. A statement that legal counsel or other professionals may be hired by the client;
4. A place for the client and licensee to sign and date the statement.

Q. When does a licensee have to use the Waiver of Duties Statement?

A. A licensee will use the Waiver of Duties Statement if his client is waiving a duty that is listed in the "Duties That May Be Waived" section of the form.

Q. A licensee will be taking a listing where he will not be performing the duties listed under the "Sellers May Waive" section of the form. When should the seller sign the Waiver of Duties Statement?

A. At the time the listing agreement is entered into.

Q. Can a client waive just one of the duties listed on the Waiver of Duties Statement?

A. Yes. Only the duty to be waived should be initialed and the form must be signed by the client and the licensee.

Q. If a licensee always performs all of the duties listed on the form, will the licensee ever have to use the Waiver of Duties Statement?

A. No. The form is only required if a duty is waived.

Q. What if a client refuses to sign the Waiver of Duties Statement?

A. ORC 4735.621 provides that a licensee must perform the specific duties owed a seller or buyer client unless the client agrees to waive those duties and signs a Waiver of Duties Statement. If a client does not sign the form the duties must be performed by the licensee.

Q. Is a copy of the seller's Waiver of Duties Statement required to be provided to the buyer's agent?

A. No. HB 150 does not require the listing agent to give a copy to the buyer's agent.

Q. If a buyer's agent asks the listing agent for a copy of the seller's Waiver of Duties Statement to confirm that the listing agent is authorized to allow the buyer's agent to negotiate directly with the seller, can the listing agent provide a copy of the form?

A. The Division of Real Estate and Professional Licensing has taken the position that the Waiver of Duties Statement could be considered confidential information and therefore should only be provided with the seller's consent. HB 150 provides that if the listing agent has provided a buyer's agent with written authorization to negotiate with the seller, the buyer's agent can then negotiate directly with the seller. The buyer's agent does not need to obtain a copy of the Waiver of Duties Statement to verify that the listing agent is not performing these services for the seller.

Q. How long must a brokerage maintain a client's Waiver of Duties Statement?

A. The license law provisions require that all transaction related documents be kept for a period of three years.

Q. If a client signs the Waiver of Duties Statement and later asks the licensee to perform a waived duty, does the licensee have to perform the waived duty?

A. No. In this case the client is asking the licensee to change the terms of their agency relationship. The licensee could agree to the change and perform the waived duty (maybe for an additional fee) or decline to change the terms of their original agreement. If any change is agreed to, the change should be documented.

Q. A listing agreement is entered into where the listing broker will perform all duties for the seller but he ends up not performing a waivable duty because the client requests that he not do so. For example, in a commercial transaction the seller decides to use his attorney to draft the counter offer. Does a Waiver of Duties Statement have to be executed when the client chooses not to use the licensee to perform a service?

A. No. The Division of Real Estate and Professional Licensing has taken the position that in this situation as long as the licensee is willing to perform all duties, the fact that the client chooses not to have him do so does not require the licensee to have the Waiver of Duties Statement signed. However, it is recommended that the licensee document the client's request that he not draft the counter offer in this case.